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New York (State) Laws, statutes, etc. (Compilation)

ANNOTATED^{et} CONSOLIDATED LAWS

OF THE

STATE OF NEW YORK

AS AMENDED TO JANUARY 1, 1918

CONTAINING ALSO

THE FEDERAL AND STATE CONSTITUTIONS

WITH

NOTES OF BOARD OF STATUTORY CONSOLIDATION,
TABLES OF LAWS AND INDEX

EDITED BY

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SECOND EDITION

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Office of the Secretary of State, }
State of New York, } ss.

In pursuance of the authority vested in me, by section 932 of the Code of Civil Procedure, as amended by chapter 594 of the Laws of 1895, I, Francis M. Hugo, Secretary of State, hereby certify that the copies of the laws contained in this volume are correct transcripts of the text of the original laws, and in accordance with such section are entitled to be read in evidence.

L. S.

Given under my hand and the seal of office of the Secretary of State, at the Capitol in the City of Albany, this 31st day of July, 1917.

FRANCIS M. HUGO,
Secretary of State of the State of New York.

ANNOTATED CONSOLIDATED LAWS

OF THE

STATE OF NEW YORK

COUNTY LAW.

L. 1909, ch. 16.—* In relation to counties, constituting chapter eleven of the consolidated laws.

[In effect February 17, 1909.]

CHAPTER XI OF THE CONSOLIDATED LAWS.

COUNTY LAW.

- Article 1. Short title (§ 1).
2. Counties as corporations (§§ 2-6).
 3. Boards of supervisors (§§ 10-49e).
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 15. Miscellaneous (§§ 240-248).
 16. Laws repealed; when to take effect (§§ 260, 261).

ARTICLE I.

SHORT TITLE.

Section 1. Short title.

§ 1. Short title.—This chapter shall be known as the "County Law."

Source.—Former County L. (L. 1892, ch. 686) § 1.

* Words "An Act" omitted in original.

Scope of Law.—The County Law provides for the management and administration of the internal affairs of the counties of the state.

It treats of the boards of supervisors, clerks of boards of supervisors, county jails, the officers elected and appointed for the purpose of conducting the public business of the county, and such other subjects as are necessary and incidental to the existence of a county as a municipal corporation and as a political or civil division of the state. The County Law is made applicable to all the counties of the state with the exception of the county of New York and with such other specific exceptions as appear in the body of the act. The exception of the county of New York is made in the old county law passed in 1892 and is preserved in this consolidated County Law. This exception was made undoubtedly because of the fact that many of the provisions applicable to other counties relating to boards of supervisors and the like were inapplicable to the county of New York and had not been applicable for more than half a century and because of the difficulty of consolidating the numerous special acts relating to the county of New York on other subjects. Therefore when the old county law was prepared the statutory revision commission excepted the county of New York from the provisions of the law by providing that "this chapter shall not apply to the county of New York." (Report of Board of Statutory Consolidation, p. 617.)

Historical note.—THE COUNTIES OF THE STATE.—In 1683, by an act passed November 1, the governor, council and representatives enacted that the province be divided into twelve counties: Albany, Cornwall, Dukes, Kings, New York, Orange, Queens, Richmond, Suffolk, The Dutchess's, Ulster and Westchester. Metes and bounds were not used in the description of the counties thus erected, but they were distinguished by a statement of the towns included in them. Dukes county contained the islands of "Nantucket, Martins Vinyard, Elizabeth Island and no mans Land"; the county of Cornwall "to conteine Pemaquid, & all his Royall Highnesses Territoryes in those parts with the Islands adjacent."

Colonial Laws of N. Y. v. 1, p. 122.

By an act of October 1, 1691, the counties above named were made more definite as to their boundaries, the preamble of the act reciting: "Forasmuch as mistakes may arise about the limitts and bounds of the respective Countyes within this Province, for Prevention whereof, bee it enacted * * *."

Colonial Laws of N. Y. v. 1, p. 267.

By act of July 3, 1766, a new county by the name of Cumberland was erected.

Colonial Laws of N. Y. v. 4, p. 903.

This county was the northeastern county of the province, its easterly bounds being the Connecticut river. Van Schaack, who printed this act by title only, states that it was repealed by the king June 26, 1767.

By an act passed March 12, 1772, which, reciting that "the lands within the county of Albany are more extensive than all the other counties of this Colony taken together," erects two counties, Tyron and Charlotte, to be taken from Albany county.

In 1772, on March 24, an act for better ascertaining the boundaries of the counties of Cumberland and Gloucester, recites the erection of the county of Cumberland by royal letters patent, dated March 19, 1768, and the creation of Gloucester county by royal authority by letters patent under date of March 16, 1770.

The county of Cornwall and Dukes county were claimed by Massachusetts as a part of the territory of that colony, and shortly after 1691 they ceased to be counties of the colony of New York.

When the state of New York came into being its boundaries embraced fourteen counties.

The counties of Cumberland and Gloucester were ceded to Vermont by deed of

L. 1909, ch. 16.

Short title.

§ 1.

cession of October 7, 1790, in the settlement of the New Hampshire Grants controversy.

The following tabulation shows the names, from what county taken and the act erecting them of the sixty-one counties of the state:

Name	Taken from	Act erecting
Albany	Tioga	1683, Nov. 1.
Allegany	Genesee	1806, Ch. 162.
Broome	Onondaga	1806, Ch. 89.
Cattaraugus	Genesee	1808, Ch. 40.
Cayuga	Original	1799, Ch. 26.
Chautauqua	Genesee	1808, Ch. 40.
Chemung	Tioga	1836, Ch. 77.
Chenango	Herkimer; Tioga	1798, Ch. 31.
Clinton	Albany	1788, Ch. 63.
Columbia	Albany	1786, Ch. 28.
Cortland	Onondaga	1808, Ch. 194.
Delaware	Ulster; Otsego	1797, Ch. 33.
Dutchess	Original	1683, Nov. 1.
Erie	Niagara	1821, Ch. 228.
Essex	Clinton	1799, Ch. 24.
Franklin	Clinton	1808, Ch. 43.
Fulton	Montgomery	1838, Ch. 332.
Genesee	Ontario	1802, Ch. 64.
Greene	Ulster; Albany	1800, Ch. 59.
Hamilton	Montgomery	1816, Ch. 120.
Herkimer	Montgomery	1791, Ch. 10.
Jefferson	Oneida	1805, Ch. 51.
Kings	Original	1683, No. 1.
Lewis	Oneida	1805, Ch. 51.
Livingston	Ontario; Genesee	1821, Ch. 58.
Madison	Chenango	1806, Ch. 70.
Monroe	Genesee; Ontario	1821, Ch. 57.
Montgomery	Erected as Tyron; taken from Albany. Name changed 1784, Ch. 17.	1772, March 12.
Nassau	Queens	1898, Ch. 583.
New York	Original	1683, Nov. 1.
Niagara	Genesee	1808, Ch. 40.
Oneida	Herkimer	1798, Ch. 31.
Onondaga	Herkimer	1794, Ch. 18.
Ontario	Montgomery	1789, Ch. 11.
Orange	Original	1683, Nov. 1.
Orleans	Genesee	1824, Ch. 266.
Oswego	Oneida; Onondaga	1816, Ch. 22.
Otsego	Montgomery	1791, Ch. 10.
Putnam	Dutchess	1812, Ch. 143.
Queens	Original	1683, Nov. 1.
Rensselaer	Albany	1791, Ch. 4.
Richmond	Original	1683, Nov. 1.
Rockland	Orange	1798, Ch. 16.
St. Lawrence	Oneida	1802, Ch. 16.
Saratoga	Albany	1791, Ch. 4.
Schenectady	Albany	1809, Ch. 65.

§ 1.	Short title.	L. 1909, ch. 16.
Name	Taken from	Act erecting
Schoharie	Albany; Otsego	1795, Ch. 42.
Schuyler	Steuben; Chemung; Tompkins.	1854, Ch. 386.
Seneca	Cayuga	1804, Ch. 31.
Steuben	Ontario	1796, Ch. 29.
Suffolk	Original	1683, Nov. 1.
Sullivan	Ulster	1809, Ch. 126.
Tioga	Montgomery	1791, Ch. 10.
Tompkins	Cayuga; Seneca	1817, Ch. 189.
Ulster	Original	1683, Nov. 1.
Warren	Washington	1813, Ch. 50.
Washington	Erected as Charlotte; from Albany; name changed	
	1784, Ch. 17.	1772, March 12.
Wayne	Ontario; Seneca	1823, Ch. 138.
Westchester	Original	1683, Nov. 1.
Wyoming	Genesee	1841, Ch. 196.
Yates	Ontario	1823, Ch. 30.

THE CITY AND COUNTY OF NEW YORK.—On November 1, 1683, two days after the passage of "THE CHARTER of Libertyes and priviledges granted by his Royall Highnesse to the Inhabitants of New Yorke and its Dependencies" it was enacted, "Thatt the said province be divided into twelve countys as followeth:

"The Citty & County of New York, to containe all the Island commonly called Manhattans Island, Mannings Island, and the two Barne Islands, the Citty to bee called as itt is, New York, and the Islands above specified the County thereof."

Colonial Laws of N. Y. v. 1, p. 121.

On April 27, 1686, the so called Dongan Charter was granted to the city of New York, whereby all "Libertyes Privilidges and franchizes Rights Royalties, free Customes Jurisdiccons and Immunities," held, used and enjoyed theretofore under various grants and charters, were confirmed. Further and other powers and rights were conferred on the "Mayor Aldermen and Comonalty."

This charter further declared, "that the said Citty of New Yorke and the Compasse Precincts and Limittes thereof and the Jurisdiccon of the same shall from henceforth extend and Reach it selfe and may and shall be able to Reach forth and extend it selfe as well in Length and in Breadth as in Circuite to the furthest extend of and in and throughout all the said Island Manhattans and in and upon all the Rivers Rivoletts Coves Creeks Waters and Water Courses belonging to the same Island as far as Low Water marke."

It thus appears that the city of New York, under the "Dongan Charter," was not coterminous with the county of New York, "Mannings Island and the two Barne Islands" being outside the jurisdiction of the city.

Colonial Laws of N. Y. v. 1, p. 181.

The next legislation relating to the boundaries of New York county was the act of October 1, 1691, which recites: "Forasmuch as mistakes may arise about the limitts and bounds of the respective Countyes within this Province, for Prevention whereof, Bee it Enacted By the Commander in Cheife and Council and Representatives * * *. The Citty and County of New Yorke to containe all the Island comonly called Manhattans Island Mannings Island the two Barne Islands and the three Oyster Islands Manhattans Island to be called the City of New Yorke and the rest of the Islands the County."

Colonial Laws of N. Y. v. 1, p. 267.

The territorial relations of the city and county of New York remained as above

until 1730, when John Montgomerie, the governor of the province of New York, by direction of George II, granted to the city of New York the charter known as the "Montgomerie Charter." In that charter it was recited that, "Said City of New York and the Compass precincts Circuit Bounds Liberties and Jurisdictions of the same do reach extend and Streach forth and Shall and may reach extend and Stretch forth as well in length as in breadth and Circuit in and through the Limitts and Boundarys following to witt To Begin at the River Creek or Run of Water called Spyt Den Duyvel over which Kings Bridge is built where the Said River or Creek Empties it Self into the North river on Westchester Side thereof at Low water mark and So to run along the Said River Creek or Run on Westchester Side at low water mark unto the East River or Sound and from thence to cross over to Nassaw Island to low water mark there Including great Barn Island little Barn Island and Mannings Island and from thence along Nassaw Island Shore at low water mark unto the South Side of the red Hook and from thence to run a Line across the North River So as to Include Nutten Island Bedlows Island Bucking Island And the Oyster Island to low water mark on the west Side of the North river or so far as the Limitts of our Said Province Extend there and so to run up along the west Side of the Said River at low water mark or along the Limitts of our Said province untill it come directly opposite to the first mentioned river or Crook and thence to the place when the Said Boundaries first began."

Colonial Laws of N. Y. v. 2, p. 599.

These general bounds do not appear to have been altered in any manner during the remainder of the colonial period. In 1775 the boundary line between the city of New York and the township of Haerlem was settled.

Colonial Laws, v. 5, p. 841.

After the change in government and in 1788, by chapter 63 of the laws of that year, "An Act for dividing this State into counties," the bounds of New York were described: "The county of New York to contain the islands called Manhattans island, Great Barn Island, Little Barn island, Mannings island, Nutten island, Bedlows island, Bucking Island, and the Oyster islands, and all the land untler the water within the following bounds; beginning at Spytten Duyvel creek when the same empties itself into Hudson's river, on the West Chester side thereof, at low water mark, wherever the same now is or hereafter may be, and so running along the said creek at low water mark as aforesaid, on the West Chester side thereof, unto the East river or Sound, and from thence to cross over to Nassau island, to low water mark there as aforesaid, including Great Barn island, Little Barn island, and Mannings island, and from thence along Nassau island shore, at low water mark as aforesaid, unto the south side of the Red Hook, and from thence across the North River, so as to include Nutten island, Bellows island, Bucking island and the Oyster islands, to low water mark on the West side of Hudson's river, or so far as the bounds of this State extend there, and so up along the west side of Hudson's river, at low water mark, or along the limits of this State, until it comes directly opposite the first mentioned creek, and thence to the place where the said boundaries first began."

In 1801, an act to divide this state into counties was passed. L. 1801, ch. 123; Kent and Redcliff Revised Acts, v. 2, p. 1.

Again, and in 1813, Revised Laws, ch. 39; Van Ness and Woodworth, v. 2, p. 31, an act to divide this state into counties was passed.

In the three last mentioned acts: L. 1788, ch. 63; L. 1801, ch. 123; R. L. ch. 39, the description of the bounds of New York county are identical.

The Revised Statutes, Part 1, ch. 2, Title 1 [in effect Jan. 1, 1830], under the caption, "Of the various Counties of the State," § 2, ¶ 5, describe the extents and limits of the county of New York as the same are given by the preceding statutes,

the variation in language in no way affecting the identity of the territory described.

The supervision and government of the local affairs of New York county and the difference in the methods in which the internal affairs of the other counties in the state are administered may be directly traced to the political form in which New York city and county were organized.

The grant of the States General to the West India Company in 1621, followed by the institution of a government by Wouter Van Twiller, in June, 1629, at Fort Amsterdam, mark the political beginning of New York county. The style of the patents granted by Van Twiller was: "We, director and council, residing in New Netherlands on the island Manhattans, under the government of their high mightinesses, the lords states general of the united Netherlands, and the privileged West India company." The political organization of New Amsterdam, the residence of the director and council on the island Manhattans, placed the administration of local affairs in the "Schout, burgomasters and schepens." This administration continued until the English came into possession of New Amsterdam, under the capitulation of August 27, 1664. Richard Nicolls, governor of the province under the commission of the Duke of York, by proclamation of June 12, 1665, under the title of, "The Governors Revocation of ye forme of Government under ye style of Burgomasters & Schepens," revoked the government by schout, burgomasters and schepens, and instituted one to "bee knowne and called by the Name & Style of Mayor Aldermen & Sherriffe, according to the Custome of England in other of his Majesties Corporacons."

Eight years later, when the Dutch came again into possession of New York, the "Benckes and Eversten's Charter," under date of August 17, 1673, restored the "form of Government of this City to its previous character of Schout, Burgomaster and Schepens as is practised in all the Cities of our Fatherland." This was followed by "Colve's Charter," dated January 15, 1674, whereby the duties of the schout, burgomasters and schepens were defined and their powers stated. On February 9, 1674, the government of New York passed to the English.

In the year 1686, Thomas Dongan, as lieutenant governor, granted a charter to the city of New York. It is recited in the charter that, "the City of New Yorke is an antient City within the said Province And the Cittizens of the said City have antiently been a Body Politique and Corporate and the Cittizens of the said City have held used and Enjoyed as well within the same as else where in the said Province Diverse and Sundry Rights Libertyes Privillidges franchises free Customes Preheminences Advantages Jurisdiccons Emoulements and Immunityes as well as by prescripcon as by Charter Letters Pattents, Grants and Confirmacons * * *." The charter grants, ratifies and confirms to the mayor, aldermen and commonalty all the rights, privileges and immunities which they "by the Name of the Mayor Aldermen and Commonalty or otherwise have Antiently had held used or Enjoyed." This Charter is printed in Colonial Laws of New York, v. 1, p. 181, and the original is in the office of the comptroller of the city of New York.

It may be remarked that the city of Albany received a like charter in the same year.

Following the granting of these charters and until the granting of the "Montgomerie Charter," there is found in various statutes and especially those imposing taxes, directions like the following: * * * that for the better assessing, raising and paying the sum of * * * the Mayor and Aldermen within the city of New York, the Mayor and aldermen of the city of Albany with the justices of the peace for the city and county of Albany for the time being and the justices of the peace for the time being for the several and respective counties aforesaid for the several counties respectively * * *."

This is taken from the First Assembly, second session, ch. 15.

The "Montgomerie Charter," granted January 15, 1730, and confirmed October

14, 1732, is given in full in Colonial Laws of New York, v. 2, p. 575. It confirms all the rights given under the "Dongan Charter," and specified the officers of the local government as follows: "There Shall be forever hereafter within the Said City a Mayor and Recorder Town Clerk and Six Aldermen and Six Assistants * * * who Shall be forever hereafter called the Mayor Aldermen and Commonalty of the City of New York and that there Shall be for ever one Chamberlain Treasurer One Sheriff one Coroner One Clerk of the Market one high Constable seven-subconstables and one Marshall or Serjeant at Mace * * *."

It has already been shown that the city and county of New York were, at the granting of the "Montgomerie Charter," coterminous, and that they remained so until the title of the territory known as the city of New York was changed to the Borough of New York by the Greater New York Charter.

New York city and county appear never to have had local officers by the name of supervisors. The "Dukes Laws," which were put in force by the order to Governor Andros, August 6, 1674, contained among the various local officers named "Overseers," whose duties and powers are not concisely defined. The change in name from "overseer" to "supervisor" is a natural transition.

Under an act passed June 19, 1703, it was enacted that there should be elected once every year, in each respective town in the province * * * one of their freeholders * * * to compute, ascertain, examine, oversee and allow the contingent, public and necessary charge of each county. It was also provided that there should be chosen in each county "two Assessors and one Collector which Supervisors, Assessors and Collectors shall be Annually Chosen in every Town * * * which Supervisors * * * shall Annually meet at the County Town * * * to Examine & Compute all Such Publick, necessary & Contingent Charges as they shall find their respective Countys properly Chargeable with * * *."

Colonial Laws of N. Y. v. 1, p. 539.

The office of supervisor thus created continued, with additional powers from time to time given, until the institution of the state. In the first Constitution of the state adopted in 1777, by section 29 it was provided that the town clerk, supervisors, assessors * * * and all other officers, heretofore eligible by the people, shall always continue to be so eligible, in the manner directed by the present or future acts of legislature. During the war of the Revolution the legislative measures adopted in relation to county affairs do not deal with or apply to the city and county of New York, that territory being in possession of the British. In 1784 [L. 1784, ch. 58] an act was passed providing for the raising of £100,000 in the city and county of New York and the counties of Suffolk, Kings, Queens and Richmond. The act provides that the quotas assigned to the said counties, the city and county of New York excepted, shall be apportioned by the supervisors of those counties. In New York the proceedings for the levy and collection of the tax are delegated to the "Mayor, recorder and aldermen." This follows the procedure of L. 1784, ch. 43, enabling the "mayor, recorder and aldermen of the City and County of New York" to raise certain money by taxation. L. 1788, ch. 65, an act for defraying the public and necessary charge in the respective counties of this state, provides for the audit of accounts and fixing the amount of taxes, but expressly provides that the act shall not extend to the city and county of New York. L. 1797, ch. 93, an act authorizing the raising of money by tax in the city and county of New York, provides "That the Mayor, recorder and aldermen of the city of New York, as the supervisors of the city and county of New York * * *." L. 1798, ch. 39, contains the same recitation, and it is repeated in L. 1799, ch. 91, and L. 1800, ch. 20. 1 R. A. [1801] ch. 178, § 28, p. 557 [L. 1801, ch. 179], provides that the mayor, recorder and aldermen of the city of New York shall, in the city and county of New York, perform all the duties enjoined by the act; and this is repeated in 2 R. A. [1801] ch. 179, § 1, p. 144. The same provision appears in 2

§§ 2, 3.

Counties as corporations.

L. 1909, ch. 16.

R. L. [1813] ch. 86, § 150, p. 399. Revised Statutes, pt. 1, ch. 12, tit. 2, Article 1, "Of the Board of Supervisors," relates to the meetings of the boards of supervisors in the several counties of the state, and the powers of the board, and section 17 of this article reads as follows:

"The mayor, recorder and aldermen of the city of New York, shall be the supervisors of the city and county of New York; and all the provisions of this article shall be construed to extend to them respectively, except when special provisions inconsistent therewith, are or shall be made by law, in relation to the city and county of New York." (Report of Board of Statutory Consolidation, pp. 617-625.)

The county law was designed as a consolidation and revision of all statute law relating to counties of the state, except New York, and to provide a system comprehensive and complete in relation to such counties. *City of Buffalo v. Neal*, 86 Hun 76, 33 N. Y. Supp. 346 (1895).

ARTICLE II.

COUNTIES AS CORPORATIONS.

Section 2. Application of this chapter.

3. County a municipal corporation.
4. Actions and contracts in corporate name.
5. Disposition of property, apportionment of debts and collection of judgments on alteration of boundary.
6. County liable for injuries caused by defective highways and bridges.

§ 2. Application of this chapter.—This chapter shall not apply to the county of New York, except as hereinafter specifically provided.

Source.—Former County L. (L. 1892, ch. 686) § 1.

Consolidators' note.—The exception of the county of New York from the County Law as contained in this section was in the former County Law in section 1 except the provision "except as hereinafter specifically provided." This modification is inserted because several sections of the County Law contain express provisions making them applicable to the county of New York. The exception inserted in section 2 will preserve any other provisions in the County Law making specific provisions applicable to the county of New York.

Section cited.—*People ex rel. Hennessy v. Coler* (1901), 65 App. Div. 217, 72 N. Y. Supp. 564.

Former section cited.—*People ex rel. Hillman v. Scholer* (1904), 94 App. Div. 282, 87 N. Y. Supp. 1122, *affd.* 179 N. Y. 602, 72 N. E. 1148; *Williams v. Bienenzucht* (1907), 54 Misc. 209, 104 N. Y. Supp. 438.

§ 3. County a municipal corporation.—A county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law.

Source.—Former County L. (L. 1892, ch. 686) § 2.

References.—Municipal corporation defined, General Municipal Law, § 2; General Corporations Law, § 3. Boundaries of counties, R. S., pt. 1, ch. 2, tit. 1, §§ 5, 6. For discussion of powers and liabilities of counties as municipal corporations, see *Bender's Supervisors' County and Town Officers' Manual* (8th Ed.), pp. 1-3.

Corporate existence of a county cannot be affected by legislative enactment. *Albrecht v. County of Queens* (1895), 84 Hun 399, 32 N. Y. Supp. 473.

Property of county.—The board of supervisors possess no corporate powers and therefore the property of the county is vested in the county and not in them. *People v. Bennett* (1867), 37 N. Y. 117, 93 Am. Dec. 551. See also *Newman v. Supervisors of Livingston* (1871), 45 N. Y. 676.

Insurance of county buildings.—Under this section, considered in connection with other sections of this law and section 78 of the General Municipal law, the Attorney General ruled that a board of supervisors has the right to insure the county court house and jail, and in case of its failure to do so the sheriff may effect such insurance at the expense of the county. Rept. of Atty. Genl. (1913) Vol. 2, p. 43.

Liability for negligence.—Municipal corporations engaged in a public duty as instrumentalities of the state are not liable for neglect or misfeasance; the one exception is where it is doing the act for its own benefit; hence the county is not liable for acts of officers of penitentiary. *Alamango v. Supervisors of Albany Co.* (1881), 25 Hun 551; or for the negligence of an elevator operator in a county building. *Moest v. City of Buffalo* (1906), 116 App. Div. 657, 101 N. Y. Supp. 996, affd. 193 N. Y. 615, 86 N. E. 1128. For same rule applied to cities, see *Smith v. City of Rochester* (1879), 76 N. Y. 506, holding that a city is not liable for acts of firemen; *Ham. v. Mayor* (1877), 70 N. Y. 459, holding that a city is not liable for acts of officers of department of public instruction.

This section has not changed the rule that counties are not liable for neglect of county officers to perform their duties. *Albrecht v. County of Queens* (1895), 84 Hun 399, 32 N. Y. Supp. 473. See also *Godfrey v. County of Queens* (1895), 89 Hun 18, 34 N. Y. Supp. 1052; *Ahern v. County of Kings* (1895), 89 Hun 148, 34 N. Y. Supp. 1023.

The doctrine that where power is granted to a municipal corporation as a political division of the state, but not for its immediate benefit, the corporation is not liable for non-user or mis-user by public agents, is applicable to counties. *Hughes v. County of Monroe* (1895), 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33.

Liability for defects in bridges.—A county is not liable for damages sustained by reason of defects in a bridge required to be maintained by the county; distinction between liability of municipal corporation vested with power for own benefit and that of counties and towns as political divisions organized for exercise of power of state considered. *Ensign v. Supervisors of Livingston Co.* (1881), 25 Hun 20.

The statute by declaring counties to be municipal corporations, imposes no greater liability than that which formerly existed. The object of the section is to permit a county to be sued as a corporate entity in cases where formerly actions were only maintainable in the name of the board of supervisors. It did not extend the liability of a county for personal injuries caused by a defective bridge. *Markey v. County of Queens* (1898), 154 N. Y. 675, 686, 49 N. E. 71, 39 L. R. A. 46. Nor to injuries resultant from negligence of a bridge tender. *Godfrey v. Queens Co.* (1895), 89 Hun 18, 34 N. Y. Supp. 1052.

Damages caused by mob.—An action does not lie at common law against a municipal corporation for damages caused by a mob; but the legislature may impose such liability. *Davidson v. Mayor* (1864), 27 How. Pr. 342, 25 Super. Ct. 230.

Liability for nuisance.—A county, which owns and maintains, for public purposes, an almshouse and farm used therewith, acts in a governmental capacity and is not liable for the acts of the officials controlling them, in permitting sewage and night soil to be spread over the farm, thereby creating and continuing a nuisance to the damage of the land and stock of a neighboring owner, and he cannot maintain an action against the county for an injunction restraining such nuisance and for damages caused thereby. *Lefrois v. County of Monroe* (1900), 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206.

Former section cited.—*Rogers v. Board of Supervisors of Westchester County*

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(1902), 77 App. Div. 501, 78 N. Y. Supp. 1081; *Deady v. Village of Lyons* (1899), 39 App. Div. 139, 57 N. Y. Supp. 448.

§ 4. **Actions and contracts in corporate name.**—An action or special proceeding for or against a county, or for its benefit, and upon a contract lawfully made with it, or with any of its officers or agents authorized to contract in its behalf, or to enforce any liability created, or duly enjoined upon it, or upon any of its officers or agents for which it is liable, or to recover damages for any injury to any property or rights for which it is liable, shall be in the name of the county. All contracts or conveyances, by or in behalf of, or to a county, shall be deemed to be in the name of the county, whether so stated or not in the contract or conveyance.

Source.—Former County L. (L. 1892, ch. 686) § 3; originally revised from R. S., pt. 1, ch. 12, tit. 1, § 3, and tit. 3, §§ 1, 2.

References.—Powers of board of supervisors in respect to contracts, County Law, § 12; as to issuance of county bonds, Id. § 12, subd. 6. What are county charges, Id. § 240. General provisions as to county and other municipal bonds, General Municipal Law, §§ 5-12.

A county, being a corporation, may sue and be sued as such, Constitution, Article 8, § 3.

County not required to give security in action, Code Civ. Pro. § 1990; costs in action against county, Id. § 3245. Actions by and against county officers, Id. §§ 1926-1931. Actions against county officers by bond holders; General Municipal Law, §§ 52-55; against county officers by county, Id. § 53; limitation of action against county or county officer, Id. § 50.

Right to insure county buildings, Id. § 78.

Object of section is to permit actions to be brought by or against a county as a legal entity in a case where, previously, actions were maintainable only in name of board of supervisors. *Markey v. County of Queens* (1898), 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46.

No new liability is created by this section, but an additional remedy is afforded. So where money was deposited by the decedent with a county treasurer in lieu of bail unlawfully required by a justice of the peace, an action will lie in behalf of the decedent's administrator against the county to recover such amount. This is so although the justice of the peace who fixed the bail was without authority to bind the county, upon the theory that the money can be traced to the county and the county has appropriated and received it for its benefit, thereby creating a liability to respond to the true owner. *Sutherland v. St. Lawrence County* (1903), 42 Misc. 38, 85 N. Y. Supp. 696, reversed on other grounds 101 App. Div. 299, 91 N. Y. Supp. 962 (1905).

Capacity to sue.—A county cannot maintain an action to have a statute appropriating moneys for the construction of state highways declared unconstitutional. *County of Albany v. Hooker* (1912), 204 N. Y. 1, 97 N. E. 403, 1 Ann. Cas. 1913C, 663.

Necessity of audit.—This section is not intended to do away with the necessity of submitting claims for the audit of the board of supervisors, and is only intended to change the law in respect to actions for or against the county which were formerly commenced in the name of the board of supervisors. *Erhard v. Kings Co.* (1895), 36 N. Y. Supp. 656. Probably overruled by *Kennedy v. County of Queens* (1900), 47 App. Div. 250, 62 N. Y. Supp. 276; see also *Vacheron v. City of New York* (1901), 34 Misc. 420, 69 N. Y. Supp. 608; but question is still an open one. See *Taylor v. Mayor, etc.* (1880), 82 N. Y. 10, where it seems to be held that

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a presentation of the claim to the board of supervisors is a condition precedent to any proceedings against the county.

It is optional with claimants against the county to present their claims for audit to board of supervisors and obtain voluntary payment, or, without such preliminary presentation for audit, to bring an action against the county. *Kennedy v. County of Queens* (1900), 47 App. Div. 250, 257, 62 N. Y. Supp. 276. See also *Freel v. County of Queens* (1898), 9 App. Div. 186, 41 N. Y. Supp. 68, as modified and affirmed 154 N. Y. 661, 49 N. E. 124; *Markey v. County of Queens* (1898), 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; *Albrecht v. County of Queens* (1895), 84 Hun 399, 32 N. Y. Supp. 473, where it is held that as a rule an action cannot be maintained against a county to enforce a claim against it, but such claim must be presented to the board of supervisors for audit, and in case of a refusal to audit, the remedy is by mandamus.

Where a claim against a county is based upon a wrong committed by or attributable to it, the claimant is not bound to submit it to the board of supervisors for audit, but he may bring an action thereon direct against the county. *Kilbourne v. Supervisors of Sullivan* (1893), 137 N. Y. 170, 33 N. E. 159.

A county is a municipal corporation and may sue or be sued. There is no peremptory statute requiring a contract obligation of a county to be submitted to the board of supervisors for audit. A claimant has an option either to submit his claim to the board, or to sue directly. If he submits his claim to the board and it is audited and allowed for any amount, the determination is judicial and must be reviewed by certiorari. If the board rejects the claim entirely by denying the obligation as a matter of law, it *seems*, that the claimant should proceed by mandamus to establish his legal right and compel an audit of the amount due. But where a claimant has once exercised his option by presenting his claim to the supervisors for audit, he has made an election and cannot thereafter sue the county; his remedy is by mandamus or certiorari. *New York Catholic Protectory v. Rockland County* (1913), 159 App. Div. 455, 144 N. Y. Supp. 552, *affd.* 212 N. Y. 311, 106 N. E. 80.

Where a county sewer commission refuses to audit the bills of a contractor, having sole authority to do so, the county is bound by their action, and the contractor is under no obligation to compel the audit by mandamus, but may bring an action at law under his contract. *American Pipe and Construction Co. v. Westchester County* (1915), 225 Fed. 947.

It is intended to provide a remedy against the county for such cause of action, and no other, as could not be presented to and allowed by board of supervisors as a county charge. *Brady v. Supervisors of New York*, 10 N. Y. 260 (1851).

Former cases were unanimously to the effect that where the claim is one that should be presented to the board of supervisors for audit, no action will lie against the county thereon. *Taylor v. Mayor, etc., of New York* (1880), 82 N. Y. 10; *Huff v. Knapp* (1851), 5 N. Y. 65; *People ex rel. Sutliff v. Supervisors of Fulton* (1893), 74 Hun 251, 26 N. Y. Supp. 610; *People ex rel. Bevins v. Supervisors of Warren* (1893), 82 Hun 298, 31 N. Y. Supp. 248; *Adams v. Supervisors of Oswego Co.* (1873), 66 Barb. 368; *McClure v. Supervisors of Niagara Co.* (1867), 50 Barb. 594; *People ex rel. Myers v. Barnes* (1889), 114 N. Y. 317, 20 N. E. 609; *People v. Supervisors* (1866), 2 Abb. (N. S.) 78; *People ex rel. Johnson v. Supervisors of Delaware* (1871), 45 N. Y. 196, *Boyce v. Supervisors of Cayuga* (1855), 20 Barb. 294.

Actions against county.—Where no discretion is vested in the supervisors, but they refuse to perform a clear duty, mandamus not an action will lie; the latter may be maintained only where the duty is that of the county, not of the board. *Boyce v. Supervisors of Cayuga* (1855), 20 Barb. 294. See also *People v. Supervisors* (1885), 3 How. Pr. (N. S.) 241. When the county treasurer misapplies taxes collected from a town for a special purpose, an action for money had and received

is maintainable by the town against the county. *Peirson v. Supervisors of Wayne* (1898), 155 N. Y. 105, 49 N. E. 766. See also *Hill v. Supervisors of Livingston* (1854), 12 N. Y. 52; *Strough v. Supervisors of Jefferson* (1890), 119 N. Y. 212, 23 N. E. 552; *Crowninshield v. Supervisors of Cayuga* (1891), 124 N. Y. 583, 27 N. E. 242; *People ex rel. McMillan v. Supervisors of Cayuga* (1892), 136 N. Y. 281, 32 N. E. 854; *Woods v. Supervisors of Madison* (1893), 136 N. Y. 403, 32 N. E. 1011; *Kilbourne v. Supervisors of Sullivan* (1893), 137 N. Y. 170, 33 N. E. 159.

Money deposited in lieu of bail cannot be recovered from the county after the forfeiture of the bail although shown to belong to the estate of which the accused was the executor. *Sutherland v. St. Lawrence County* (1905), 101 App. Div. 299, 91 N. Y. Supp. 962, revg. 42 Misc. 38, 85 N. Y. Supp. 696.

Where an illegal tax is collected an action for money had and received will lie against the county; no demand is necessary when it is done with knowledge of its officers; nor need the claim be submitted for audit. *Newman v. Supervisors* (1871), 45 N. Y. 676.

Supervisors may maintain action for moneys fraudulently drawn from county treasury by a public officer. *Supervisors of New York v. Tweed* (1872), 13 Abb. (N. S.) 152. A debt created by the issue of county bonds is a debt of the county and not of the state; and when the proceeds of such issue are stolen or procured by fraud from the county treasury the county alone can maintain an action for recovery of same. *People v. Ingersoll* (1874), 58 N. Y. 1, 17 Am. Rep. 178.

Supervisors cannot audit accounts not legally chargeable to their county; the payment of an account so audited is not a voluntary payment and county may maintain an action for the recovery of the moneys paid. *Supervisors of Richmond v. Ellis* (1875), 59 N. Y. 620.

Compromise and settlement of claims, *People ex rel. Benedict v. Supervisors of Oneida* (1881), 24 Hun 413. The board of supervisors having power to settle and allow a claim, can, incidentally to such powers, waive the statute of limitations. *Woods v. Supervisors of Madison* (1893), 136 N. Y. 403, 32 N. E. 1011. Board of supervisors may compromise and settle a judgment recovered by them as incidental to their power to sue. *Supervisors v. Bowen* (1871), 4 Lans. 24.

Borrow money, the power to, is not inherent in a board of supervisors. *Parker v. Supervisors of Saratoga* (1887), 106 N. Y. 392, 13 N. E. 308.

A complaint, in an action against a county, which alleges that the plaintiff presented its claim to the board of supervisors of the defendant, and that the latter "did, as plaintiff is informed and believes . . . wholly disallow said claim," states no cause of action, for the reason that the determination of the board of supervisors is conclusive in the action. *New York Catholic Protectory v. Rockland County* (1914), 212 N. Y. 311, 106 N. E. 80, distinguishing *Kennedy v. County of Queens*, 47 App. Div. 250, 62 N. Y. Supp. 276.

As to corporate capacity of a county before enactment of this section, see *Newman v. Supervisors of Livingston* (1871), 45 N. Y. 676, 686.

§ 5. **Disposition of property, apportionment of debts and collection of judgments on alteration of boundary.**—When a county is divided or its boundary changed, its real property shall become the property of the county, within whose limits it lies after the change. The personal property and debts of such county shall be apportioned between the counties interested, by the supervisors thereof, or by the committees of their respective boards appointed for that purpose, subject to the approval of such boards; and the debts shall be charged on each county, according to such apportionment.

Any judgment recovered previous to such division, or after such division in proceedings instituted previous thereto, in the county court or before any justice of the peace may be collected by execution to be issued to the sheriff of the county where such judgment shall have been rendered, or to a constable thereof, as the case may require, who shall execute the same as if such division had not been made; and such judgments may be revived, and the like proceedings had thereon, as if such county had not been divided.

Source.—Former County L. (L. 1892, ch. 686) § 4; R. S., pt. 3, ch. 8, tit. 17, § 35, incorporated; originally revised from R. S., pt. 1, ch. 12, tit. 1, §§ 5-7.

§ 6. County liable for injuries caused by defective highways and bridges.—When, by law, a county has charge of the repair or maintenance of a road, highway, bridge or culvert, the county shall be liable for injuries to person or property sustained in consequence of such road, highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed existing because of the negligence of the county, its officers, agents or servants. A civil action may be maintained against the county to recover damages for any such injury; but the county shall not be liable in such action unless a written claim for such damages, verified by the oath of the claimant, containing a statement of the place of residence with reasonable certainty, and describing the time when, the particular place where and the circumstances under which the injuries were sustained, the cause thereof and, so far as then practicable, the nature and extent thereof, shall within three months after the happening of the accident or injury or the occurrence of the act, omission, fault or neglect out of which or on account of which the claim arose, be served upon the county clerk or chairman of the board of supervisors. No action shall be commenced upon such claim until the expiration of three months after the service of such notice. (*Added by L. 1917, ch. 578, in effect May 21, 1917.*)

ARTICLE III.

BOARDS OF SUPERVISORS

Section 10. Meeting and organization of boards of supervisors.

- 10-a. Quarterly meetings.
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12. General powers.
13. Limitation of credit.
14. Resolutions authorizing issue of obligations.
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18. Publication of acts of board.
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21. Compensation for publication of local laws.
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§ 10. Meeting and organization of boards of supervisors.—The supervisors of the cities and towns in each county, when lawfully convened, shall be the board of supervisors of the county. They shall meet annually, at such time and place as they may fix and may hold special meetings at the call of the clerk, on the written request of a majority of the board, and whenever required by law. A majority of the board shall constitute a quorum. They may adjourn from time to time, and their meetings shall be public. At the annual meeting they shall choose one of their number chairman for the ensuing year. In the event of a vacancy occurring in the office of chairman by reason of death or expiration of term of a supervisor, they may at a special meeting of the board called for such purpose, choose one of their number chairman to serve until the next annual meet-

ing. In a county in which the biennial town meetings are held at a time other than the general election they may choose one of their number chairman at a special meeting of the board called for such purpose. In the absence of the chairman at any meeting they shall choose a temporary chairman to serve during such absence. They shall appoint a clerk to serve during their pleasure, and until his successor is appointed; and shall fix his compensation. They may compel the attendance of absent members at their meetings, make rules for the conduct of their proceedings, and impose and enforce penalties for the violation thereof, not exceeding fifty dollars for each offense. (*Amended by L. 1910, ch. 279, L. 1911, ch. 250 and L. 1912, ch. 193, in effect Apr. 4, 1912.*)

Source.—Former County L. (L. 1892, ch. 686) § 10; L. 1904, ch. 574; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 1, 5-7, 9, 10; L. 1875, ch. 482, § 7.

Consolidators' note.—*Boards of Supervisors.*—Some of the provisions of Article 3 cannot be applied to the counties of Kings, Queens and Richmond, but it has been deemed best not to make any specific exception and to make only such changes as were obviously necessary. When the counties of Kings, Queens and Richmond were taken into the city of New York the boards of supervisors in these counties were abolished and all their powers and duties not transferred to other officers were vested in the board of aldermen of the city of New York. [Charter of the city of New York, § 1586.] This devolution was made pursuant to Article 3, section 26, of the state Constitution. Wherever powers are vested in the boards of supervisors, therefore, by this article, so far as the counties of Kings, Queens and Richmond are concerned, the board of aldermen of the city of New York must be substituted, except where the powers, duties and obligations of the boards of supervisors have been devolved upon some other city officer. The provisions of this article must be construed in conjunction with the charter of the city of New York. It is deemed best to leave the question as to the application of the various provisions to these counties to be determined by judicial construction in the light of their practical application rather than attempt to take the chances of the confusion that might result from an effort to make specific exception and the possibility of repealing some provision that is applicable. This confusion arises, not from the preparation of the former County Law, but from the manner in which the charter of the city of New York was prepared, which instead of transferring to the board of aldermen such powers as were deemed advisable, formerly vested in boards of supervisors, transferred them by a reference which in some cases would require judicial construction to determine their application.

The last paragraph is written without change of substance or effect from L. 1904, ch. 574, § 1, pt., adding § 6 to L. 1903, ch. 266, providing for the appointment and compensation of clerks of boards of supervisors in counties of not less than 50,000 nor more than 54,000 inhabitants, according to the last Federal enumeration.

References.—Each county to have a board of supervisors, Constitution, Article 3, § 26. Laws providing for election of members to be general, *Id.* § 18; supervisors to be chosen by electors or county authorities, *Id.* Article 10, § 2; election of city supervisors, *Id.* Article 12, § 3.

Election of supervisor at town elections, Town Law, § 80; term of office, *Id.* § 82; oath of office, *Id.* § 83; undertaking, *Id.* § 100; general duties, *Id.* § 98.

Quorum of board, General Construction Law, § 41. Meeting of board as board of county canvassers, Election Law, § 430. Meetings with state board of tax commissioners, Tax Law, § 173.

Clerk of board of supervisors; appointment and powers and duties, County Law, §§ 50-54.

Powers.—Board of supervisors possess no powers as corporations. *Brady v. Supervisors of New York* (1861), 10 N. Y. 260. Boards of supervisors acquire their powers by statute; they are specific, and limited in character, and cannot be transcended. *Chemung Canal Bank v. Supervisors of Chemung* (1848), 5 Den. 517. See also *People ex rel. Merritt v. Lawrence* (1843), 6 Hill 244; *People ex rel. O'Mara v. Supervisors* (1891), 40 St. Rep. 238, s. c. 16 N. Y. Supp. 254. The powers, duties and liabilities of counties are all conferred by the Constitution and laws, and they are specific and limited. *Ahern v. County of Kings* (1895), 89 Hun 148, 34 N. Y. Supp. 1023.

The powers of a county as a body politic can only be exercised by the board of supervisors. *Davidson v. Mayor* (1864), 27 How. Pr. 342, 25 Super. (2 Rob.) 230.

Supervisors of new county.—It is proper for the legislature to provide that the board of supervisors of a new county be composed of the duly elected supervisors of the towns that make up such county; though the board is a county organization, its members are chosen by the several towns respectively, and individually they are classed as town officers. *Matter of Noble* (1898), 34 App. Div. 55, 54 N. Y. Supp. 42.

Office of supervisor is elective and legislature cannot appoint. *Williams v. Boynton* (1895), 147 N. Y. 426, 42 N. E. 184, affg. 71 Hun 309, 25 N. Y. Supp. 60. Provision of Constitution, Article 3, § 18, prohibiting legislature from passing local bill providing for election of supervisors, does not apply to city supervisors. *People ex rel. Clancy v. Supervisors of Westchester* (1893), 139 N. Y. 524, 34 N. E. 1106.

Supervisors though elected by the towns are for some purposes deemed county officers. *Godfrey v. County of Queens* (1895), 89 Hun 18, 34 N. Y. Supp. 1052.

Qualifications of members.—Where claimant's right to office of supervisor has been substantially decided in his favor by the court of appeals, the board has no power to determine a contest as to his seat; its action in so doing will be set aside on certiorari. *People ex rel. Bradley v. Supervisors of Essex* (1893), 69 Hun 406, 23 N. Y. Supp. 654. The board must accept as a member a supervisor who was declared elected after a recanvass pursuant to a writ of mandamus. *Williams v. Boynton* (1893), 71 Hun 309, 25 N. Y. Supp. 60, affd. 147 N. Y. 426, 42 N. E. 184.

Meetings.—The supervisors are required to meet annually, and may hold special meetings from time to time; their neglect to perform a duty required to be performed at the annual meeting, cannot nullify the statute; they or their successors are bound to do what was required, and may be compelled to do so by mandamus. *People ex rel. Scott v. Supervisors of Chenango* (1853), 8 N. Y. 317, 330. Supervisors are required to meet annually, but they may hold special meetings, and adjourn from time to time. *People v. Stocking* (1866), 50 Barb. 573, 32 How. Pr. 48.

Quorum.—All questions may be determined by a majority of those present. *People ex rel. Hawes v. Walker* (1856), 23 Barb. 304, 2 Abb. Pr. 421. The provision of the statute declaring that a majority of the members shall constitute a quorum for the transaction of business cannot be altered by a rule of the board. *People ex rel. Burrows v. Brinkerhoff* (1877), 68 N. Y. 259.

The number necessary to constitute a quorum remains the same even though there be vacancies in the board. *Erie R. Co. v. City of Buffalo* (1904), 180 N. Y. 192, 197, 73 N. E. 26.

Resolutions.—The board acts for the county by resolution, as an organized body, and the action of the individual supervisors, although unanimous, would not bind the county. *Hill v. Supervisors of Livingston Co.* (1854), 12 N. Y. 52, 63.

Rules.—Board may, by its rules, delegate investigation of a claim to a committee appointed from among its number, which is required to report to the full board.

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People ex rel. Caldwell v. Supervisors of Saratoga (1899), 45 App. Div. 42, 60 N. Y. Supp. 1122.

Term of committees.—A committee of a board of supervisors has no authority to act after the expiration of the term of office of all of its members. Each board should appoint its committees for the transaction of its own business. Rept. of Atty. Genl. (1908), 488; Rept. of Atty. Genl. (1912) 88.

The chairman holds office for one year only. Rept. of Atty. Genl. (1894) 384.

One who continues to act as chairman of the board of supervisors after his successor in the office of supervisor has qualified and entered upon the discharge of his duties is not entitled to the *per diem* compensation provided to supervisors by statute for attendance upon sessions of the board or for committee work. Rept. of Atty. Genl. (1911), Vol. 2, p. 693.

The clerk of the board of supervisors must reside in the county where his services are to be performed. Rept. of Atty. Genl. (1895) 287.

Appointees of boards of supervisors hold office during the pleasure of the boards. Rept. of Atty. Genl. (1894) 384.

Section cited.—Rept. of Atty. Genl. (1895) 178.

§ 10-a. Quarterly meetings.—The board of supervisors in any county may, by resolution, determine to hold, in addition to the annual meeting, four regular quarterly meetings on the second Monday of the months of February, May, August and November. If such resolution be adopted the board of supervisors may transact at any such meeting all business that may come before it, including the audit of accounts and charges against the county which have been presented to the board and which shall have then accrued. Whenever a board of supervisors of any county shall have audited any account, claim or demand against the county at a meeting other than the annual meeting of the board, it shall certify the aggregate of all sums so audited and allowed to the county treasurer of the county. Any such board of supervisors may, concurrently with such certification or any time thereafter, authorize the county treasurer to borrow upon the faith and credit of the county a sum of money sufficient to pay the aggregate amount of the accounts so audited and allowed at any one or more of the meetings so held. No such loan shall be negotiated for a longer period than twelve months. (*Added by L. 1917, ch. 119, in effect Apr. 2, 1917.*)

§ 11. Penalty for neglect.—If any supervisor shall refuse or neglect to perform any of the duties which are or shall be required of him by law, as a member of the board of supervisors, he shall for every such offense forfeit the sum of two hundred and fifty dollars to the county. For a refusal or neglect to perform any other duty required of him by law, he shall for every such offense forfeit a like sum to the town.

Source.—Former County L. (L. 1892, ch. 686) § 11; originally revised from R. S., pt. 1, ch. 20, tit. 1, § 16.

References.—Wilful violation of official duties a misdemeanor, Penal Law, § 1841. Omission of duty by public officer a misdemeanor, Id. § 1857. Auditing and paying fraudulent claim against the county, Id. § 1863. Recovery of penalties and forfeitures by district attorney, Code Civil Procedure, §§ 1961, 1962; disposition of

moneys received by district attorneys in actions for recovery of penalties, County Law, § 201.

Liability of supervisor.—A ministerial officer, charged with the performance of duties specified by statute, may be proceeded against by a person injured by a failure to perform. *Clark v. Miller* (1874), 54 N. Y. 528. See also *Hover v. Barkhoof* (1870), 44 N. Y. 113; *People v. Brooks* (1845), 1 Den. 457, 43 Am. Dec. 704.

Where an act of the legislature directing the board to do some act is mandatory, the supervisors neglecting to comply are liable to an action for the penalty. *Caswell v. Allen* (1810), 7 Johns. 63. See also *Morris v. People* (1846), 3 Den. 381, to the effect that motive for neglect is immaterial.

Application for removal of supervisor, see *Matter of Hoag* (1911), 145 App. Div. 889, 129 N. Y. Supp. 775.

§ 12. **General powers.**—The board of supervisors shall:

1. Have the care and custody of the corporate property of the county.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 1; originally revised from R. S., pt. 1, ch. 12, tit. 1, § 4; L. 1869, ch. 855, § 8.

References.—Legislature may confer upon boards of supervisors such additional powers as it may deem expedient. Constitution, Art. III, § 27. Change of location of county buildings, County Law, § 31. Insurance of county buildings, General Municipal Law, § 78.

Powers in general.—Boards of supervisors are legislative bodies, in many respects of limited powers; but where they have jurisdiction they may act for the county precisely as the legislature may act for the state. If they act without jurisdiction, their acts are void, the same as is the action of the legislature when in violation of any provision of the constitution. *People ex rel. Hotchkiss v. Supervisors of Broome Co.* (1875), 65 N. Y. 222.

The board of supervisors of a county is vested with such powers of local legislation and administration as are conferred upon it by the legislature. Its power is co-extensive with the power expressly granted to it or which is necessarily or reasonably implied from the powers so expressly conferred. *Wadsworth v. Supervisors of Livingston* (1916), 217 N. Y. 484, 112 N. E. 161.

The acts of the board within their statutory powers are legislative and not judicial. *People ex rel. O'Connor v. Supervisors of Queens* (1897), 153 N. Y. 370, 47 N. E. 790; *People ex rel. Village of Jamaica v. Supervisors of Queens* (1892), 131 N. Y. 468, 30 N. E. 488.

Powers and duties of, as public bodies. Rept. of Atty. Genl. (1903) 517.

Implied powers.—Boards of supervisors, in the exercise of the legislative powers conferred upon them by the constitution, are not confined in their actions to the bare letter of the statute enacted to carry out the constitutional provisions, but may, in the exercise of a sound discretion, act under powers that are fairly to be implied. *People ex rel. Wakely v. McIntyre* (1898), 154 N. Y. 628, 49 N. E. 70; *Woods v. Supervisors* (1893), 136 N. Y. 403, 32 N. E. 1011.

County property.—Board may provide suitable furniture for county jail. *Schenck v. Mayor* (1876), 67 N. Y. 44. Records of conveyances in county clerk's office are not corporate property of the county; and board of supervisors cannot have indices of such records made in hostility to the clerk. *People ex rel. Welch v. Nash* (1875), 3 Hun 535, affd. 62 N. Y. 484.

A county which owns and maintains, for public purposes, a penitentiary, almshouse and farm used therewith, acts in a governmental capacity and is not liable for the acts of the officials controlling them, in permitting sewage from the buildings to be spread over the farm, thereby creating and continuing a nuisance to the damage of the land and stock of a neighboring owner, and he cannot main-

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tain an action against the county for an injunction restraining such nuisance and for damages caused thereby. *Lefrois v. County of Monroe* (1900), 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206, revg. 24 App. Div. 421, 48 N. Y. Supp. 519.

Insurance of county buildings.—A board of supervisors has the right to insure the county court house and jail. Rept. of Atty. Genl. (1913) Vol. 2, p. 43.

Consent to the construction of an electric road in front of county premises is within the powers of a board of supervisors. *Case v. County of Cayuga* (1895), 88 Hun 59, 34 N. Y. Supp. 595.

Survey of railroads and corporate property.—Boards of supervisors have no power to expend money to make surveys of railroads and corporate property. Rept. of Atty. Genl. (1902) 278.

Armories.—The County Law vests no authority in and imposes no duty on the boards of supervisors in the matter of armories. Rept. of Atty. Genl. (1907) 395.

Board cannot lease premises for an armory except in compliance with state military code. *Boiler v. New York* (1876), 40 Super. (8 J. & S.) 523.

Appointment of attorney.—A board of supervisors has implied power to appoint and discharge an attorney, but cannot, by such appointment, bind its successors. *Vincent v. County of Nassau* (1904), 45 Misc. 247, 92 N. Y. Supp. 32, *affd.* 110 App. Div. 730, 96 N. Y. Supp. 446.

Employment of member of board as attorney is void both as against public policy and by statute. *Beebe v. Supervisors of Sullivan County* (1892), 64 Hun 377, 19 N. Y. Supp. 629, *affd.* 142 N. Y. 631, 37 N. E. 566.

Compromises.—Supervisors may compromise and settle a judgment recovered by them for the county, pending an appeal therefrom. *Supervisors of Orleans County v. Bowen* (1871), 4 Lans. 24.

No power to contract with county clerk for reindexing of records.—*Wadsworth v. Supervisors of Livingston* (1916), 217 N. Y. 484, 112 N. E. 161.

2. Audit all accounts and charges against the county, and direct annually the raising of sums necessary to defray them in full.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 2; as amended by L. 1908, ch. 410; originally revised from R. S., pt. 1, ch. 12, tit. 1, § 4; L. 1869, ch. 855, § 8.

References.—What are county charges, County Law, § 240; accounts are required to be itemized, *Id.* § 24; clerk of board to designate items allowed or disallowed, *Id.* § 56, subd. 5.

Audit of town accounts by town boards, Town Law, § 133; accounts to be itemized, *Id.* § 175.

False auditing of claims a felony, Penal Law, § 1863.

Meaning of term "to audit."—To audit is to hear, to examine an account, and in its broader sense it includes its adjustment or allowance, disallowance or rejection. *People ex rel. Myers v. Barnes* (1889), 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739. See also *People ex rel. Read v. Town Auditors* (1895), 85 Hun 114, 32 N. Y. Supp. 688. The verb "audit" as here used, means simply to examine, to adjust, and it clearly implies the exercise of judicial discretion. *People ex rel. Hamilton v. Supervisors of Jefferson* (1898), 35 App. Div. 239, 54 N. Y. Supp. 782. See also *Matter of Murphy* (1881), 24 Hun 592, *affd.* 86 N. Y. 627.

The term includes both the allowance and reejection of a claim, and also the allowance of a claim in part and its rejection in part. *People ex rel. Andrus v. Supervisors of Saratoga* (1905), 106 App. Div. 381, 94 N. Y. Supp. 1012.

Necessity for audit.—It is optional with a person having a liquidated claim which is a county charge to present it to the board of supervisors for audit under this subdivision, or, without such previous presentation, to bring an action thereon

against the county *eo nomine*. *Kennedy v. County of Queens* (1900), 47 App. Div. 250, 62 N. Y. Supp. 276, *Western New York Inst. for Deaf Mutes v. County of Broome* (1913), 82 Misc. 63, 143 N. Y. Supp. 241. Compare cases under section 4, ante.

Jurisdiction of board.—The jurisdiction to audit is limited to the powers conferred by statute. *People ex rel. Merritt v. Lawrence* (1843), 6 Hill 244; *Chemung Canal Bank v. Supervisors* (1848), 5 Denio 517. If a claim is allowed which is not a legal claim against the county the audit is void. *Osterhoudt v. Rigney* (1885), 98 N. Y. 222; *Supervisors of Richmond v. Ellis* (1875), 59 N. Y. 620. Rept. of Atty. Genl. (1911) vol. 2, p. 347. A claim against a county is not made legal by its audit by the board of supervisors. *People ex rel. Tracy v. Green* (1874), 47 How. Pr. 382.

A claim for money illegally collected as taxes and paid into the county treasury is not a county charge which the statute intended should be audited. *Newman v. Supervisors of Livingston Co.* (1871), 45 N. Y. 676. See also *Ross v. Supervisors of Cayuga Co.* (1885), 38 Hun 20. Claims which have their origin in torts need not be presented to the board for audit. *McClure v. Supervisors of Niagara* (1867), 50 Barb. 594, 33 How. Prac. 202. See also *Howell v. City of Buffalo* (1857), 15 N. Y. 512. The bonds and notes of a county, issued for loans authorized by law, are not open accounts for county charges which must be presented for audit. *Parker v. Supervisors of Saratoga* (1887), 106 N. Y. 392, 13 N. E. 308.

Money, though voluntarily paid to a supervisor by the board, may be recovered where fraudulently obtained. *Supervisors of Richmond v. Van Chief* (1875), 1 Hun 454, 3 T. & C. 458, *affd.* 60 N. Y. 645.

Want of funds is no excuse for not auditing claim; they should be provided for in the next tax levy. *People v. Supervisors of New York* (1861), 22 How. Pr. 71, *affg.* 21 How. Pr. 322.

Delegation of power.—The final audit should be by the board as a whole. The examination of accounts may be made by a committee of the board, but the determination as to the allowance or disallowance of any part thereof rests exclusively with the board itself. *People ex rel. Kimball v. Supervisors of St. Lawrence* (1881), 25 Hun 131; *People v. Hagadorn* (1887), 104 N. Y. 516, 10 N. E. 891; *Bellinger v. Gray* (1873), 51 N. Y. 610; *Town of Salamanca v. Cattaraugus Co.* (1894), 81 Hun 282, 30 N. Y. Supp. 790; *People v. Stocking* (1866), 50 Barb. 573.

It seems that where the board exercises governmental functions, the whole body must act; but, when it acts as a mere business corporation, it may delegate the mechanical and physical work to its agents. *People ex rel. Vaughn v. Supervisors* (1889), 52 Hun 446, 5 N. Y. Supp. 600.

Audit, how far conclusive.—Audit is conclusive upon amount due claimant, unless modified on review. *Martin v. Supervisors of Greene* (1864), 29 N. Y. 645; *People ex rel. Baldwin v. Supervisors of Livingston* (1857), 26 Barb. 118, *revd.* on other grounds 17 N. Y. 486; *People ex rel. Vaughn v. Supervisors* (1889), 52 Hun 446, 5 N. Y. Supp. 600. Certificate of audit is conclusive against the county. *People ex rel. Central Nat. Bank v. Fitzgerald* (1877), 54 How. Pr. 1. If claimant accepts payment of claim as audited, he is estopped. *People ex rel. O'Mara v. Supervisors* (1891), 40 N. Y. St. Rep. 238, 16 N. Y. Supp. 254. The audit and allowance of an account by the board is conclusive of the right of the claimant to recover it. *Brown v. Green* (1874), 46 How. Pr. 302, 2 T. & C. 18, *affd.* 56 N. Y. 476; *New York Catholic Protectory v. Rockland County* (1914), 212 N. Y. 311, 106 N. E. 80. See also *People ex rel. Kelly v. Haws* (1861), 21 How. Pr. 117. The prior audit by the town board of an account against the town is conclusive, and cannot be reversed or reviewed by the board of supervisors. *McCrea v. Chahoon* (1889), 54 Hun 577, 8 N. Y. Supp. 88.

A taxpayer's action will not run to attack the validity of an audit made within the

jurisdiction of the board, unless there is established fraud or collusion in the audit, but an excess of jurisdiction amounts to an illegality which renders the audit open to attack. That some part of the claim is within the jurisdiction of the board is not sufficient to give it jurisdiction to audit and allow, conclusively, other items of the claim, which, if presented by themselves, would have been beyond the jurisdiction. But where the charges, audited and allowed, are in their legal nature proper charges, then the audit and allowance is conclusive as to the performance and extent of the work on which the charges are based. *Smith v. Hedges* (1915), 169 App. Div. 115, 154 N. Y. Supp. 867, affg. 87 Misc. 439, 150 N. Y. Supp. 899.

The reasonableness of the amount of a bill for costs and expenses in a proceeding before the governor for the removal of a sheriff is a question purely for the board of supervisors to determine when they make their audit. *Gavin v. Supervisors of Rensselaer* (1916), 93 Misc. 264, 157 N. Y. Supp. 973.

A complaint, in an action against a county, which alleges that the plaintiff presented its claim to the board of supervisors and that the latter "did, as plaintiff is informed and believes . . . wholly disallow said claim," states no cause of action, for the reason that the determination of the board is conclusive in the action. *New York Catholic Protectory v. Rockland County* (1914), 212 N. Y. 311, 106 N. E. 80.

When the question whether a charge made by a county clerk is a valid county charge is dependent upon a question of fact to be determined by the board of supervisors, the audit and allowance of the claim by the board, in the absence of fraud or collusion, is conclusive in the claimant's favor. Where the lawfulness of a charge made by a county clerk does not depend upon any such question of fact, but the charge is unlawful on its face, it is not aided in any respect by the audit thereof; and the association of such illegal claims with claims which are lawful in an audited bill does not serve to protect the former from attack notwithstanding the audit. *People v. Sutherland* (1912), 207 N. Y. 22, 100 N. E. 440.

Judicial act.—Power to audit is a judicial act, and the board is not liable for an erroneous determination. *Chase v. Saratoga Co.* (1861), 33 Barb. 603; *Osterhoudt v. Rigney* (1885), 98 N. Y. 222; *People v. Stocking* (1866), 50 Barb. 573; *Weaver v. Devendorf* (1846), 3 Den. 117; *People ex rel. Brown v. Supervisors* (1885), 3 How. Pr. (N. S.) 241; *People ex rel. Kelly v. Haws* (1861), 21 How. Pr. 117; *Supervisors of Onondaga v. Briggs* (1846), 2 Den. 26; *Wallace v. Jones* (1907), 122 App. Div. 497, 107 N. Y. Supp. 238, affd. 195 N. Y. 511, 88 N. E. 1134.

While in a very largely qualified sense the action of the board is *quasi-judicial*, it is not so in the sense that an erroneous and improper audit is incapable of correction by the board. *People ex rel. Hotchkiss v. Supervisors of Broome* (1875), 65 N. Y. 222.

Where the amount of services is undisputed and where the rate of compensation is established by law or undisputed contract so that an unquestionable duty exists that the board pay the claim, then the board cannot evade this duty by saying that the board is a *quasi-judicial* tribunal. *People ex rel. Morrison v. Supervisors of Hamilton* (1891), 56 Hun 459, 10 N. Y. Supp. 88, affd. 127 N. Y. 654, 27 N. E. 857. See also *Matter of Murphy* (1881), 24 Hun 592, affd. 86 N. Y. 627; *People ex rel. Kinney v. Supervisors of Cortland* (1870), 58 Barb. 139.

In investigation of a claim the board of supervisors are not the protectors of the county, but are bound to stand impartial between claimant and county; they are made by statute the judges of what is justly due. The claimant may claim opportunity to be heard, to produce witnesses and cross-examine witnesses; the county likewise should have a right to be represented. A record of all evidence should be kept so that it may be prepared to return its proceedings for review on certiorari. *People ex rel. Bliss v. Supervisors* (1891), 39 St. Rep. 313, 15 N. Y. Supp. 748. See also *People ex rel. White v. Supervisors* (1892), 48 St. Rep. 3, 20 N. Y. Supp. 273, holding that board has reasonable discretion as to reception of evidence.

The audit is in the nature of a judgment against the county. *People ex rel. McDonough v. Queens* (1884), 33 Hun 305; *People ex rel. Brown* (1885), 3 How. Pr. (N. S.) 241.

A rule of the board cannot operate against the statutory provisions as to auditing. *People v. Supervisors of N. Y.* (1861), 22 How. Pr. 71, affg. 21 How. Pr. 322.

Exercise of power to audit; discretion.—Within the range of their discretion the board is sufficiently powerful. The courts may not dictate their conclusion, but may justly require that they arrive at one in a just and intelligent way; they must audit by passing specifically upon the separate charges, so that both the claimants and the people may know what has been done; their conclusion must be an actual audit, not an arbitrary guess at a gross sum. *People ex rel. Thurston v. Auditors* (1880), 82 N. Y. 80. See also *People ex rel. Sutliff v. Supervisors of Fulton* (1892), 74 Hun 251, 26 N. Y. Supp. 610.

Under the provisions of L. 1874, ch. 323 that in all proceedings before the governor for the removal of any county officer upon charges preferred against him, all the costs and expenses thereof shall be a county charge upon such county, and shall be audited and allowed by the board of supervisors thereof, the board of supervisors has power, when a claim is presented to it thereunder, to examine the items thereof and determine whether or not such costs and expenses were reasonable, and whether or not they were necessarily and properly incurred; and as to these matters the court will not control the discretion of the board by a writ of mandamus. *People ex rel. Benedict v. Supervisors of Oneida* (1881), 24 Hun 413.

Audit of claim for services.—Where a board of supervisors has received a claim against a county based on *quantum meruit* for services of a physician in making post-mortem examinations, and has acted upon it by allowing it in part and reducing the amount, the claimant cannot disregard the audit and sue the county *eo nomine* for the entire amount of his claim. Such an audit is final and reviewable only by certiorari. *Foy v. County of Westchester* (1901), 60 App. Div. 412, 69 N. Y. Supp. 887, affd. 168 N. Y. 180, 61 N. E. 172.

The audit by a board of supervisors, having jurisdiction over the matter of a claim for services rendered the county, at a reduced amount, is, in the absence of fraud or collusion, final and conclusive, and cannot be attacked collaterally in an action brought by an assignee of the claimant, even though the board of supervisors erroneously allowed on plausible grounds items which were not a proper county charge. The rule of *res adjudicata* applies to such an audit. *Bank of Staten Island v. City of New York* (1902), 68 App. Div. 231, 74 N. Y. Supp. 284, affd. 174 N. Y. 519, 66 N. E. 1104.

When the board by law is required to audit and allow accounts for salaries of certain public officers, they have no discretion to exercise. *Morris v. People* (1846), 3 Den. 381. See also *People ex rel. Downing v. Stout* (1856), 23 Barb. 338, where an officer's salary was fixed by the board itself. Unless the amount is fixed by law, supervisors have discretion in fixing amount of claims. *People ex rel. Kinney v. Supervisors of Cortland* (1870), 58 Barb. 139, 40 How. Pr. 53.

Where a legal claim for services was rejected because the supervisors believed it to be illegal it was held that a peremptory writ of mandamus should be granted directing the board to hear, consider and determine whether the services were rendered, and, if they were, to audit the claim. *Matter of Ramsdale v. Supervisors of Orleans* (1896), 8 App. Div. 550, 40 N. Y. Supp. 840.

Supervisors must audit salary of an officer as fixed by law. *People ex rel. Downing v. Stout*, 23 Barb. 338 (1856). See also *People ex rel. Kelly v. Haws* (1861), 21 How. Pr. 178. But see *People v. Supervisors* (1856), 12 How. Pr. 204.

Attorney's services.—Claim for services by an attorney assigned to defend a prisoner is not a charge on the county, and in the absence of statutory authority the

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board is powerless to audit same. *People v. Supervisors of Albany* (1864), 28 How. Pr. 22. A claim for attorney's services rendered to the board is a county charge and must first be presented for audit. *Brady v. Supervisors of N. Y.* (1851), 10 N. Y. 260.

Charges for legal services to county excise board were required to be presented to supervisors for audit; and mandamus will lie if board refuse to audit such claim if legally chargeable to county. *People ex rel. Johnson v. Supervisors of Delaware* (1871), 45 N. Y. 196. See also *People v. Supervisors* (1852), 14 Barb. 52.

A claim by an attorney, assigned to defend a poor person, indicted for murder in the first degree, for the services of an interpreter, apparently rendered prior to the trial, should not be allowed by the county, where it appears that a similar item has been paid for the services of an interpreter at the trial in the interest of the defense, and the papers do not show that the additional item claimed was necessary and proper. Although an order has been granted in such an action requiring the stenographer to furnish from day to day a transcript of his minutes to the attorney assigned for the defense, the expense incurred is not chargeable to the county. *Matter of Kenney v. Prendergast* (1912), 153 App. Div. 325, 137 N. Y. Supp. 1097.

Audit of separate items.—A person who presents to a board of supervisors for audit a claim consisting of several items, is entitled to have the judgment of the board on each item of the claim, and, if the claim is allowed at a reduced amount, without indicating the items disallowed, the claimant may insist upon a reaudit of the claim. *People ex rel. Drummond v. Supervisors* (1903), 83 App. Div. 51, 82 N. Y. Supp. 504. See also *People ex rel. Johnson v. Supervisors of Delaware* (1871), 45 N. Y. 196; *People ex rel. Thurston v. Auditors* (1880), 20 Hun 150, affd. 82 N. Y. 80; *People ex rel. Sutliff v. Supervisors* (1893), 74 Hun 251, 26 N. Y. Supp. 610.

Audit of rejected accounts by subsequent board.—An account rejected by a board upon its merits cannot be audited by a subsequent board. *Osterhoudt v. Rigney* (1885), 98 N. Y. 222; *Supervisors of Richmond v. Ellis* (1875), 59 N. Y. 620. But if a claim is disallowed for any reason not affecting its merits, it may be audited by a subsequent board. *People ex rel. Mason v. Supervisors of Wayne* (1887), 45 Hun 62. The board may properly reject a claim which has been audited and rejected by the board of a previous year. *People ex rel. Andrus v. Supervisors of Saratoga* (1905), 106 App. Div. 381, 94 N. Y. Supp. 1012.

Reconsideration of audited claims.—Where a claim has been considered, audited and allowed by a board of supervisors, but not actually paid, said board may reconsider its action and reaudit the account. The fact that the claim as audited was assigned prior to the reconsideration thereof by the board of supervisors does not change the situation, as the assignee acquired no greater right than the assignor had and must be presumed to have known that the board had power to reconsider its action and reaudit the claim. *Matter of Equitable Trust Co. v. Hamilton* (1917), 177 App. Div. 390.

Effect of legislative enactments.—Legislature may direct the board to assess the costs and expenses of a suit brought by direction of the voters of a town by the highway commissioners on the town. *Town of Guilford v. Supervisors of Chenango* (1855), 13 N. Y. 143. See also *People ex rel. Morrill v. Supervisors of Queens* (1889), 112 N. Y. 585, 20 N. E. 549; *People ex rel. Outwater v. Green* (1874), 56 N. Y. 466.

Local act (1900, ch. 277, § 6) providing for the payment of the proceeds of bonds, issued for the acquisition of certain property within a county, upon the order of the board of supervisors, is entirely in accord with provisions of this subdivision. *People v. Neff* (1908), 191 N. Y. 210, 83 N. E. 770, affg. 122 App. Div. 135, 106 N. Y. Supp. 747.

Effect of contract on audit.—Under this act it is the duty of the board of supervisors to audit claims against the county for printing election ballots, and any contract made by a county clerk for the printing of such ballots is subject to such audit, and under such contract the supervisors will not be compelled by certiorari to audit the account at the same amount as they allowed on a prior audit of a similar contract. *People ex rel. Newburgh News Printing and Publishing Co. v. Supervisors of Orange* (1910), 140 App. Div. 227, 125 N. Y. Supp. 105, *affd.* 203 N. Y. 564, 96 N. E. 1127.

Effect of erroneous audit.—After alleged erroneous audit by board of supervisors, an action will not lie for the recovery of a larger sum. *Martin v. Supervisors of Greene* (1864), 29 N. Y. 645. See also *Chase v. County of Saratoga* (1861), 33 Barb. 603; *People ex rel. Brown v. Supervisors of Herkimer* (1885), 3 How. Pr. (N. S.) 241.

Recovery of moneys paid under void resolution.—Public moneys paid pursuant to a resolution of a board of supervisors void under this section, subd. 2, may be recovered in an action under section 51 of the General Municipal Law. *Shiebler v. Griffing* (1913), 83 Misc. 363, 145 N. Y. Supp. 969.

Waiver of defense of voluntary payment of taxes.—A board of supervisors has the power to waive the defense that an alleged erroneous payment of taxes to the county by a town was voluntary. *New York Central, etc., R. Co. v. Maine* (1893), 71 Hun 417, 24 N. Y. Supp. 962.

An appropriation in aid of a centennial celebration is unauthorized though made without wrong intent. *Rice v. Glens Falls Publishing Co.* (1914), 86 Misc. 503, 149 N. Y. Supp. 311.

Waiver of statute of limitations.—The authority to audit and allow claims implies power to waive by proper agreement the defense of the Statute of Limitations, as to claims not already barred, and its waiver will bind a succeeding board. *Woods v. Supervisors of Madison County* (1893), 136 N. Y. 403, 32 N. E. 1011.

Evidence.—Where the claimant has failed to observe the statutory requirement as to proof, the board can either reject the bill altogether or allow what they consider fair compensation. *People ex rel. Toohy v. Webb* (1892), 21 N. Y. Supp. 298.

Court can examine evidence taken before board and set aside its determination as against preponderance of evidence, as it can in case of a jury verdict. *People ex rel. Sutliff v. Supervisors* (1893), 74 Hun 251, 26 N. Y. Supp. 610.

A board of supervisors in passing on a claim for services may act upon information acquired apart from any formal hearing. Thus, they may consider letters received from clerks of other countries stating the rates paid by them for similar services. *People ex rel. McHenry v. Supervisors of Madison* (1910), 140 App. Div. 759, 126 N. Y. Supp. 153.

Mandamus or review.—If audit is refused or amount is arbitrarily reduced, remedy is by mandamus. *Matter of Lanehart* (1898), 32 App. Div. 4, 52 N. Y. Supp. 671; but if claim requires exercise of discretion and a determination based upon conflicting evidence, remedy is by certiorari. *Id.* And see also *People ex rel. Hamilton v. Supervisors of Jefferson* (1898), 35 App. Div. 239, 54 N. Y. Supp. 782; *People ex rel. Plumb v. Supervisors of Cortland* (1861), 24 How. Pr. 119; *People ex rel. Martin v. Earle* (1873), 47 How. Pr. 458; *People ex rel. McAleer v. French* (1890), 119 N. Y. 502, 23 N. E. 1061; *Vedder v. Superintendent* (1848), 5 Den. 564; *Albrecht v. County of Queens* (1895), 84 Hun 399, 32 N. Y. Supp. 473.

If a board of supervisors refuses to act upon or allow or disallow a claim, the remedy of the claimant is by writ of mandamus. If a valid claim against a county is not allowed at a proper amount, the remedy of the claimant is by writ of certiorari to review the audit. *Matter of Equitable Trust Co. v. Hamilton* (1917), 177 App. Div. 390.

Where a question of fact is to be determined by the board of supervisors, the

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board has the right to decide, and mandamus will not lie; but where no such question exists and the amount of the claim is undisputed, so that on the facts a clear, unquestionable duty exists that the board pay the claim, then the board may be compelled by mandamus to perform its duty. *People ex rel. Morrison v. Supervisors of Hamilton* (1891), 56 Hun 459, 10 N. Y. Supp. 88, *affd.* 127 N. Y. 654, 27 N. E. 857. See also *People ex rel. Sherman v. Supervisors of St. Lawrence* (1865), 30 How. Pr. 173.

Where the supervisors refuse to allow a legal charge, the court may instruct and guide them in the execution of their duty by mandamus and compel them to admit the claim as a county charge without controlling the exercise of their judgment and discretion as to the amount to be allowed. *Hull v. Supervisors of Oneida* (1821), 19 Johns. 259, 10 Am. Dec. 223. See also *People ex rel. Bliss v. Supervisors of Cortland* (1891), 39 N. Y. St. Rep. 313, 15 N. Y. Supp. 748; *People v. Supervisors of Otsego Co.* (1873), 51 N. Y. 401.

The rejection of a claim by a board of supervisors on the ground that the county is not liable therefor, may be reviewed by mandamus as well as by a writ of certiorari. *People ex rel. Smart v. Supervisors* (1901), 66 App. Div. 66, 72 N. Y. Supp. 568.

When the board refuses to examine the accounts, for some cause other than errors or want of proof as to the items, it may be compelled to proceed with the examination and audit. *People ex rel. Hasbrouck v. Supervisors of N. Y.* (1861), 21 How. Pr. 322, *affd.* 22 How. Pr. 71.

To entitle creditor to mandamus to compel board of supervisors to assess against a town a judgment recovered against its highway commissioners, it must be established that the judgment is one the town is precluded from disputing. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397, *affg.* 29 Hun 185.

Where a board of supervisors considered a claim for a refund of excess taxes and determined to repay the excess of state, county and town taxes, but denied a refund of the excess of school and highway taxes, and the petitioner accepted the award and waited three years before again requesting a refund of such taxes, which was again denied, it was held that he was not entitled to a writ of mandamus directing the board to repay the excess of school and highway taxes. *People ex rel. Erie Railroad Company v. Supervisors of Erie* (1908), 193 N. Y. 127, 86 N. E. 348.

Where the board has passed upon the whole claim on its merits and has exercised its judgment in good faith, mandamus will not lie to compel board to allow a greater amount; where the board has not acted upon each item of the claim and arrived at its decision in a systematic way it may be required to. *People ex rel. O'Mara v. Supervisors* (1891), 40 N. Y. St. Rep. 238, 16 N. Y. Supp. 254, *affd.* 43 N. Y. St. Rep. 77, 17 N. Y. Supp. 314.

A mandamus will not lie to a board of supervisors to control them in the exercise of their discretion as to the amount at which an account presented shall be audited. *People ex rel. Phoenix v. Supervisors of New York* (1841), 1 Hill 362.

A writ of certiorari lies to review an audit made by a board of supervisors allowing in part and rejecting in part a claim against the county. *People ex rel. M., B. & Co. v. Westchester County* (1901), 57 App. Div. 135, 67 N. Y. Supp. 981.

If the board of supervisors passes upon a claim and disallows it, either in whole or in part, the sole remedy is to review the determination, if erroneous, by certiorari. *New York Catholic Protectory v. Rockland County* (1914), 212 N. Y. 312, 106 N. E. 80.

The regularity of the audit of a claim by the board of supervisors cannot be questioned in an action by the claimant to recover moneys collected under a tax levy; the claimant's remedy is by mandamus or certiorari. *Adams v. Wheatfield* (1899), 46 App. Div. 466, 61 N. Y. Supp. 738.

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Certiorari will lie to review an erroneous determination of the board of supervisors as to a claim declared by the legislature to be just; after such review, if board still refuse to allow the claim, further remedy by mandamus will be given. *People ex rel. Oneida Valley Nat. Bank v. Supervisors of Madison* (1873), 51 N. Y. 442.

The audit and payment of part of a claim does not preclude the board from contesting the residue even upon a principle which would show the former allowance to have been improper. *People ex rel. Phoenix v. Supervisors of New York* (1841), 1 Hill 362.

If the board has acted on the subject matter and exercised its discretion by allowing but part of an account, though it be less than that certified by a justice of the supreme court, mandamus will not lie. *People ex rel. Ayres v. Supervisors of Fulton* (1852), 14 Barb. 52.

3. Annually direct the raising of such sums in each town as shall be necessary to pay its town charges.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 3, originally revised from R. S., pt. 1, ch. 12, tit. 1, § 4; L. 1869, ch. 855, § 8.

References.—Town charges specified, Town Law, § 170; audit by town board, Id. § 133; compensation of town officers, Id. § 85; fees in criminal proceeding, Id. §§ 107, 171; accounts to be itemized, Id. § 175; abstract for board of supervisors, Id. § 155. Appeal from audit of town board to board of supervisors, Id. § 177.

Town charges.—Supervisors are required to cause the amounts specified in the certificates of the town auditors to be levied upon the town, and they cannot reverse or review the action of the auditors. *Osterhoudt v. Rigney* (1885), 98 N. Y. 222, 234.

Judgments against towns.—Board cannot be compelled by mandamus to levy the amount of a judgment against a highway commissioner upon the property of the town. *People ex rel. Everett v. Supervisors of Ulster* (1883), 93 N. Y. 397, affg. 29 Hun 185. It is the duty of the board of supervisors to provide for the payment of judgments against the town, and mandamus will lie upon their neglect to do so. *People ex rel. Crouse v. Supervisors of Fulton* (1893), 70 Hun 560, 564, 24 N. Y. Supp. 397, affd. (1893), 139 N. Y. 656, 35 N. E. 208.

When towns are divided, board cannot be compelled to levy until debts are apportioned. *People ex rel. McKenzie v. Supervisors of Ulster* (1883), 30 Hun 148, affd. (1883), 94 N. Y. 263.

4. Cause to be assessed, levied and collected, such other assessments and taxes as shall be required of them by any law of the state.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 4, originally revised from L. 1875, ch. 482; L. 1838, ch. 314.

References.—Duties of boards of supervisors as to assessment and collection of taxes, Tax Law, §§ 50–55. Correction of errors in assessments, Id. §§ 55a, 56, 56a; County Law, § 16. Reassessment of property illegally assessed, Tax Law, § 57. Levy of taxes; tax warrant annexed to tax roll, Id. §§ 58, 59.

Purposes of tax.—The legislature may delegate to a county the power to a board of supervisors to erect a bridge and to assess a tax on particular towns for the payment thereof. *Town of Kirkwood v. Newbury* (1890), 122 N. Y. 571, 26 N. E. 10, affg. 45 Hun 323. As to building and maintenance of bridges, see *Huggans v. Riley* (1890), 125 N. Y. 88, 25 N. E. 993.

A county is not bound to levy a tax for the default of a county treasurer, until all remedy against him personally has been exhausted. *First Nat. Bank of Ballston Spa v. Supervisors of Saratoga* (1887), 106 N. Y. 488, 13 N. E. 439.

5. Have power to fix the amount and the time or manner of payment of the salary or compensation of any county officer or employee, except a judicial officer or an officer or employee of a county tuberculosis hospital and the term of office and mode of appointment, number and grade of any appointive county officer and of the clerks, assistants or employees in any county office, except an officer or employee of a county tuberculosis hospital, notwithstanding the provisions of any general or special law fixing the amount of such salary or compensation or the time or manner of payment thereof, or fixing the term of office or providing for the mode of appointment, number or grade of any such county officer or of the clerks, assistants or employees in any county office, or vesting in any other board, body, commission or officer authority to fix such term of office, or the amount of such salary or compensation or the time or manner of payment thereof or to provide for the mode of appointment, number or grade of such officers or of the clerks, assistants or employees in any county office; and the power hereby vested in the board of supervisors shall be exclusive of any other board, body, commission or officer, except the authorities of a county tuberculosis hospital, notwithstanding any general or special law. The salary or compensation of an officer or employee elected or appointed for a definite term shall not be increased or diminished during such term. (*Amended by L. 1911, ch. 359, L. 1913, ch. 742, and L. 1914, ch. 358.*)

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 5; originally revised from L. 1875, ch. 482, § 1, subd. 2; L. 1877, ch. 436, §§ 5, 6; L. 1852, ch. 304, §§ 1, 4.

Consolidators' note.—Authorizes the boards of supervisors to fix the salary and compensation of county treasurers and superintendents of poor of their respective counties. This provision can have no application to the counties of Kings, Queens and Richmond, as the office of county treasurer in these counties was abolished by the charter of the city of New York, and their powers, duties and obligations were devolved upon the comptroller of the city of New York. [Charter of the city of New York, § 1587.] There are no superintendents of poor in the counties of Kings, Queens and Richmond, and, therefore, the board of aldermen as the successors of the boards of supervisors in these counties have no salary of superintendents of the poor to determine.

References.—Extra compensation to county officers not to be allowed by boards of supervisors, Constitution, Article 3, § 28. Fees of county treasurer for collection of the state tax, Tax Law, § 91; for collection of tax on collateral inheritances, Tax Law, § 237; for collection of liquor taxes on issuance of certificates, Liquor Tax Law, § 11; fees generally, Code Civil Procedure, § 3321. Salaries of county clerks and sheriffs, fixed by statute in many counties, see references under County Law, §§ 160, 180. Salaries of county judges and surrogates, *Id.* § 232.

Compensation of supervisors.—A board of supervisors has no power to increase the compensation of its members for service on the board. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 584.

County clerk.—Change of form of compensation of county clerk may be made by a board of supervisors from a fee to a salary basis. *Opinion of Atty. Genl.* (1913) 2.

County treasurer is entitled to fees allowed by law for receiving and paying over state taxes, *Supervisors of Monroe v. Otis* (1875), 62 N. Y. 88; unless otherwise expressly provided by a statute. *Supervisors of Seneca v. Allen* (1885), 99 N. Y.

532, 2 N. E. 459. See also *People ex rel. Lawrence v. Supervisors of Westchester* (1878), 73 N. Y. 173. Right to commissions for receiving and disbursing money where no compensation fixed. *Supervisors of Otsego v. Hendryx* (1870), 58 Barb. 279.

The board of supervisors has no authority to increase the compensation of a county treasurer during his term. An additional allowance for clerk hire during the term of any county treasurer necessarily increases his compensation. Rept. of Atty. Genl. (1912) 126.

Where county treasurer is salaried.—It was intended by the revision of the statutes in the County Law that the county treasurers in those counties where, at the time of the enactment of such law, such treasurers were salaried officers, that they should be retained as such, and that the salary and compensation which the board of supervisors had fixed for them should be in full of all compensation allowed them for every official duty pertaining to their office, including their services for the collection and paying over of state, school and court moneys. *People ex rel. Conine v. Steuben Co.* (1905), 183 N. Y. 114, 75 N. E. 1108; *Matter of New York Central & Hudson River R. R. Co.* (1880), 7 Abb. N. C. 408; Rept. of Atty. Genl. (1911), Vol. 2, p. 396.

A county treasurer whose salary and compensation has, pursuant to the provisions of this section, been fixed by the board of supervisors "at the sum of \$1,500, and, in addition all fees allowed by law" is not entitled to retain the fees and commissions for collecting and paying out bank taxes and court and trust funds, as provided by section 24 of the Tax Law and section 3321 of the Code respectively, or for preparing conveyances of property sold for taxes, as provided by section 154 of the Tax Law, but must account therefor. Rept. of Atty. Genl. (1912), Vol. 2, p. 258. It has been held, however, that, although a board of supervisors has fixed a certain sum as the salary of the county treasurer in full of every interest, fee or compensation he is, nevertheless, entitled, in addition to such salary, to compensation subsequently provided by the Legislature in the Liquor Tax Law for collecting liquor taxes, etc., and also to the compensation subsequently provided by the bank tax law. *Montgomery County v. Vosbury* (1911), 74 Misc. 562, 134 N. Y. Supp. 457; Rept. of Atty. Genl. (1898), 150. The same rule has been applied to commissions allowed under the Tax Law. Rept. of Atty. Genl. (1900) 204.

Court attendants.—Where a board of supervisors passed resolutions empowering the sheriff to appoint "three court officers" and authorizing the superintendent of the court house and annex to appoint "ten laborers" at three dollars per day, thereby providing an equivalent of thirteen court attendants which the sheriff of said county was entitled to appoint under Laws of 1910, chapter 243, it was proper to recognize only the court attendants selected by the sheriff, because the amendments to the County Law did not divest the sheriff of his power of appointment. *Halligan v. Runkle* (1916), 174 App. Div. 497, 160 N. Y. Supp. 42.

Superintendent of highways.—A board of supervisors has the absolute and exclusive right to appoint a county superintendent of highways and to fix his salary and provide for the payment of his necessary expenses, although said salary at the time of the appointment exceeds the salary stated in the notice published by the commission for the competitive examination of candidates. *MacDonald v. Ordway* (1916), 219 N. Y. 328, — N. E. —, revg. 174 App. Div. 518, — N. Y. Supp. —.

Superintendent of poor.—Personal expenses of a superintendent of the poor are not a county charge unless the board of supervisors has expressly so provided in fixing his salary or compensation. *Matter of Strong v. Williams* (1915), 167 App. Div. 714, 153 N. Y. Supp. 175.

Employment of attorney.—A board of supervisors may employ an attorney and counsel as the necessity arises, but it cannot appoint an attorney to act for a term of one year at a yearly salary payable in quarterly installments, and thus

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prevent their successors from exercising the right to change counsel. *Vincent v. County of Nassau*, 45 Misc. 247, 92 N. Y. Supp. 32 (1904), *affd.* 110 App. Div. 730, 96 N. Y. Supp. 446. Contract for services as attorney in actions against county, see *People ex rel. Fisher v. Supervisors of Delaware* (1905), 108 App. Div. 83, 95 N. Y. Supp. 458.

Clerks to election commissioners.—A board of supervisors has authority to provide for the appointment and compensation of clerks and stenographers for election commissioners. *People v. Holmes* (1912), 139 N. Y. Supp. 923. The salary of chief clerk of board of elections of county of Ulster may be fixed by the board of supervisors. *People ex rel. Simpson v. Snyder* (1916), 173 App. Div. 171, 158 N. Y. Supp. 937.

Special deputy sheriff.—The salary of a special deputy sheriff appointed to act as quarantine inspector may be fixed by the board of supervisors and the claims audited, although the services have been rendered. *People ex rel. Baumann v. Lyon* (1912), 154 App. Div. 266, 138 N. Y. Supp. 973.

Clerks and deputies.—Board can only fix the number, grades and pay of clerks in county offices required by statute to have such clerks and deputies. *People ex rel. Masterson v. Gallup* (1884), 96 N. Y. 628. And see *People ex rel. Bacon v. Supervisors of Kings* (1887), 105 N. Y. 180, 11 N. E. 391, *affg.* 33 Hun 373. Therefore where there is no law providing for a clerk to a county judge the supervisors have no authority to create such an office and fix the compensation. *Shiebler v. Ireland* (1913), 175 N. Y. St. Rep. 762, 141 N. Y. Supp. 762.

Appointment of assistants in county offices.—The amendment of 1911 authorizes boards of supervisors to prescribe or fix the mode or manner in which those authorized by law to appoint clerks, assistants and employees in county offices should exercise the power and does not confer upon boards of supervisors the power themselves to make such appointments. *Sheldon v. McArthur* (1911), 73 Misc. 575, 133 N. Y. Supp. 195, *affd.* 148 App. Div. 908, 133 N. Y. Supp. 197; *Rept. of Atty. Genl.* (1911), Vol. 2, p. 625.

Additional compensation.—When a district attorney is assigned a fixed salary, it is in lieu of all other compensation and he is not entitled to more on account of a new duty imposed upon him. *People ex rel. Phoenix v. Supervisors of N. Y.* (1841), 1 Hill 362. A resolution of a board of supervisors giving a clerk to a coroner is not the granting of an additional compensation within the Constitution, Article 3, § 28, *People ex rel. Masterson v. Gallup* (1883), 65 How. Pr. 108, 12 Abb. N. C. 65, *revd.* on other grounds, 30 Hun 501, *affd.* 96 N. Y. 628.

Effect of insufficient appropriation.—Where the supervisors fixed the salaries of the employees in the district attorney's office and later fixed the amount to be raised by taxation for salaries at considerably less than the amount fixed for salaries, it was held that the action of the board plainly indicated an intention on its part to reduce the salaries, and authority was thus impliedly given to the district attorney to make arrangements with appointees to accept a less salary than fixed by the board, and that where an employee accepted and retained employment at a reduced salary he could not thereafter recover the difference between the amount accepted and the amount fixed by the supervisors. *People ex rel. Bacon v. Supervisors of Kings* (1887), 105 N. Y. 180, 11 N. E. 391.

5-a. Fix the amount of the undertakings required by law to be executed by the clerk, district attorney and the superintendent of the poor of the county. (*Added by L. 1914, ch. 63, in effect Mch. 21.*)

References.—Undertaking required of county clerk, County Law, § 160; of district attorney, *Id.* § 200; of superintendent of the poor, *Id.* § 221. General provisions relating to official undertakings, *Id.* § 247; Public Officers Law, §§ 11, 12.

6. Borrow money when they deem it necessary, for the erection or alteration of county buildings, and for the purchase of sites therefor, on the credit of the county, and for the funding of any debt of the county not represented by bonds, and issue county obligations therefor, and for other lawful county uses and purposes; and authorize a town in their county to borrow money for town uses and purposes on its credit, and issue its obligations therefor, when, and in the manner, authorized by law. (*Amended by L. 1915, ch. 106, in effect Mch. 24, 1915.*)

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 6; originally revised from L. 1849, ch. 194, subds. 8, 9; L. 1875, ch. 482, § 1; L. 1891, ch. 289.

Consolidators' note.—The last three lines of this subdivision can have no application to the counties of New York, Kings, Queens and Richmond, as there are no towns in any of those counties.

References.—Limitation of amount of indebtedness of county, County Law, § 14, 16; as to municipal bonds generally, General Municipal Law, §§ 3, 5–12.

Board of supervisors to authorize issue of bonds by town for highway purposes, Highway Law, § 97. County or town may borrow money to pay for county's and town's share of cost of construction of county highway, Highway Law, § 142.

Funded debt.—The legislature intended to include in the term "funded debt" all municipal indebtedness embraced within or evidenced by a bond, the principal of which is payable at a time beyond the current fiscal year of its issue, with periodical terms for the payment of interest, provision being made for payment by raising the necessary funds by future taxation and the *quasi*-pledging, in advance, of the municipal revenue. *People ex rel. Peene v. Carpenter* (1898), 31 App. Div. 603, 52 N. Y. Supp. 781.

There is no inherent power in boards of supervisors to borrow money or to issue negotiable paper, but the authority therefor must be found in some statute, given either expressly or by implication. *Parker v. Supervisors of Saratoga* (1887), 106 N. Y. 392, 13 N. E. 308.

Action of board legislative.—The action of the board in directing issue of bonds for the improvement of a highway is purely legislative, and cannot be reviewed on certiorari. *People ex rel. Trustees of Jamaica v. Supervisors of Queens* (1892), 131 N. Y. 468, 30 N. E. 488.

Power of towns to borrow money.—The board of supervisors, acting under subdivision 6 of section 12 of the County Law, may authorize town to issue its bonds to pay the purchase price of lands required for the use of a town hall. Such subdivision was not intended to apply exclusively to expenditures for highways and bridges under section 69 of the former County Law (now Highway L. § 97). *Jamaica Sav. Bank v. City of New York* (1901), 61 App. Div. 464, 70 N. Y. Supp. 967.

As to power of board to authorize a town to bond itself for the erection of a bridge, see *Barker v. Town of Oswegatchie* (1891), 41 N. Y. St. Rep. 821, 16 N. Y. Supp. 727.

Cost of state roads.—This subdivision, taken in connection with Laws of 1898, ch. 115, section 9, has been held to authorize the board of supervisors of a county in which a state road is constructed to issue bonds for the payment of its share of the cost of the road, including the fifteen per cent of such cost which is primarily charged upon the county but is ultimately to be paid by the town. *County of Ontario v. Shepard* (1905), 100 App. Div. 200, 91 N. Y. Supp. 611.

But since the amendment of L. 1898, ch. 115, mentioned above, by L. 1907, ch. 717, the Attorney-General has ruled that a board of supervisors has no authority to issue bonds for funding a county debt for highways. *Rept. of Atty. Genl.* (1909) 891.

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Section cited.—*Ghiglione v. Marsh* (1897), 23 App. Div. 61, 48 N. Y. Supp. 604.

7. Make such laws and regulations as they may deem necessary for the destruction of wild and noxious animals and weeds within the county.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 7; originally revised from L. 1849, ch. 194, § 4, subd. 14.

References.—Removal of noxious weeds and brush within the highways, Highway Law, § 54. Town meeting may provide for rewards for destruction of noxious weeds in or out of the highways, Town Law, § 47, subd. 5.

8. Provide for the protection and preservation, subject to the laws of the state, of wild animals, birds and game, and fish and shell-fish, within the county; and prescribe and enforce the collection of penalties for the violation thereof.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 7; originally revised from L. 1875, ch. 482, § 1, subd. 16.

References.—Supervisors of Queens, Nassau and Suffolk may pass law regulating taking shellfish and fish from salt water, Conservation Law, § 334. By §§ 302, 303 of the Fisheries, Game and Forest Law of 1892, as amended by L. 1895, ch. 395, resolutions and laws of boards of supervisors were repealed, and such boards were authorized to pass additional rules and regulations as to fish and game. Both of these acts were repealed by the Forest, Fish and Game Law of 1900, and also by the Forest, Fish and Game Law of 1909, the latter act being repealed by the Conservation Law, and it may be that the power conferred upon boards of supervisors by this subdivision is retained, to be exercised with regard to the provisions of the Conservation Law. See *People v. Fish*, 89 Hun 163, 34 N. Y. Supp. 1013 (1895).

Constitutional.—See *Smith v. Levinus*, 8 N. Y. 472 (1853).

Limitation of power.—Power only is conferred on boards of supervisors to enact laws containing restrictions and prohibitions additional to and not inconsistent with general state laws, or special or local laws which it may be seen are not intended to cover the whole subject. *People v. Fish* (1895), 89 Hun 163, 34 N. Y. Supp. 1013.

Power to make local laws for the protection of game. Rept. of Atty. Genl. (1902) 298.

9. Divide any school commissioner's district within the county which contains more than two hundred school districts, and erect therefrom an additional school commissioner's district, and when such district shall have been formed, a school commissioner for the district shall be elected in the manner provided by law for the election of school commissioners.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 9; originally revised from L. 1875, ch. 482, § 1, subd. 36, as added by L. 1881, ch. 543.

References.—By Education Law, §§ 380-390, as amended by L. 1910, ch. 607, the office of school commissioner was abolished and the office of district superintendent of schools was created. The board of supervisors of each county was required to divide the county into supervisory districts on the third Tuesday in April, 1911, Education Law, § 381, subd. 2; and changes may be made on petition of district superintendents, *Id.* § 381, subd. 6, as added by L. 1916, ch. 238.

10. Fix and regulate the time of opening and closing the county offices daily, except Sundays and holidays, where such time is not fixed by law.

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Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 10; originally revised from L. 1875, ch. 482, § 1, last par. as added by L. 1882, ch. 118.

References.—County clerk's offices, when to be opened, County Law, § 165; sheriff's offices, when to be opened, Id. § 184. Public holidays, General Construction Law, § 24. Business in public offices on holidays and half-holidays, Public Officers Law, § 62.

11. Contract, at such time and upon such terms as the board may by resolution determine, with the authorities of any other county for the reception into the penitentiary of such county, and the custody and employment at hard labor therein, of any person convicted within their county of any offense, other than a felony, and sentenced to imprisonment in a county jail, or penitentiary, for a term exceeding sixty days.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 11; originally revised from L. 1875, ch. 482, § 1, subd. 17.

References.—Contracts with penitentiaries for support of prisoners, Prison Law, § 320.

Support of felons.—Board of supervisors cannot contract with the authorities of a penitentiary for the support of felons. *Commissioners of Charities v. Supervisors of Queens* (1892), 64 Hun 195, 18 N. Y. Supp. 883.

Section cited.—Rept. of Atty. Genl. (1903) 232.

12. Cause an action to be brought on the undertaking of any county officer, whenever a breach thereof shall occur.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 12; originally revised from R. S., pt. 1, ch. 12, tit. 2, § 27.

References.—The word "undertaking" includes bond, General Construction Law, § 14. Force and effect of official undertaking, County Law, § 247; Public Officers Law, §§ 11, 12.

As to the action generally, see *Supervisors of Schoharie Co. v. Pindar* (1870), 3 Lans. 8.

County treasurer's bond.—Sureties not released because of malfeasance of supervisors. *Supervisors of Monroe Co. v. Otis* (1875), 62 N. Y. 88.

The condition of the bond of county treasurer includes making of correct reports. *Supervisors of Tompkins Co. v. Bristol* (1885), 99 N. Y. 316, 1 N. E. 878.

13. Purchase, lease or otherwise acquire, for the use of the county, necessary real property for courthouses, jails, almshouses, asylums and other county buildings, and for other county uses and purposes; and erect, alter, repair or construct, any necessary buildings or other improvements thereon for necessary county use, and cause to be levied, collected and paid, all such sums of money as they shall deem necessary therefor; to select such name as they may deem proper and appropriate for the almshouse of such county and thereafter to designate such almshouse by the name so selected; and sell, lease or apply to other county use, the sites and buildings, when a site is changed; to sell, and for a proper consideration to convey, all of the title and interest of the county in and to any land or property owned by the county but not in actual use by the county; and if sold, apply the proceeds to the payment for new sites, buildings and improvements. (*Subd. amended by L. 1917, ch. 304, in effect May 2, 1917.*)

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Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 13, as amended by L. 1906, ch. 318; originally revised from L. 1875, ch. 482; L. 1881, ch. 570.

Consolidators' note.—This subdivision was amended in 1906, and the question arises whether the provision in the charter of the city of New York which transferred the powers and duties of boards of supervisors in the city of New York upon the board of aldermen was intended to apply to amendments of the County Law made since the charter of the city of New York went into effect. No attempt is made to pass upon this question but it is left for the courts to determine whether the provision of the charter applied only to such statutes as were in existence at the time that the provision went into effect or whether or not it extended to subsequent amendments. The amendment in this particular case was made to the statute without any reservation and became a part of the County Law which excepted from its provisions the county of New York.

References.—Location and change of location of county buildings, County Law, § 31-33. Acquisition of lands by condemnation, General Municipal Law, § 74; Code Civil Procedure, §§ 3357-3382.

The erection of courthouse at place other than county seat.—The supervisors of the county of Steuben have authority under this subdivision to erect a courthouse in the city of Hornellville and to appropriate money therefor. Special action by the supervisors does not change the county seat from its present location in Bath. *Lyon v. Supervisors of Steuben* (1906), 115 App. Div. 193, 100 N. Y. Supp. 676.

Necessity for referendum.—Subdivisions 6 and 13 of this section, taken in connection with section 31, *post*, confer on boards of supervisors the exclusive power to erect county buildings and to fix or change the site of any county building without submitting the question to a vote of the electors of the county, except where a change in location exceeds one mile. Rept. of Atty. Genl. (1911) Vol. 2, p. 418.

Requiring employment of union labor.—A requirement in a contract made by a board of supervisors for the erection of a public building that only union men shall be employed is illegal. *Davenport v. Walker* (1901), 57 App. Div. 221, 68 N. Y. Supp. 161.

Statute appointing commissioners to erect court house.—A statute appointing certain persons a board of commissioners to erect a court house is not in violation of either section 2, article 10 of the Constitution, providing for the election or appointment of county officers, or of section 27, article 3, relating to local legislative powers, since the legislature has power to appoint persons to carry out a local improvement who are not thereby constituted county officers, but become the agents of the state, although the power to make such improvements is at the time vested in local authorities elected by the people. *People ex rel. Comrs. v. Supervisors of Oneida* (1902), 170 N. Y. 105, 62 N. E. 1092.

Authority of committee of supervisors to act for the board in making contracts for the erection of public buildings. *People ex rel. Griffiths v. Supervisors of Oneida* (1911), 143 App. Div. 722, 128 N. Y. Supp. 638; Rept. of Atty. Genl. (1908) 488.

Power to borrow money.—Board is given power to borrow money for erection of county buildings and purchase of sites, and issue of obligations therefor. *Ghiglione v. March* (1897), 23 App. Div. 61, 48 N. Y. Supp. 604.

Acquisition of sites.—It is not necessary that the county should purchase a site and then erect a building thereon. If the county owns a site with a building thereon, it may appropriate a part of such building as a jail. *Roach v. O'Dell* (1885), 33 Hun 320, *affd.* in 99 N. Y. 635.

Review of action.—The action of a board of supervisors in delegating to a committee the power to locate and purchase a site for a "Children's Home," where, in the judgment of such committee, the interest of the county would be best sub-

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served, and to incur on behalf of the county an indebtedness therefor, is legislative in its character and not reviewable by certiorari. *People v. Supervisors of St. Lawrence* (1881), 25 Hun 131.

14. To make one or more jury districts and to make such regulations in respect to the holding of the terms of courts as shall be necessary by reason of such change.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 14.

15. (*Repealed by L. 1917, ch. 352.*)

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 15, as added by L. 1900, ch. 130.

References.—Contracts for board of civil prisoners, County Law, § 12, subd. 22. Custody and control of prisoners, Id. § 92; food and labor of prisoners, Id. § 93.

16. To raise by tax a sum not exceeding one thousand dollars in any year, except in the county of Erie and in said county a sum not to exceed four thousand dollars in any year to aid in carrying out the provisions of the forest, fish and game law. (*Subd. amended by L. 1909, ch. 477, in effect May 25, 1909.*)

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 16, as added by L. 1900, ch. 296.

17. The board of supervisors of Chautauqua county shall have power to determine that a sheriff thereafter elected in such county shall receive a salary instead of fees, and may fix such salary, or if the sheriff of such county shall thereafter be made a salaried office, to determine that a sheriff thereafter elected shall receive the fees prescribed by law, as compensation for his services, instead of his salary. In case the office of sheriff of such county shall thereafter be made a salaried office to determine that a sheriff shall collect all fees and perquisites to which he is entitled, in pursuance of law, except such as are payable by the county, and shall at least once in each month pay the same to the county treasurer, and such fees and perquisites shall become part of the general fund of the county.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 17, added by L. 1901, ch. 255.

18. The board of supervisors of each county may raise by tax on real and personal property, subject to taxation in such county, not more than five thousand dollars, to be expended in the repair and construction of side-paths in such county. The county treasurer of each county where such sum has been raised shall place the same to the credit of the sidepath fund, provided by section four, chapter one hundred and fifty-two of the laws of eighteen hundred and ninety-nine as amended by chapter six hundred and forty of the laws of nineteen hundred, and it shall be expended and paid out according to the provisions of said last named chapter.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 18, as added by L. 1903, ch. 465.

Consolidators' note.—The powers, duties and obligations of the county treasurers

of the counties of Kings, Queens and Richmond have been devolved upon the comptroller of the city of New York. [Charter of the city of New York, § 1587.]

References.—The so-called Bicycle Side Path Act (L. 1899, ch. 152) referred to in this subdivision was repealed by the Highway Law and not re-enacted. This subdivision is therefore obsolete.

19. Whenever a judgment has been rendered in the court of claims in favor of any county against the state of New York, and the time to appeal therefrom has expired or the attorney-general has issued a certificate that there has been no appeal and that no appeal will be taken by the state from such judgment, the board of supervisors of such county may sell, assign, transfer or set over such judgment to the comptroller, who may purchase the same as an investment for the various trust funds of the state or canal debt sinking fund, or to any person, firm, association or corporation desiring to purchase such judgment, for a sum not less than the amount for which same was rendered with accrued interest, but no judgment so acquired by the state shall be deemed merged or satisfied thereby. And such board of supervisors may designate and authorize its chairman and clerk, the treasurer of the county and the attorney of record procuring the entry of such judgment, or any or either of them to execute in the name of the county and deliver to the party purchasing such judgment the necessary release, transfer or assignment required in law to complete such sale, setting over, transfer or assignment.

Source.—Former County L. (L. 1892, ch. 686) § 12, subd. 19, as added by L. 1905, ch. 244.

The "accrued interest" mentioned in this subdivision refers to the interest permissible under section 269 of the Code of Civil Procedure and therefore interest should not be allowed beyond the twentieth day after the comptroller is authorized to issue his warrant for the payment of a judgment. Rept. of Atty. Genl. (1905) 285.

20. The board of supervisors shall annually fix and determine the compensation to be allowed and paid to officers for the conveyance of juvenile delinquents to the houses of refuge and state industrial schools, and no other or greater amount than that so fixed and determined shall be allowed and paid for such service.

Source.—L. 1859, ch. 254, § 1.

Consolidators' note.—L. 1859, ch. 254, § 1. Statute cited directs supervisors to fix fees for conveyance of juvenile delinquents to houses of refuge, and of lunatics to the insane asylums. Insanity Law, § 85, now provides that the cost of transporting insane persons to state hospitals shall be a state charge. Hence the consolidation is made in this form.

21. The board of supervisors shall have power to direct the payment, by justices of the peace, of all fines and penalties imposed and received by them, to the supervisors of their respective towns, on the first Monday in each month, and to direct justices of the peace to make a verified report of all fines and penalties collected by them to the board of town auditors of their respective towns on the Tuesday preceding the annual town meeting.

Upon such payment as herein prescribed to the supervisor of any town, he shall immediately pay over such part of such fines and penalties to any person or corporation who shall be entitled to receive the same by virtue of any statute, special or otherwise. The residue of such amount shall be applied to the support of the poor of such town. This subdivision shall not apply to the county of Kings.

Source.—L. 1894, ch. 685, § 1.

Consolidators' note.—The exception contained at the end of this subdivision as to the county of New York is unnecessary as the county of New York is excepted from all of the provisions of the County Law. The exception of Kings is preserved for the reason that it was the intention of the legislature that this particular subdivision should not apply to the county of Kings. No exception is made of the counties of Queens or Richmond, as the application of the subdivision to these counties under the provisions of section 1586 of the charter of the city of New York is a matter for judicial determination.

22. The board of supervisors may contract with the sheriff of their county, or the jailer of the common jail therein, for the support and maintenance of such persons as may be confined in such jail upon any writ or process in any civil action or proceeding in the nature of a civil action. Such sheriff or jailer shall attach to all bills rendered for such support and maintenance, a list, under oath, of the number and names of the persons to whom such support and maintenance was furnished, and the length of time each person was so supported. This subdivision shall not be construed as repealing any present provisions of law relating to the care, custody, support or maintenance of such prisoners in the counties of Kings and Monroe.

Source.—1875, ch. 251, §§ 2, 3.

Consolidators' note.—The repealing provision at the end of this subdivision is preserved as showing an intention on the part of the legislature not to modify any special provisions applicable to the counties of Kings and Monroe, relating to the subject-matter of this subdivision. The last sentence of this subdivision was undoubtedly inserted at the request of the local legislators to make sure that the subdivision would not effect local legislation. The subdivision has no application to the county of New York, and its application to the counties of Queens and Richmond and the other counties of the state in the light of any special provisions applicable to any of these counties is a matter to be determined by the courts.

23. The board of supervisors of a county in which a law library is maintained by the state shall, upon the request of a judge of the court of appeals who resides therein, provide and maintain for his use, suitable and commodious offices, approved by him. In case of the refusal or neglect of such board of supervisors to provide and maintain such offices the expense of the same pursuant to the judiciary law shall be a county charge.

Source.—Code Civ. Pro. § 203, as added by L. 1897, ch. 221.

Consolidators' note.—Subdivisions 23, 24, and 25 are provisions taken from the Code of Civil Procedure, some of which were enacted prior to the passage of the charter of the city of New York and some of which were passed after that time. Wherever the board of supervisors appears in any of these sections it would seem

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as though they had no application to the city of New York, whether passed before or after the enactment of the charter of the city of New York of 1901, for the county of New York for over a century had had no board of supervisors like the other counties of the state. So far as the counties of Kings, Queens and Richmond are concerned, which counties have had no boards of supervisors since the enactment of the charter of the city of New York in 1897, the provisions are applicable or not as the courts may determine. It does not lie within the function of this board to attempt to clarify matters where two constructions are possible. Where these subdivisions vested powers in boards of supervisors before the passage of the charter for the city of New York in 1897 these powers will be devolved upon the board of aldermen under the charter; where they vested powers in the board of supervisors by enactment made subsequent to the passage of the charter for the city of New York it is an open question whether they apply. They are inserted, however, in the County Law, leaving their application to subsequent determination according to all the local provisions applicable to each case.

References.—As to support and maintenance of supreme court and court of appeals law libraries, Education Law, §§ 1160-1180.

23-a. The board of supervisors of any county may appropriate and make available for the home defense committee of the county such amount as it may deem proper to defray the disbursements of the committee, to be paid out by the county treasurer on the order of the treasurer of such committee out of any moneys of the county available therefor; but this subdivision shall not be operative longer than the expiration of six months after the close of the present war. (*Subd. added by L. 1917, ch. 525, in effect May 17, 1917.*)

24. The board of supervisors of any county, except Kings, Queens, Livingston, Monroe, Cortland, Westchester and Onondaga, may, in their discretion, provide for the employment of a stenographer for the county court thereof, and said board of supervisors must fix his compensation and provide for the payment thereof in the same manner as other county expenses are paid. (*Amended by L. 1915, ch. 91, § 3, in effect Mch. 19, 1915.*)

Source.—Code Civ. Pro. § 358, as amended by L. 1883, ch. 403; L. 1895, ch. 946; L. 1906, ch. 629.

References.—Appointments, duties and compensation of stenographers of county courts, Judiciary Law, §§ 318, 319.

25. The board of supervisors of each county must provide for the payment of the sums, chargeable upon the treasury of the county, for the salary, fees, or expenses of a stenographer or assistant stenographer; and all laws relating to raising money in a county, by the board of supervisors thereof, are applicable to those sums.

Source.—Code Civ. Pro. § 88.

26. The board of supervisors of any county may, on the application of any city of the third class, village, town, school district, water district, lighting district or fire district in the county, authorize such municipality or district by referendum vote thereon, to raise moneys or issue the bonds

or other obligations of such municipality or district, to run for such period of time not exceeding fifty years, as the board of supervisors may prescribe, for paving the streets, roads and highways and constructing sidewalks within such municipality, and any public municipal or district improvement, and to raise moneys by local taxation for the redemption of such bonds or obligations; to extend or diminish municipal or district boundary lines; to widen, extend, limit or diminish the area occupied by streets, roads and highways; and to establish, increase or lower stated salaries of local officials. Nothing in this subdivision, however, shall operate to abridge the right or power now possessed by any such municipality or district, under any general or special law, whether heretofore or hereafter enacted, to perform any of the acts which such municipality or district might perform without authority from such board; but the provisions of this subdivision shall be liberally construed to enable municipalities and districts, with the authority of the board of supervisors, to exercise their legitimate municipal or district functions without special recourse to the legislature. (*Added by L. 1910, ch. 141, and amended by L. 1913, ch. 351.*)

Subd. 26 cited.—*Smith v. Smith* (1916), 174 App. Div. 473, 478, 160 N. Y. Supp. 574.

27. The board of supervisors of any county in which there is a society for the prevention of cruelty to children may from time to time appropriate and pay for the support and maintenance of such society from county funds available therefor, such sums as it may deem proper and may raise moneys for such purposes by tax on real and personal property within the county. The moneys thus applied shall be paid to the board of directors of such society and by it expended for corporate purposes, but the board of supervisors may, in its discretion, prescribe rules and regulations governing such expenditures and require the submission of reports of the disbursements of the corporation and the approval by the board of supervisors of accounts to be paid from moneys thus appropriated. (*Added by L. 1911, ch. 545.*)

28-a. The board of supervisors of any county may from time to time appropriate and pay out for the general improvements of agricultural conditions and for the support and maintenance of county farm bureaus to conduct demonstration work in agriculture and home economics and for the employment by said bureaus of county agricultural agents and home demonstration agents, and for any other purpose which the board of supervisors shall deem proper and which, in its judgment, will encourage and promote the general improvement of agricultural conditions therein, such sums as it may deem proper, and may raise money for such purpose by a tax on real and personal property in the county; provided that this money shall be expended under an agreement to be entered into between the farm bureau county association of farmers supporting the work and the state leader of county agents, for the co-operative management of said

farm bureau and the proper supervision of said county agricultural agent and home demonstration agent; and provided that the co-operative relations therein established shall continue until either party to the agreement shall notify the other party that it wishes to terminate the agreement. Such a notification shall be in writing and shall be served at least six months preceding any action taken to annul the agreement. After receiving such notice co-operative relationships between said parties shall cease at the expiration of the six months' period of notice providing reconsideration or request for continuance is not made by the party issuing notification of desire to continue work under the provisions of this agreement.

There shall be annually appropriated out of any moneys in the treasury not otherwise appropriated, for the purpose of assisting in the organization and contributing toward the support of county farm bureaus in the various counties of the state the sum of six hundred dollars (\$600) per annum for each county in the state which shall qualify as required by this section, provided, however, that no such bureaus shall be entitled to receive any money so appropriated unless the county in which the same is organized shall appropriate through its board of supervisors or otherwise raise and provide at least eighteen hundred dollars per annum for the support and maintenance thereof; and in addition there shall be annually appropriated such sums of money as may be necessary for the proper and necessary supervision thereof.

The general supervision of the co-operative agricultural extension and development work herein provided for shall be under the joint direction of the commissioner of agriculture and the dean of the New York state college of agriculture through a representative to be known as state leader of county agents, mutually agreed upon, and they are hereby authorized to make rules and regulations for the organization and conduct of such county farm bureaus, and the moneys appropriated pursuant to this subdivision shall be paid by the state treasurer on the warrant of the comptroller on vouchers and certificates approved by the commissioner of agriculture. (*Subd. added by L. 1912, ch. 281, in effect Apr. 27, 1917.*)

29. The board of supervisors of any county may from time to time appropriate and pay out for the general improvement of agricultural conditions in said county such sums as it may deem proper, and may raise money for such purpose by a tax on real and personal property in the county. The moneys so raised may be used in the employment of a person or persons to give free agricultural advice in said county and for any other purpose which the board of supervisors shall deem proper and which, in its judgment, will encourage and promote the general improvement of agricultural conditions therein. (*Added as subd. 28 by L. 1912, ch. 35, and re-numbered by L. 1917, ch. 106.*)

30. The board of supervisors of any county in which there is a society

for the prevention of cruelty to animals may from time to time appropriate and pay for the support and maintenance of such society from county funds available therefor, such sums as it may deem proper and may raise moneys for such purpose by tax on real and personal property within the county. The moneys thus applied shall be paid to the board of directors of such society and by it expended for corporate purposes, but the board of supervisors may, in its discretion, prescribe rules and regulations governing such expenditures and requiring the submission of reports of the disbursements of the corporation and the approval by the board of supervisors of accounts to be paid from moneys thus appropriated. (*Subdivision 27 added by L. 1911, ch. 663, renumbered 28 by L. 1912, ch. 148, and renumbered 30 by L. 1917, ch. 106.*)

31 (29). Where by statute a county is required to cause to be raised and paid moneys for the support and maintenance of any person or persons in any state charitable institution which otherwise would be a charge against and payable by the towns and cities of such county, or where a county officer, or board, is required to incur expenses for supplies or services, which are required to be apportioned to the towns and cities of such county, the board of supervisors of such county may audit and pay claims therefor and cause the amounts thereof to be raised by tax levy and collected in the same manner and at the same time as state and county taxes are levied, assessed and collected in said towns and cities. (*Added by L. 1912, ch. 148.*)

The Legislature evidently intended to renumber this subd. as 31 by L. 1917, ch. 106, which purports to renumber subd. 28 as added by L. 1911, ch. 663, and renumbered by L. 1912, ch. 148. L. 1911, ch. 663, did not add subd. 28. L. 1912, ch. 148, added 29, but did not renumber 28.

32. The board of supervisors of any county in which there are money's in the county treasury consisting of revenues received under the provisions of chapter six hundred and forty of the laws of nineteen hundred, repealed by chapter three hundred and thirty of the laws of nineteen hundred and eight, may provide by resolution that such moneys shall be expended for the repair and improvement of side-paths, in the various towns of the county, under the direction of the county superintendent of highways, so far as the same may be sufficient therefor, upon side-paths leading from each city or town, in an amount to be specified in the resolution, equal to the portion derived from the revenues collected under such chapter therein. The moneys to be thus applied shall be paid to the county superintendent of highways by the county treasurer in the same manner as other county funds which are ordered paid by the board of supervisors; but all order or warrants therefor shall refer to such fund as the side-path fund. (*Subdivision 28 also added by L. 1912, ch. 194, and renumbered 32 by L. 1917, ch. 106.*)

33. The board of supervisors shall have power to, and may, provide a

fund for the payment in advance of audit of properly itemized and verified bills for the expenses of the district attorney lawfully and necessarily incurred in the prosecution of criminal actions or proceedings arising in his county, and, by resolution, authorize the county treasurer to apply said fund in payment of such bills on the approval of the district attorney endorsed thereon; said bills so paid to be transmitted to the clerk of the board of supervisors and audited by it at its next regular session held subsequent to their payment. The district attorney and any claimant receiving payment as aforesaid shall be jointly and severally liable for any item or items contained in a bill so paid in advance of audit which shall be disallowed and rejected by the board of supervisors upon final audit, to be recovered in an action brought by the board of supervisors in the name of the county. (*Subd. 29, also added by L. 1912, ch. 235, and renumbered 33 by L. 1917, ch. 106.*)

34. The board of supervisors are authorized to contract for telephone service and for the lighting, heating and maintenance of county buildings, and to provide the method and time of payment for the same, or it may provide a fund for payment in advance of audit of such bills, and by resolution authorize the county treasurer to apply such fund to the payment of duly itemized and verified bills for such purposes, on the approval endorsed thereon of its proper committee of the proper county officer having charge thereof; such bills so paid to be transmitted to the clerk of the board of supervisors for final audit as provided in the next preceding subdivision of this section. The members of any committee, or any officer, approving said bills as aforesaid, and any claimant receiving payment, shall be jointly and severally liable for the amount of any bill or item or items contained in a bill so paid in advance of audit, which shall be rejected and disallowed by the board of supervisors upon final audit, to be recovered in an action brought by the board of supervisors in the name of the county. (*Added by L. 1912, ch. 235, and renumbered 34 by L. 1917, ch. 106.*)

34. The board of supervisors of the county of Erie shall have power exclusively, and it shall be its duty, to contract annually with one or more undertakers for the care, removal and burial of bodies of persons dying within said county, where there are no known relatives, friends or personal representatives of such deceased in the state liable or willing to become responsible for the expense thereof and for the conveyance and delivery of such bodies to and from the public morgue of such county and the performance of any other acts incidental thereto. Each undertaker, with whom such a contract shall be made, shall execute and deliver a bond in such amount, with such sureties and upon such conditions as such board shall require. (*Subd. added by L. 1917, ch. 289, in effect Apr. 30, 1917.*)

35. The board of supervisors of a county adjoining a city of the first

class, shall have the power to appoint a commission of taxpayers, of said county, not exceeding seven in number, who shall serve without compensation, to examine the question of the application of the different laws of the state as applicable to the method of government of the county, its population, needs and the advisability of changing the forms or methods of government of the county and its several localities; to investigate the form of government of other counties or cities, within and without the state of New York, the method used in the administrative, judicial and economic branches of the different municipalities investigated, for the purpose of recommending an improvement in the government and welfare of the people of the county, and to report its investigation, findings and recommendations with all convenient speed to the board of supervisors. Such commission of taxpayers shall have the power to employ counsel, to appoint such assistant or assistants, including one or more stenographers as the commission may require to aid in such investigation, to fix the salaries of such counsel, assistants and stenographers, to purchase the necessary stationery and equipment. The board of supervisors shall provide rooms for the commission to hold its meetings, and raise and provide the money by taxation or otherwise to pay all expenses necessarily incurred during the investigation by such commission and such counsel, assistants and stenographers as may be employed by said commission. (*Added as subd. 31 by L. 1914, ch. 324 and renumbered 35 by L. 1917, ch. 106.*)

36. The board of supervisors is authorized to provide for the payment of properly itemized and verified bills of district superintendents of schools of the supervisory districts in the county rendered by them for expenses incurred for necessary printing and office supplies, subject to such conditions as the board may prescribe. The board may, by resolution, authorize the incurring of indebtedness for such purposes and when so authorized the bills therefor shall be audited and paid in the same manner as other charges against the county. (*Added as subd. 31 by L. 1914, ch. 389, and renumbered 36 by L. 1917, ch. 106.*)

37. The board of supervisors in any county in which the poor are a town charge may by resolution provide that a soldier, sailor or marine who has served in the military or naval service of the United States and who has received an honorable discharge from service, or his family or the family of any who may be deceased shall be relieved and provided for as a county charge. Application for such relief and the granting thereof shall be governed by sections eighty, eighty-one and eighty-two of the poor law. (*Added as subd. 32 by L. 1915, ch. 243, and renumbered 37 by L. 1917, ch. 106.*)

38. The board of supervisors of any county containing a population of less than two hundred thousand and adjoining a city of the first class may authorize the establishment of a plan for the grades of streets, avenues

and boulevards; the alteration of such plan of grades, or of any plan thereof, which shall have been established by law; the laying out, opening, grading, construction, closing and change of line, or of the width of any one or more of such streets, avenues and boulevards or any other streets, avenues and boulevards, within said county, or any part or parts thereof, and of the courtyards, sidewalks and roadways; to provide for the estimation and award of the damages to be sustained, and for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, the levying, collection and payment of such damages, and of all other charges and expenses to be incurred, or which may be necessary in carrying out the provisions of this subdivision; the laying out of new or additional streets, avenues or boulevards according to a general scheme or plan for the improvement of highways in said town, the acceptance by town officers of conveyances of land for public highways, naming and changing of names of streets and avenues within the said county, the opening, laying out, grading, construction, closing and change of line of any street, avenue or boulevard within the county, provided, however, that nothing shall be done hereunder in respect to or concerning any street, avenue or boulevard situated within an incorporated village, without the consent of the board of trustees of such incorporated village. The provisions, however, for the defraying of the expenses thereof by assessment as herein provided, shall only be exercised on the petition of the property owners who own more than one-half of the frontage on any such street, avenue or boulevard, or on the certificate of the supervisor, justices of the peace, and town clerk of the town in which said street, avenue or boulevard is located, or two-thirds of such officers, that the same is in their judgment proper and necessary for the public interest; or in case the said street, avenue, or boulevard, in respect to which such action is proposed to be taken, shall lie in two or more towns, on a like certificate of such town officers of each of said towns, or two-thirds of all of them; provided, however, that before proceeding to make any such certificate, the said officers, or such number of them as aforesaid, shall give ten days' notice by publication in one of the weekly papers of said county and by posting in six public places in said town, or in each of said towns, of the time and place at which they will meet for the purpose of considering the same, at which meeting the public and all persons interested may appear and be heard in relation thereto; and provided that no such street or avenue shall be laid out, opened or constructed upon or across any lands heretofore acquired by the right of eminent domain, and held in fee for depot purposes by any railroad. (*Added as subd. 32 by L. 1915, ch. 679, and amended by L. 1916, ch. 5, and renumbered 38 by L. 1917, ch. 106.*)

39. Should the board of supervisors of any county containing a population of less than two hundred thousand and adjoining a city of the first class at any time deem it for the public interest to acquire title to lands

and premises required for any streets, highway or boulevard heretofore or hereafter laid out, widened, altered, extended or otherwise improved, it may acquire the same by dedication, or by condemnation under the condemnation law, provided, however, that no land shall be acquired for any street, highway or boulevard in an incorporated village without the consent of the board of trustees of such incorporated village. Such board may direct, by a two-thirds vote, where no buildings are upon the lands, that the title to any piece or parcel of land lying within the lines of any such street, highway, or boulevard shall be vested in the county upon the date of recovery of such dedication or upon the date of the filing of the oath of the condemnation commissioners as provided in the condemnation law, or upon a specified date thereafter and where there are buildings upon such lands, upon a date not less than six months from the date of the filing of said oath. Thereafter, when the condemnation commissioners shall have taken and filed said oath, upon the date of such filing or upon such subsequent date as may be specified, where no buildings are upon such lands and where there are buildings upon such lands upon the date specified by said board of supervisors either before or after the filing of such oath, the same being not less than six months from the date of said filing, the county shall become and be seized in fee of said lands, tenements, and hereditaments in the said resolution mentioned, that shall or may be so required as aforesaid, the same to be held, appropriated, converted and used to and for such purpose accordingly, in like manner as are other public streets in said county. In such cases interest at the legal rate upon the sum or sums to which the owners, lessees, parties or persons are justly entitled upon the date of the vesting of title in the county as aforesaid, from said date to the date of the report of the commissioners shall be allowed by the commissioners as a part of the compensation to which such owners, lessees, parties or persons are entitled. In the other cases, title, as aforesaid, shall vest in the county upon the confirmation by the court of the report of the condemnation commissioners. Upon the vesting of title as herein provided, the county or any person or persons acting under its authority, may immediately, or at any time thereafter take possession of the same, or any part or parts thereof, without any suit or proceeding at law for that purpose. The title acquired by the county, to lands and premises required for a street, shall be in trust, and such lands and premises appropriated and kept open for, or as part of a public street or highway, forever, in like manner as the other streets in the county. (*Added as subd. 33 by L. 1915, ch. 679, and amended by L. 1916, ch. 5, and renumbered as 39 by L. 1917, ch. 106.*)

40. The board of supervisors of any county wherein a deputy county treasurer is not now allowed by law to be appointed, may by resolution authorize the appointment of a deputy county treasurer and shall fix his salary. Such deputy county treasurer shall act for the county treasurer during his absence from the state or his inability to act as such county

treasurer, and may act for such county treasurer during his temporary absence from the office when authorized so to do by such treasurer. Such authorization shall be in writing under the hand and seal of such treasurer. (*Subd. added by L. 1917, ch. 106, in effect Mch. 30, 1917.*)

§ 13. Limitation of credit.—An issue of town or county obligations shall not be authorized when such issue, with the amounts issued and outstanding under any previous or other authority of the board, shall exceed ten per centum of the assessed valuation of the real estate of such town or county, as it shall appear on the last assessment-rolls thereof, except that in towns such obligation may be issued in excess of such amount with the assent of a majority of the electors of such town whose credit is proposed to be given, voting on the question at a regular town meeting of such town; but in no case shall the amount of such town obligations, issued and outstanding, exceed one-third of such assessed valuation. This section shall not include any case where special authority has been given by the legislature to issue such town obligations in excess of the amounts herein authorized.

Source.—Former County L. (L. 1892, ch. 686) § 13, as amended by L. 1893, ch. 251; originally revised from L. 1875, ch. 482, § 1, subd. 1.

Consolidators' note.—The changes made in this section are necessary because of Article 8, section 10, of the Constitution, which limits the amount of indebtedness of counties. The Constitution provides that "no county or city shall be allowed to become indebted for any purpose or in any manner to an amount which including existing indebtedness shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation as it appeared by the assessment-rolls of said county or city on the last assessment for state or county taxes prior to the incurring of such indebtedness and all indebtedness in excess of such limitation except such as now may exist shall be absolutely void except as herein otherwise provided." So far as section 13 authorizes an indebtedness by a county in excess of ten per centum of the assessed valuation of the real estate of the county where the assent of a majority of the electors of the county is obtained, it is in conflict with the provision of the Constitution above referred to and is void.

References.—Credit or money not to be used for denominational schools, Constitution, Article 9, § 4; nor to be given to any individual, association or corporation, *Id.* Article 8, § 10. Limitation of indebtedness, *Id.* and General Municipal Law, § 3. As to municipal bonds generally, *Id.* §§ 5-12.

Include long-term bonds.—The obligations referred to in these two sections (12 and 13) embrace long-term bonds. *Ghiglione v. Marsh* (1897), 23 App. Div. 61, 48 N. Y. Supp. 604.

Limitation of expenditure for construction of village water system.—It seems that the provisions of this section apply to the issue of bonds of a town under sections 237, 287 and 288 of the Town Law and that such an issue will not be authorized if the amount thereof with the other obligations of the town issued and outstanding exceed the limitation of credit therein prescribed. *Rept. of Atty. Genl. June 9, 1910.*

Petition for special town meeting to vote on the question of bonding the town for highway purposes should state that the amount proposed to be borrowed by the town, together with the amounts at present issued and outstanding against the

town, will not exceed one third of the assessed valuation of the real estate of the town. Rept. of Atty. Genl. (1909) 369.

§ 14. **Resolutions authorizing issue of obligations.**—Every resolution of any such board, authorizing the issue of such obligations, shall specify the form thereof, the place of payment, in annual instalments or otherwise, within a period not exceeding thirty years from the date of such obligation, and the rate of interest to be paid thereon, not exceeding the legal rate; and no such obligation shall be sold for less than par. Such resolution shall also contain a provision requiring adequate security to be given by the officer or board of officers authorized to issue such obligations, for the faithful performance of his or their duty in issuing the same, and the lawful application of the funds arising therefrom, and of the funds which may be raised by tax for the payment thereof, which may come into their hands.

Source.—Former County L. (L. 1892, ch. 686) § 14; originally revised from L. 1875, ch. 482, §§ 3, 4.

Section prescribes form and term of obligations, which shall not exceed thirty years, and limits the rate of interest to the legal rate. Ghiglione v. Marsh (1897), 23 App. Div. 61, 48 N. Y. Supp. 604.

§ 15. **Legalization of informal acts.**—Any such board may, by a two-thirds vote of all its members, legalize the informal acts of any town meeting or village election within such county, and the regular acts of any one or more town or village officers, performed in good faith, and within the scope of their authority.

Source.—Former County L. (L. 1892, ch. 686) § 15; originally revised from L. 1869, ch. 855, § 5; L. 1871, ch. 695; L. 1884, ch. 141; L. 1885, ch. 326.

§ 16. **Correction of assessments, and returning and refunding of illegal taxes.**—Any such board may correct any manifest clerical or other error in any assessment or returns made by any one or more town officers to such board, or which may, or shall have properly come before such board for its action, confirmation or review; and cause to be refunded to any person the amount collected from him of any tax illegally or improperly assessed or levied, and upon the order of the county court, it shall refund any such tax. In raising the amount so refunded, or necessary to supply the deficiency caused by the correction of any error in such assessment, such board shall, in the same or next ensuing tax-levy, adjust and apportion such amount upon the property of the several towns and wards of the county as shall be just, taking into consideration the portion of the state, county, town and ward included therein, and the extent to which such town or ward has been benefited thereby.

Such board shall ascertain, fix and determine the amount which any person or corporation is equitably entitled to receive back from any town, for taxes paid while the boundary line between towns was in dispute and cause the same to be levied and collected.

Source.—Former County L. (L. 1892, ch. 686) § 16; originally revised from L.

L. 1909, ch. 16.

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1849, ch. 194, § 4, subd. 16, as added by L. 1873, ch. 119; L. 1869, ch. 855, § 5, L. 1871, ch. 695; L. 1884, ch. 141; L. 1885, ch. 326; L. 1886, ch. 306, § 1.

References.—Correction of errors by board of supervisors upon petition of assessors, Tax Law, § 56. Correction of assessments and refund of erroneous taxes, § 56-a, as added by L. 1916, ch. 323. Correction of errors in description of property, Id. § 55-a. Reassessment of property illegally assessed, Id. § 57. Audit and allowance of claim for repayment of illegal or erroneous assessment, Id. § 296.

Statute retrospective.—The section applies to errors and irregularities existing at time of enactment of act. *People ex rel. Pitts v. Supervisors of Ulster* (1875), 65 N. Y. 300.

Confined to clerical errors.—The power of correction conferred upon the board of supervisors is confined to clerical or other errors of that description. *Matter of N. Y. Catholic Protectory* (1879), 77 N. Y. 342.

This section has reference merely to clerical corrections and the performance of ministerial duties in reference thereto, and does not empower the supervisors to make assessments to pay claims disallowed by a town board. *Armstrong v. Fitch* (1908), 126 App. Div. 527, 110 N. Y. Supp. 736.

Section does not subject all assessments to review, or permit a correction of all errors, but simply of those which are apparent by an examination of the assessment roll or return, without extrinsic evidence to make them clear; the errors of the assessors in making assessments, and substantial errors of judgment or of law are not subject to correction. *People ex rel. Hermance v. Supervisors of Ulster* (1877), 71 N. Y. 481. The supervisors are given no power over jurisdictional questions arising upon the work of the assessors. *Matter of Buffalo Mutual Gas Light Co.* (1894), 144 N. Y. 228, 39 N. E. 86.

Distinction between erroneous and unlawful assessment, explained. *Norris v. Jones* (1894), 81 Hun 304, 30 N. Y. Supp. 1134; *Matter of Ulster Co. Sav. Bank* (1880), 20 Hun 481; *People ex rel. Ithaca Sav. Bank v. Beers* (1883), 67 How. Pr. 219, 226; *Harris v. Supervisors of Niagara* (1884), 33 Hun 279, 16 Abb. N. C. 282; *Williams v. Supervisors of Wayne* (1879), 78 N. Y. 561.

Illegal and improper assessments.—Section applies to cases where assessors had no power to make the assessment. *People ex rel. Hermance v. Supervisors of Ulster* (1877), 71 N. Y. 481, affg. 10 Hun 545. See also *Matter of Young* (1899), 28 Misc. 186, 56 N. Y. Supp. 861.

The taxes which the statute was intended to relieve from are such as were not legally chargeable, not such as were assessed in an erroneous manner. *Matter of Douglas* (1888), 48 Hun 318, 1 N. Y. Supp. 126.

Where assessors and collector have jurisdiction of the person and property, the presumption is that the tax was legally assessed and collected, and the burden is on the petitioner to show the contrary. *Matter of Peek* (1894), 80 Hun 122, 30 N. Y. Supp. 59.

The statute was designed to relieve from taxes not legally chargeable to the person,—taxes which he should not be required in any manner to pay; the terms illegal or improper assessment or levy of tax had reference to the tax itself rather than to the method of making the assessment or levy—to an illegal tax rather than to the erroneous assessment or levy of a legal one. *Harris v. Supervisors of Niagara* (1884), 33 Hun 279, 16 Abb. N. C. 282.

Where assessors have not acquired jurisdiction to assess a tax, the acts of the board of supervisors in levying it are void. *Matter of Douglas* (1888), 48 Hun 318, 1 N. Y. Supp. 126.

If a general tax for town and county purposes is levied without authority or contrary to law a remedy is provided by this section. *People ex rel. Toms v. Supervisors of Erie* (1910), 199 N. Y. 150, 92 N. E. 389, affg. 138 App. Div. 912, 122 N. Y. Supp. 744.

Excessive assessments.—"Illegally or improperly assessed" does not comprehend an assessment which is simply excessive. *Matter of Baumgarten* (1899), 39 App. Div. 174, 176, 57 N. Y. Supp. 284. See generally, as to powers of boards of supervisors to correct assessments. *Matter of Buffalo Mut. Gas-Light Co.* (1894), 144 N. Y. 228, 39 N. E. 86.

Taxes voluntarily paid cannot be refunded. *Matter of McCue v. Supervisors of Monroe* (1900), 162 N. Y. 235, 56 N. E. 627, distinguishing *Matter of Adams v. Supervisors* (1898), 154 N. Y. 619, 49 N. E. 144. *Matter of Reid* (1900), 52 App. Div. 243, 65 N. Y. Supp. 373.

Where an assessment is void on its face and a person without duress in fact pays the tax levied upon said assessment, it is a voluntary payment and cannot be recovered under this section; so also, where an assessment, although valid on its face, but in fact illegal, is paid by a person with knowledge of the fact which renders the assessment void and without duress in fact. *Matter of Village of Delhi* (1911), 201 N. Y. 408, 94 N. E. 874, affg. 139 App. Div. 412, 124 N. Y. Supp. 487.

Payments made under a mistake of law are not recoverable. *Van Hise v. Board of Supervisors* (1897), 21 Misc. 572, 48 N. Y. Supp. 874. See also *Matter of Eckerson* (1898), 25 Misc. 645, 56 N. Y. Supp. 373, affd. 41 App. Div. 631, 59 N. Y. Supp. 1116. But see *Matter of Edison Elec. Ill. Co.* (1897), 22 App. Div. 371, 48 N. Y. Supp. 99, affd. (1898) 155 N. Y. 699, 50 N. E. 1116, where it is held that a corporation which paid a local tax on its personal property, without knowledge of an exemption, was entitled to a refund.

School taxes do not come before the board of supervisors "for its action, confirmation or review," and, therefore, are not subject to the provisions of this section. *Matter of Reid* (1900), 52 App. Div. 243, 65 N. Y. Supp. 373.

An error in the return of a school tax collector, resulting in a second levy of taxes collected but erroneously returned as uncollected, may be corrected by the board of supervisors. (Opinion of Comptroller, Jan. 5, 1916), 8 State Dept. Rep. 560.

Two-thirds vote of board necessary for the refund of taxes. *Van Antwerp v. Kelly* (1888), 50 Hun 513, 3 N. Y. Supp. 462, affd. 130 N. Y. 699, 30 N. E. 68.

Presentment to supervisors in first instance.—This section contemplates a presentation of the matter to the board of supervisors in the first instance before application shall be made to the County Court, and if power exists and the facts justify it that court may direct the tax to be refunded, whether the conclusion of the board shall have been favorable to the claimant or not. The board of supervisors or the County Court can correct only such errors as are manifest from an inspection of the roll itself without argument or evidence. *Matter of Trustees of Village of Delhi* (1910), 139 App. Div. 412, 124 N. Y. Supp. 487, affd. 201 N. Y. 408, 94 N. E. 874.

Jurisdiction of courts to order refund.—The power of the county court to order the refunding of a tax illegally assessed, or levied and collected, is a different power from that conferred upon the board to correct manifest errors, and is not applicable to cases of mere clerical errors which would not render the assessment void. *Matter of N. Y. Catholic Protectory* (1879), 77 N. Y. 342; *Matter of Buffalo Mut. Gas-Light Co.* (1894), 144 N. Y. 228, 39 N. E. 86. Refunding of taxes. Rept. of Atty. Genl. (1897) 327.

County court may direct board to refund tax imposed on exempt property and paid under protest. *Williams v. Board of Supervisors* (1879), 78 N. Y. 561. It is not necessary that a competent tribunal should have passed upon the legality of the tax. *Matter of Catholic Protectory* (1879), 77 N. Y. 342. County court has no jurisdiction until application has been made to the board of supervisors to refund the tax illegally collected. In *re Gilloren* (1896), 16 Misc. 130, 38 N. Y. Supp. 954, affd. 9 App. Div. 631, 41 N. Y. Supp. 1116.

See generally as to power of court to order a refund. *Matter of Buffalo Mut.*

Gas-Light Co., 144 N. Y. 228 (1894), 39 N. E. 86; *Matter of Peek*, 80 Hun 122, 126, 30 N. Y. Supp. 59 (1894); *Matter of Gilloren*, 16 Misc. 130, 38 N. Y. Supp. 954 (1896), *affd.* 9 App. Div. 631, 41 N. Y. Supp. 1116; *Matter of Ulster Co. Sav. Bank*, 20 Hun 481 (1880).

Power to apportion tax and remit portion.—Where part of the water works of a village were situated outside its limits in the adjoining town and the town levied an assessment against the village for "Water works, 45 acres, valuation \$14,000," and the village, without taking any proceedings to correct the roll, paid the tax and then applied to the supervisors for a refund on the ground that only eight acres of the water works were outside the limits of the village, which application was denied, the County Court has no jurisdiction to apportion the tax and remit a portion of it. *Matter of Trustees of Village of Delhi* (1910), 139 App. Div. 412, 124 N. Y. Supp. 487, *affd.* 201 N. Y. 408, 94 N. E. 874.

Refund of portion of franchise tax.—A board of supervisors may order a refund to a corporation of the difference between a franchise tax as levied and what the tax would have been if the proper assessed valuation had been used, and may fix and determine the amount to be levied against the town. (*Opinion of Comptroller*, Feb. 2, 1916), 8 State Dept. Rep. 582.

Proceeding to compel refund.—In such a proceeding affidavits of an assessor will not be received to show that in making the assessment the assessors included other property than the property upon the assessment roll; neither can the court determine whether the assessment was illegal and improper, since the court can do nothing except what the board of supervisors may have done in the first instance. *Matter of Village of Medina* (1907), 52 Misc. 621, 103 N. Y. Supp. 1018, *affd.* 121 App. Div. 929, 106 N. Y. Supp. 1148. The application of the taxpayer is informal and not governed by any established rules of procedure. *Matter of Adams v. Supervisors* (1898), 154 N. Y. 619, 49 N. E. 144.

Procedure to apportion deficiency.—The same procedure should be followed in apportioning the deficiency occasioned by refunds under this section as is prescribed for refunds pursuant to court orders under article 13 of the Tax Law. (*Opinion of Comptroller*, Feb. 2, 1916), 8 State Dept. Rep. 582.

Order mandatory.—An order of the County Court granted upon notice to the board of supervisors recommending said board to correct an erroneous assessment and to refund to the party aggrieved the amount erroneously assessed, is mandatory and mandamus will lie to compel obedience to such an order. *People ex rel. Pells v. Supervisors of Ulster county* (1875), 65 N. Y. 300.

Dispute as to boundary.—Where same property is assessed and tax paid in two towns, because of a dispute as to boundary, and the board of supervisors refuse to ascertain the amount to be refunded, the statute may be invoked, whether an action will lie against the assessors and collector or not. *People ex rel. Witherbee v. Supervisors of Essex* (1881), 85 N. Y. 612.

Section cited.—*Matter of Douglas v. Board of Supervisors of the County of Westchester* (1902), 172 N. Y. 309, 65 N. E. 162, *revd.* 68 App. Div. 296, 74 N. Y. Supp. 144; *Rept. of Atty. Genl.* (1906) 307.

§ 17. **Powers, how exercised.**—Every act or resolution of the board shall require for its passage the assent of a majority of the supervisors elected, unless otherwise required by law. Every act or resolution of such board in the exercise of its legislative powers shall have a title prefixed, concisely expressing its contents, followed by a reference to the law or laws conferring the authority to pass the act or resolution, the number of votes, both for and against its passage, and, when the assent of any supervisor is required, that such assent was given; and all acts or resolutions so passed

shall be numbered in the order of their passage, and certified by the chairman and clerk, and within six weeks after the close of each session, such resolutions shall be published in the newspapers in the county appointed to publish the session laws of the legislature.

Source.—Former County L. (L. 1892, ch. 686) § 17; originally revised from L. 1849, ch. 194, § 5; L. 1875, ch. 482, § 2; L. 1890, ch. 287.

Consolidators' note.—The words "Such resolutions shall be" have been inserted in the last clause of this section in order to limit the provision in this section to publication of concurrent resolutions. The publication of acts passed by boards of supervisors is provided for by § 18 post. See note to § 18 post.

References.—Resolution of board, when certified by the clerk, may be read in evidence, Code Civ. Pro. § 941.

Application.—Has no reference to ordinary proceedings of the board, but only to such as are legislative in character. *Kingsley v. Bowman* (1898), 33 App. Div. 1, 53 N. Y. Supp. 426.

Validity of resolution.—Every substantial requirement or condition in respect to the exercise of legislative power by the board must be complied with. *Barker v. Town of Oswegatchie*, 10 N. Y. Supp. 834. If the board has full power to act, its performance thereof is not rendered illegal by a mistake in a recital in its resolution as to the source of its power, even if the alleged source is a repealed statute. *Matter of Rockaway Park Improvement Co.* (1894), 83 Hun 263, 31 N. Y. Supp. 386.

Necessity for seal.—If the board has no seal, the lack of a seal which a statute may direct to be affixed to the certificate to the resolution does not impair its validity. *People ex rel. Masterson v. Gallup* (1883), 12 Abb. N. C. 64, 65 How. Pr. 108, *affd.* 96 N. Y. 628.

Passage of resolution must be by a vote of a majority of those elected to the board; where there were eighteen members elected and ten voted for a resolution, and eight against it, and one of the ten had no authority to act as a supervisor, the resolution was not carried. *Williams v. Boynton* (1893), 71 Hun 309, 25 N. Y. Supp. 60, *affd.* 147 N. Y. 426, 42 N. E. 184.

Location of county buildings.—Resolution changing location of county buildings in conformity with the vote of the electors of the county is not within the meaning of this section. The section applies only to resolutions which become final and complete solely by the action of the board. *Stanton v. Supervisors of Essex* (1906), 112 App. Div. 877, 98 N. Y. Supp. 1059, *affd.* 191 N. Y. 428, 84 N. E. 380.

Resolution to acquire bridge pursuant to statute, form of, see *Matter of Saratoga Lake Bridge Co. v. Walbridge* (1910), 140 App. Div. 817, 126 N. Y. Supp. 468.

Appointment of commissioner of elections.—Where for the purpose of the appointment of a successor a commissioner of elections has not received the necessary vote to make his recommended appointment effectual under this section, his office as commissioner of elections would be deemed vacant after the expiration of the term for which he had been duly appointed; but until his successor was appointed and had qualified, he would hold over and be entitled to discharge the duties of the office and receive its emoluments. *People ex rel. Woods v. Flynn* (1913), 81 Misc. 279, 142 N. Y. Supp. 230.

Section cited.—*People ex rel. Bonheur v. Christ* (1913), 208 N. Y. 6, 101 N. E. 846; *Rept. of Atty. Genl.* (1900) 269.

§ 18. Publication of acts of board.—All acts passed by the boards of supervisors of the several counties of this state, shall be published in two newspapers representing respectively the two principal political parties into which the people of the counties are divided, after such manner, and at

such compensation as the several boards of supervisors may provide, the same to be a county charge, payable in the manner provided in section forty-eight of the legislative law for the publication of local laws enacted by the legislature, provided that the rate of compensation shall not be less than the rate fixed by said section for the publication of laws of a local nature, enacted by the legislature.

Source.—L. 1845, ch. 260, § 6, as amended by L. 1892, ch. 715, § 6.

Consolidators' note.—This section is taken from L. 1892, ch. 715, § 6. This section, passed at the same session as the County Law, superseded the provisions of County Law, § 17, as to publication of acts of boards of supervisors. See General Construction Law, § 100, and 94 App. Div. 520, 88 N. Y. Supp. 115 (1904).

Section cited.—*People ex rel. Bonheur v. Christ* (1913), 208 N. Y. 6, 101 N. E. 846.

§ 19. **Printing and distribution of proceedings of board.**—Each board of supervisors shall cause as many copies of the proceedings of its sessions as it may deem necessary, certified by its chairman and clerk, to be printed as a county charge, in a pamphlet volume, as soon as may be after each session, for exchange with other boards, for the members of the board and other town and county officers, and for public distribution. At least three copies of such printed volume shall be forwarded to and filed in each town clerk's office and in the county clerk's office. In counties containing cities of the first class, and in counties containing three cities of the third class, the publication of the proceedings of the board of supervisors may be ordered to be made in a daily newspaper, the work to be done by contract, let to the lowest bidder, after an opportunity to bid therefor has been given to the proprietors of all the daily newspapers printed in the English language in said county; such bid may include the printing and binding in pamphlet volumes of such number of copies of the proceedings of such board as may be required, and also the printing of pamphlet copies thereof for the use of the members of said board at its sessions. Such printed proceedings shall contain a summary statement of all bills against the county, presented to the board and audited and allowed or disallowed, indicating the amount allowed or disallowed. The board of supervisors may as often as it shall be deemed necessary, cause to be printed and distributed in like manner, in the same volume or otherwise, its county laws, combined with suitable forms and instructions thereunder, and reports of committees and county officers filed with it.

Whenever the proceedings of the board of supervisors of any county are printed in a volume by authority of the board of supervisors, the volume so printed, and duly certified by the chairman and clerk of the said board of supervisors to be a true record of such proceedings, shall be and constitute the book of records of the said board. (*Amended by L. 1913, ch. 256, and L. 1916, ch. 606, in effect May 20, 1916.*)

Source.—Former County L. (L. 1892, ch. 686) § 18, as amended by L. 1899, ch. 203; last par. from L. 1884, ch. 327.

Publication of proceedings in newspaper.—A board of supervisors has no authority to contract for the publication of its proceedings in a newspaper, except in

counties containing a city of the first class. (Opinion of Comptroller, Jan. 21, 1916), 8 State Dept. Rep. 574. Daily publications not authorized prior to amendment of 1899. *Kingsley v. Bowman* (1898), 33 App. Div. 1, 53 N. Y. Supp. 426.

Use of union label.—The requirement by board of supervisors advertising for bids for the printing of its journal that a union label be used by the printer is unlawful and against public policy as tending to create a monopoly by restricting competition to a special class of printers. *People ex rel. Single Paper Co. Limited v. Edgcomb* (1906), 112 App. Div. 604, 98 N. Y. Supp. 965.

§ 20. Designation of newspapers for publication of session laws.—The members of the board of supervisors in each county representing, respectively, each of the two principal political parties into which the people of the county are divided or a majority of such members representing respectively, each of such parties, shall designate in writing a paper fairly representing the political party to which they respectively belong, regard being had to the advocacy by such paper of the principles of its party and its support of the state and national nominees thereof, and to its regular and general circulation in the towns of the county, to publish the session laws and concurrent resolutions of the legislature required by law to be published, which designation shall be signed by the members making it and filed with the clerk of the board of supervisors. If a majority of the members of the board representing either of such parties can not agree upon a paper or shall fail to make a designation of a paper or papers as above provided, then and in such case, the paper or papers last previously designated in behalf of the party or parties whose representatives, or a majority of them, have failed to agree shall be held to be duly designated to publish the laws for that year, and any designation of a paper or papers made contrary to the provisions of this section shall be void. If there shall be but one paper published in the county, then, in that case, the laws shall be published in that paper. If either of the two principal parties into which the people of the county are divided shall have no representative among the members of the board of supervisors, then, and in that event, the newspaper last legally designated in behalf of such party, not having a representative among the members of the board of supervisors, shall be held to be duly designated to publish the laws for that year. The clerk of each board of supervisors as soon as such designation is made shall forward to the secretary of state a notice stating the name and address of such newspapers as have been selected for the publication within the county of the laws and concurrent resolutions of the legislature, or if there is but one newspaper in such county he shall before the first day of January in each year, forward to the secretary of state a notice stating the name and address of such newspaper, and that it is the only newspaper published in the county.

Source.—Former County L. (L. 1892, ch. 686) § 19, as amended by L. 1898, ch. 349; L. 1905, ch. 496; originally revised from L. 1845, ch. 280, §§ 3, 4; L. 1892, ch. 715.

Consolidators' note.—The last sentence of the former section 19 has been transferred to Legislative Law, § 48.

References.—Slips of session laws to be forwarded by secretary of state to newspapers, Legislative Law, §§ 48, 90.

Object of statute.—The purpose of requiring publication of the Session Laws and Concurrent Resolutions of the Legislature is to give to the people of the state early and general notice of their enactment and of the provisions thereof. *People ex rel. Utica Sunday Tribune Co. v. Williams* (1910), 140 App. Div. 58, 124 N. Y. Supp. 328, revd. 200 N. Y. 525, 93 N. E. 1129; see also *People ex rel. Mayham v. Dickson* (1910), 138 App. Div. 606, 123 N. Y. Supp. 110.

Representatives of political parties.—The designation is to be made by majority of the supervisors representing the two political parties. *People ex rel. Baldwin v. Barnes* (1897), 17 App. Div. 197, 45 N. Y. Supp. 356. And should be made annually. Rept. of Atty. Genl. (1903) 495.

A Republican who had been elected supervisor of his town upon the Republican ticket sought a renomination, but was unsuccessful. He was then nominated by the Democrats and placed at the head of the ticket under the regular party symbol of that party. He was elected over the regular Republican candidate. It was held that he was entitled to vote with the Democratic members of the board upon the question of designating a Democratic newspaper for the publication of the session laws. *Norris v. Wyoming County Times* (1903), 83 App. Div. 525, 82 N. Y. Supp. 322.

The paper should fairly represent the party for which it is designated. *People v. Supervisors of Monroe* (1891), 60 Hun 328, 14 N. Y. Supp. 867. Effect of a tie vote, see *People ex rel. Fuller v. Supervisors of Seneca* (1860), 18 How. Pr. 461.

Test of right to designation.—In testing the question whether a certain newspaper should be designated regard must be had not only to its advocacy of the principles of its party and its support of the State and National nominees, but also to its general and regular circulation in the towns of the county where it is published. If a newspaper be deficient in either of these particulars it should not be designated if there be another paper published in the county which measures up to the full requirements of the statute. *People ex rel. Utica Sunday Tribune Co. v. Williams* (1910), 140 App. Div. 58, 124 N. Y. Supp. 328, revd. on other grounds 200 N. Y. 525, 93 N. E. 1129. Hence, the designation of a newspaper whose aggregate circulation does not exceed 1,000 copies, and which has no circulation in two of the towns of the county, is of no effect, if there is another paper published in the county, qualified on the grounds of political advocacy which has a circulation of over 11,000 covering all the towns of the county. *People ex rel. Guernsey v. Somers* (1912), 153 App. Div. 623, 130 N. Y. Supp. 761, affd. 208 N. Y. 621, 102 N. E. 1110.

The statute does not require the designation of the paper having the largest circulation in the county but leaves a very large discretion to the board of supervisors, and their acts in this respect are purely administrative and not reviewable. *People ex rel. Utica Sunday Tribune Co. v. Hugo* (1916), 93 Misc. 618, 158 N. Y. Supp. 490.

The statute does not make it incumbent upon the members of the board of supervisors to select the newspaper having the largest circulation, but in making the designation of the newspaper the statute requires that they must have regard to its regular and general circulation in the towns of the county. Where the newspaper designated is under an agreement with other newspapers in the county for the joint publication of the session laws, so as to insure the regular and general circulation in the towns, such newspaper has not been selected with due regard for the requirements of the statute, and such designation will be annulled by the court. *People ex rel. Republican and Journal Co. v. McCarthy* (1909), 134 App. Div. 761, 119 N. Y. Supp. 387.

Where one of two Republican papers of equal party loyalty has a circulation of 2,700 within a county and the other has only 900 within the same territory the former should be designated to publish the session laws and concurrent resolutions of the Legislature. *People ex rel. Mayham v. Dickson* (1910), 138 App. Div. 607, 123 N. Y. Supp. 110.

The fact that a newspaper has for a long series of years advocated the principles and policies of a political party, gives it no right to the publication of the session laws, etc., unless it is at the time of the designation fulfilling that rôle. *It seems*, that a board of supervisors acting in good faith may designate a newspaper to publish the session laws, etc., on behalf of a political party, although such paper has not always been a party organ, in the place of the paper which had always fulfilled this rôle, but which, upon a particular occasion and in the year just then closing, had concededly varied its policy and refrained from the support of some of the party candidates. *People ex rel. Elmira Advertiser Association v. Gorman* (1915), 169 App. Div. 891, 155 N. Y. Supp. 727.

Results at last annual election controlling.—*Matter of Pearsall v. Board of Supervisors of Nassau County* (1914), 162 App. Div. 38, 146 N. Y. Supp. 1021, *affd.* 211 N. Y. 580, 105 N. E. 1092.

Implied power of board of supervisors in contingency not provided for.—Where a new political party, at the last general election, cast the second highest number of votes in a particular county, thus becoming one of the two principal parties into which the people of the county have divided themselves, and yet has no representative in the board of supervisors, and no newspaper which had been previously designated to publish the session laws and which could hold over, a contingency arises not provided for in section 20 of the County Law, and it is the duty of the board of supervisors, under its general power, to designate a newspaper representing the principles of the new party to publish the session laws, concurrent resolutions of the legislature and its own acts, and it may be compelled to perform that duty by mandamus. *People ex rel. Bonheur v. Christ* (1913), 208 N. Y. 6, 101 N. E. 846.

Failure to file designation with Secretary of State.—Where a designation has been made and the session laws published the fact that the designation has not been transmitted to the Secretary of State does not affect the right of the paper to be paid for the publication of the session laws. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 168.

Revocation of designation.—Members cannot change designation after certificate has been filed with clerk. *People v. Supervisors of Monroe* (1891), 60 Hun 328, 14 N. Y. Supp. 867; *Matter of Troy Press Co.* (1904), 94 App. Div. 514, 88 N. Y. Supp. 115, *affd.* 179 N. Y. 529, 71 N. E. 1141; *Rept. of Atty. Genl.* (1911), Vol. 2, p. 32; *Atty. Genl. Opin.*, 6 State Dept. Rep. (1915) 443.

A supervisor may revoke his signature to the designation of a newspaper by delivering to the clerk a written notice to that effect at any time before the clerk has acted upon the designation. The power to designate newspapers under this section is conferred upon the supervisors individually. *People ex rel. Harper v. Roberts* (1907), 52 Misc. 308, 102 N. Y. Supp. 1110.

Although this section provides that the "designation of a paper or papers made contrary to the provisions of this section shall be void," a mere suggestion that a designation made does not comply with the provisions of the statute, even though supported by affidavits, is not sufficient to require the action of the board of supervisors to be set aside. *People ex rel. Elmira Advertiser Association v. Gorman* (1915), 169 App. Div. 891, 155 N. Y. Supp. 727.

Queens county.—This section does not apply to Queens county, the designation there being controlled by section 48, subd. 3, of the Legislative Law. *Rept. of Atty. Genl.* (1913), Vol. 2, p. 6.

Board of supervisors abolished.—Where the board of supervisors of a county has been abolished, and no provision has been made for designating a paper to publish the session laws, the papers last previously designated must be deemed designated for the current year. Rept. of Atty. Genl. (1899), 223.

Supervisor with pecuniary interest in paper.—Where a supervisor is entitled to act in one of the groups designating a newspaper to publish the session laws and has a pecuniary interest in a newspaper designated by such group, the newspaper may not be paid for its services regardless of whether the supervisor exercised his privilege to act with his group or not. Where there is only one newspaper in a county representing a dominant political party the rule would be different. Rept. of Atty. Genl. (1914) 50; See also Rept. of Atty. Genl. (1908) 156.

Supervisor as city editor of paper.—Where a majority of the seven Democratic members of the board of supervisors of Schenectady county designated the *Schenectady Gazette* to publish the Session Laws, concurrent resolutions of the legislature and election notices for the year 1915, and filed said designation with the board of supervisors who, in turn, sent to the secretary of state the proper notice, said designation is not illegal because one of the supervisors voting therefor, though employed at a stated salary as city editor of the *Gazette* by the corporation which publishes it, was not interested therein either as a stockholder, officer or director. A designation of another newspaper thereafter made by three of the seven Democratic members of the board of supervisors to publish like matter is not legal under this section. *People ex rel. Crowe v. Peck* (1914), 88 Misc. 230, 151 N. Y. Supp. 835.

Certiorari.—The determination of a board of supervisors designating a newspaper to publish session laws, being an administrative act is not reviewable by certiorari. *People ex rel. Republican and Journal Co. v. Wiggins* (1910), 199 N. Y. 382, 92 N. E. 789, revg. 138 App. Div. 933, 123 N. Y. Supp. 1136; *People ex rel. Utica Sunday Tribune Co. v. Hugo* (1916), 93 Misc. 618, 158 N. Y. Supp. 490; *People ex rel. Elmira Advertiser Association v. Gorman* (1915), 169 App. Div. 891, 155 N. Y. Supp. 727, contr.; *People ex rel. Hall v. Ford* (1908), 127 App. Div. 444, 112 N. Y. Supp. 130.

Mandamus.—Although certiorari will not lie to review the action of the board of supervisors in making an improper designation, mandamus may lie to compel them to perform their official duty. A newspaper which has not been designated pursuant to statute is not entitled to a writ of mandamus compelling the county treasurer to pay it for the publication of notices of tax sales, although the parties stipulated on the trial that the plaintiff had performed all the conditions precedent to recover payment for the work so performed. *People ex rel. Guernsey v. Somers* (1912), 153 App. Div. 623, 130 N. Y. Supp. 761, affd. 208 N. Y. 621, 102 N. E. 1110.

The board of supervisors of a county cannot designate newspapers to publish Session Laws for a period exceeding one year. After such designation has once been lawfully made it cannot be revoked. Where the clerk of a board refuses to notify the secretary of state of such designation without good reason, a writ of mandamus will be issued to compel him to perform such duty. *Matter of Troy Press Co.* (1904), 94 App. Div. 514, 88 N. Y. Supp. 115, affd. 179 N. Y. 529, 71 N. E. 1141. Compare *People ex rel. Donnelly v. Riggs* (1897), 19 Misc. 693, 45 N. Y. Supp. 53, holding that the duty of the clerk is not absolutely ministerial, but involves to some extent the exercise of discretion; therefore, mandamus will not lie against him to act in a particular manner.

Where a newspaper in a petition for a writ of mandamus against a board of supervisors in terms asks for an alternative writ, but contends that it is the only newspaper in the county which meets the requirements of the statute, and that it is the duty of the court to direct the board of supervisors to designate such paper, the question must be dealt with upon the theory that the petitioner asks for a

peremptory writ, and where the board has made a designation in good faith the petition should be dismissed. *People ex rel. Elmira Advertiser Association v. Gorman* (1915), 169 App. Div. 891, 155 N. Y. Supp. 727.

A board of supervisors in designating a newspaper under sections 20 and 22 of the County Law, to publish the session laws, etc., does not act judicially but rather in an administrative capacity. Its action is not open to review by certiorari, nor can its decision as to whether a newspaper represents the principles of a political party be set aside by a peremptory writ of mandamus. *People ex rel. Elmira Advertiser Association v. Gorman* (1915), 169 App. Div. 891, 155 N. Y. Supp. 727.

Right of Secretary of State to review designation.—The designation by the supervisors of a newspaper is an administrative act and should not be ignored and treated as a nullity by the Secretary of State in the absence of a judicial determination to that effect. *Rept. of Atty. Genl.* (1912) Vol. 2, p. 23.

Session laws and concurrent resolutions to be published in same paper.—The purpose of this section is to give publicity and not patronage. Thus, the supervisors of one party have no right to select one paper to publish the Session Laws and another to publish the concurrent resolutions. *People ex rel. Hall v. Ford* (1908), 127 App. Div. 444, 112 N. Y. Supp. 130. Designation of newspapers by the board of supervisors for publication of election notices, carries with it publication of concurrent resolutions passed by the legislature. *Rept. of Atty. Genl.* (1896) 210.

Publication in paper not designated.—If the comptroller directs the publication in a paper not designated, the expense is not a county charge. *People ex rel. Thompson v. Supervisors of Hamilton* (1878), 73 N. Y. 604.

Publication of concurrent resolutions.—The Secretary of State has authority to select newspapers for the publication of concurrent resolutions in any county where none are designated by the board of supervisors. *Rept. of Atty. Genl.* (1899) 287.

Payment for publication made before order reversed.—A board of supervisors designated a newspaper to publish the session laws and concurrent resolutions. On review of this action by certiorari on behalf of another newspaper, the Appellate Division annulled the designation, whereupon the relator was designated by the board as the official paper. Thereafter the action of the Appellate Division was reversed (199 N. Y. 382) and the relator applied for a mandamus to compel the comptroller to audit its bill for services rendered while it was the official paper under such designation. *Held*, that since the judgment of a competent court is binding until it is reversed, the relator is entitled to be paid for services rendered until the reversal of the order of the Appellate Division in the certiorari proceeding. *People ex rel. Republican & J. Co. v. Lazansky* (1913), 208 N. Y. 435, 102 N. E. 556, revg. 153 App. Div. 547, 138 N. Y. Supp. 341.

Designation as both state and county paper; two claims for single publication.—Where there is no dispute as to the fact that a newspaper designated both as State and county paper for the purpose of publishing the Session Laws made but a single publication under both designations, the Comptroller has no jurisdiction to audit both claims, and the court has power to declare one of such audits a nullity. *People v. Journal Co.* (1913), 158 App. Div. 326, 143 N. Y. Supp. 389, *affd.* (1914) 213 N. Y. 1, 106 N. E. 759.

Section considered.—*Rept. of Atty. Genl.* (1911) Vol. 2, p. 155; *Rept. of Atty. Genl.* (1909) 330.

§ 21. **Compensation for publication of local laws.**—The charge for the publication of laws of a local nature in the newspapers designated to publish said laws shall be paid by the several counties of the state in which

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said laws may be published in the manner and at the compensation prescribed by section forty-eight of the legislative law.

Source.—Former County L. (L. 1892, ch. 686) § 21. See L. 1892, ch. 715, § 2.

Consolidators' note.—Former § 20 of County Law has been omitted for the following reasons: (1) First sentence down to semicolon was superseded by L. 1892, ch. 715, § 4. See 94 App. Div. 520, 88 N. Y. Supp. 115 (1904), and General Construction Law, § 100; (2) Remainder of first sentence has been consolidated in Legislative Law, § 48; (3) The second sentence is now covered by Legislative Law, § 48, subd. 4.

The material contained in former § 21 has been omitted from County Law because superseded by L. 1892, ch. 715, § 2, which has been consolidated in Legislative Law, § 48. See General Construction Law, § 100, and 94 App. Div. 520, 88 N. Y. Supp. 115 (1904). The new matter inserted as section 21 is for the purpose of retaining in County Law a reference to the manner in which the publication of local laws shall be paid.

References.—Charge for publication of general laws, paid by state, Legislative Law § 48, sub. 5. Rate to be charged for local laws, Id. § 48, sub. 5.

Former law cited.—Rept. of Atty. Genl. (1892) 309; Rept. of Atty. Genl. (1892) 408.

§ 22. Election notices and official canvass.—Such boards, except in the counties of Erie and Kings, shall, in like manner, designate two newspapers, representing respectively each of the two principal political parties into which the electors of the county are divided, in which shall be published the election notices issued by the secretary of state, and the official canvass, and fix the compensation therefor, which shall be a county charge.

Source.—Former County L. (L. 1892, ch. 686) § 22; originally revised from L. 1875, ch. 482, § 7, subd. 3.

Consolidators' note.—The exception of the county of Kings is not omitted from this section because the legislature intended when the former County Law was passed in 1892 to except the county of Kings from the provisions of this section. This exception continues up to the present time. Whatever powers the boards of supervisors had under this section in the counties of Queens and Richmond were devolved upon the board of aldermen of the city of New York under the provision of section 1586 of the charter of the city of New York, but no such devolution occurred in the case of the county of Kings, as this county was expressly excepted from the provisions of this section.

References.—Publication of notices of elections by secretary of state, Election Law, § 293; of submission of proposed constitutional amendments or other propositions or questions, Id. § 295; of list of registration and polling places, Id. § 301; notices of primaries, Id. § 75; publication of nominations, Id. § 130.

Provisions mandatory.—The provisions of this section relative to the "official canvass" are mandatory and such canvass which is a tabulation of all the votes of the county by election districts, should be published in addition to the publication of the determinations and statements mentioned in section 438 of the Election Law. Opinion of Atty. Genl. (1917) 10 State Dept. Rep. 506.

All determinations of the county board of canvassers and the statements upon which they are based, are required to be published in one issue of two newspapers designated by the board of supervisors. The determination may be combined as to all officers elected in the county. Opinion of State Comptroller (1916), 10 State Dept. Rep. 547.

Designation of more than two newspapers.—An attempt by members of a board of supervisors to designate for the publication of election notices four papers for each of the two principal political parties is void as to all the papers so designated,

and a resolution revoking the designation is unnecessary. The compensation to be paid for publishing election notices is not limited by the rates fixed for the publication of the session laws. *Matter of Ford v. Supervisors* (1904), 92 App. Div. 119, 87 N. Y. Supp. 417, appeal dismissed 178 N. Y. 616, 70 N. E. 1098.

State election controlling.—In construing this section the identity of the two principal political parties is established by the result of the state election rather than by the outcome of a county or local election. In designating newspapers to publish the election notices the choice should therefore be confined to newspapers representing the parties whose candidates received the highest number of votes in the last State election. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 379.

Concurrent resolutions which are to be submitted to a vote of the people, must be published in the newspapers designated by the several boards of supervisors for the publication of the election notices. *Rept. of Atty. Genl.* (1896) 210.

Publication of determinations and statements of county boards of canvassers as to persons elected should be made only as to county officers, members of assembly and county propositions. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 423.

Queens county.—The power of the supervisors of a county to designate newspapers to publish notice of elections and the official canvass of elections under this section was by section 1586 of the New York city charter transferred to the board of aldermen of the city and not to the board of elections. Hence, when a newspaper which was so designated by the supervisors of Queens county in 1899 has in 1904 published such election notices on the direction of the clerk of said county, and no other newspaper has been designated by the board of aldermen of the city of New York, such newspaper can recover from the city for publishing such notices. *Standard Publishing Co. v. City of New York* (1906), 111 App. Div. 260, 97 N. Y. Supp. 740.

Section cited.—*Rept. of Atty. Genl.* (1912) Vol. 2, p. 384.

§ 23. **Compensation of supervisors.**—1. For services of supervisors, except in the counties of Albany, Columbia, Dutchess, Orange, Erie, Franklin, Hamilton, Herkimer, Montgomery, Niagara, Oneida, Onondaga, Rensselaer, Rockland, Saratoga, Schenectady, Steuben, Suffolk, Ulster and Westchester each supervisor shall receive from the county compensation at the rate of four dollars per day, in Broome county at the rate of five dollars per day and in Essex county at the rate of eight dollars per day, for each calendar day's actual attendance at the sessions of their respective boards, and mileage at the rate of eight cents per mile for once going and returning from his residence to the place where the sessions of the board shall be held, by the most usual route, for each regular and special session.

2. In the county of Allegany each supervisor shall receive from the county compensation at the rate of five dollars per day for each calendar day's actual attendance at the sessions of the board of supervisors and mileage at the rate of eight cents per mile for once going and returning every week during any regular or special session of such board from his place of residence to the place where any such session of the board is held.

3. In the county of Franklin each supervisor shall receive the mileage above provided and a per diem compensation for attending sessions of the board, and for committee work when the board is not in session, to be fixed by the board of supervisors at not to exceed eight dollars per day.

4. In the counties of Hamilton, Herkimer, Niagara, Rockland, Saratoga,

Schenectady and Steuben each supervisor shall receive an annual salary, in the county of Herkimer of two hundred and twenty dollars and the mileage hereinabove prescribed, in the county of Hamilton of one hundred and twenty dollars and his reasonable traveling expenses actually and necessarily incurred in once going and returning from his residence to the place where the sessions of the board shall be held, by the most usual route, for each regular and special session, in the county of Niagara of four hundred dollars, in the county of Rockland of four hundred dollars, in the county of Saratoga of three hundred dollars, in the county of Schenectady of five hundred dollars and in the county of Steuben of one hundred and fifty dollars, in lieu of any per diem compensation.

5. In the counties of Dutchess and Orange each supervisor shall receive an annual salary from the county of one hundred and fifty dollars and also mileage at the rate of ten cents per mile for going and returning, once in each week during the annual session of the board of supervisors and when the board is sitting as a board of county canvassers, by the most usually traveled route, from his residence to the place where the sessions of the board shall be held, and in addition thereto compensation at the rate of four dollars per day and mileage as hereinabove provided for each special session of the board which he attends; such compensation and mileage to be paid by the county treasurer on the last day of the annual session in each year.

6. In the county of Suffolk each supervisor shall receive an annual salary of one thousand dollars for all services to the county for board meetings and committee work, in lieu of any per diem compensation. He shall be reimbursed by the county for actual expenses to and from board and committee meetings.

7. In the county of Ulster each supervisor shall receive an annual salary from the county of three hundred and fifty dollars, and also mileage at the rate of eight cents per mile for going and returning once in each week during the annual session of the board of supervisors, and when the board is sitting as a board of county canvassers, and once in going and returning to and from each special session by the most usually traveled route from his residence to the place where the session of the board shall be held, and in addition thereto he shall receive from the county while actually engaged in any investigation or other duty which may legally be committed to him his actual expenses, and such salary, mileage and expenses shall be audited and paid as other county charges; and such compensation shall be for any and all services which such supervisor shall render to the county and in lieu of all per diem compensation, except that each supervisor may be allowed for his services in making a copy of the assessment-roll and extending taxes as hereinafter provided.

8. Each supervisor, except in the counties of Albany, Allegany, Columbia, Dutchess, Orange, Erie, Montgomery, Niagara, Oneida, Onondaga, Rensselaer, Saratoga, Schenectady, Suffolk and Westchester may also

receive compensation from the county at the rate of four dollars per day, and in Broome county at the rate of five dollars per day, and in the county of Franklin at a rate not exceeding eight dollars per day to be fixed by the board of supervisors, while actually engaged in any investigation or other duty which may be lawfully committed to him by the board, except for services rendered when the board is in session and, if such investigation or duty require his attendance at a place away from his residence, and five miles or more distant from the place where the board shall hold its sessions, his actual expenses incurred therein.

9. Each supervisor in the counties of Dutchess, Orange and Allegany shall also be entitled to receive in addition to the compensation hereinabove provided, to be paid in the same time and manner, compensation at the rate of four dollars per day while actually engaged in any investigation or other duty which may be lawfully committed to him by the board of supervisors of his county, together with his actual expenses incurred therein.

10. No other compensation or allowance shall be made to any supervisor for his services, except such as shall be by law a town charge, except that in the counties of Niagara, Hamilton, Herkimer, Saint Lawrence, Schenectady and Saratoga each supervisor, while heretofore or hereafter actually engaged in any investigation, or in the performance of any other duty, which shall have been legally delegated to him by the board of supervisors, except when the board is in session, shall be entitled to receive in addition to the compensation hereinbefore provided, his actual expenses incurred therein.

11. The board of supervisors of any county, except Saratoga and Suffolk counties, may also allow to each member of the board for his services in making a copy of the assessment-roll, three cents for each written line for the first one hundred lines, two cents per line for the second hundred written lines, and one cent per line for all written lines in excess of two hundred, and one cent for each tax actually extended by him on the tax-roll, and, if there be more than one item of tax on a line of the tax-roll, one cent for computing and extending the total of such items.

12. The board of supervisors of any county may also allow to each member of the board for his services in making a copy of the tax-roll for delivery to the collector compensation at the rate of one-half the compensation authorized for making a copy of the assessment and tax-rolls.

13. In the county of Suffolk the extension and copying of the tax-rolls shall be performed by clerks and be a town charge. (*Amended by L. 1910, ch. 279, L. 1911, ch. 554, L. 1912, ch. 34, L. 1913, chs. 254 and 355, L. 1914, ch. 357, L. 1915, ch. 332, L. 1916, ch. 426, and L. 1917, ch. 527, in effect Jan. 1, 1918.*)

Source.—Former County L. (L. 1892, ch. 686) § 23, as amended by L. 1893, ch. 724; L. 1895, ch. 480; L. 1900, ch. 529; L. 1905, ch. 20; L. 1907, ch. 482; L. 1908, ch. 438; last par. from L. 1904, ch. 574; originally revised from R. S., pt. 1, ch. 12,

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tit. 2, § 15; L. 1849, ch. 194, § 10; L. 1869, ch. 855, § 8; L. 1875, ch. 482, § 8; L. 1881, ch. 97; L. 1882, ch. 58; L. 1886, ch. 63; L. 1887, ch. 297, § 1.

Consolidators' note.—Contrary to the usual rule adopted in preparing the consolidated County Law the counties of Kings, Queens and Richmond are omitted from this section. The section provides for the compensation to be paid supervisors in counties. There are no supervisors in the counties of Kings, Queens and Richmond and, therefore, the provisions of this section can have no possible application. The aldermen who are elected to represent the wards in these counties receive such compensation as the statute provides, which would undoubtedly cover any services that they may perform as supervisors.

New matter at the end of the section is rewritten without change of substance or effect from L. 1904, ch. 574, § 1, pt., adding § 5 to L. 1903, ch. 266, providing for the compensation of supervisors in counties of not less than 50,000 nor more than 54,000 inhabitants, according to the last Federal enumeration.

Reference.—Compensation of supervisor as town officer, Town Law, § 85. Compensation while attending meetings of state tax commission, Tax Law, § 173. Preparation of tax rolls by clerk of board of supervisors, County Law, § 50.

Special acts as to salaries of supervisors.—The following special acts relate to salaries of supervisors in certain counties:

Albany County—L. 1871, ch. 1887, amended by L. 1875, ch. 497 and L. 1908, ch. 445; L. 1884, ch. 368, § 11, amended by L. 1906, ch. 5.

Columbia County—L. 1889, ch. 488, amended by L. 1909, ch. 89.

Dutchess County—L. 1898, ch. 134.

Erie County—L. 1876, ch. 231, amended by L. 1879, ch. 195, L. 1888, ch. 364, L. 1892, ch. 485, L. 1893, ch. 620, L. 1895, ch. 174, L. 1898, ch. 487, L. 1907, ch. 407, and L. 1909 chs. 129, 543.

Montgomery County—L. 1900, ch. 194, amended by L. 1906, ch. 76.

Oneida County—L. 1876, ch. 250, superseded by L. 1901, ch. 34.

Onondaga County—L. 1906, ch. 10, amended by L. 1916, ch. 180.

Oswego County—L. 1897, ch. 290, amended by L. 1915, ch. 92.

Rensselaer County—L. 1857, ch. 331, amended by L. 1875, ch. 560.

Schenectady County—L. 1887, ch. 722, amended by L. 1904, ch. 64.

Westchester County—L. 1902, ch. 342, amended by L. 1905, ch. 42, L. 1910, ch. 91.

The object of the amendment of 1910 was to include Herkimer and Broome counties under the general law, and to repeal local acts affecting such counties. See L. 1910, ch. 279, § 2, below.

L. 1910, ch. 279, § 2.—Chapter one hundred and eighty-six of the laws of eighteen hundred and sixty-nine, entitled "An act to increase the compensation of the supervisors of the counties of Broome and Allegany," and all acts amendatory thereof and supplemental thereto, and sections five and six of chapter two hundred and sixty-six of the laws of nineteen hundred and three, entitled "An act providing for the holding of town meetings and elections in counties of the state having a certain population," as added by chapter five hundred and seventy-four of the laws of nineteen hundred and four, and as amended, respectively, by chapters one hundred and fifty-six of the laws of nineteen hundred and six and two hundred and sixty of the laws of nineteen hundred and five, are hereby repealed.

Committees.—Where compensation is not specifically provided, a supervisor as a member of the board, cannot receive other compensation than that allowed by this section. Supervisors of Richmond v. Ellis (1875), 59 N. Y. 620. An allowance of three dollars per day to members of the board for committee work done by them at times other than at sessions is illegal and void. Van Sicklen v. Supervisors of Queens (1884), 32 Hun 62. A custom of the board to allow its members five dollars *per diem* for services of its members on committees cannot be shown; nor can it be proved that the services were worth that much; the statute is conclusive

and does not allow supervisors to pay themselves out of the county funds as upon a *quantum meruit*. *Supervisors of Richmond v. Van Clief* (1874), 1 Hun 454, 3 T. & C. 458, *affd.* 60 N. Y. 645.

Continuance after successor qualifies.—One who continues to act as chairman of the board after his successor in the office of supervisor has qualified and entered upon the discharge of his duties is not entitled to the *per diem* compensation provided for attendance upon sessions of the board or for committee work. *Rept. of Atty. Genl.* (1911) Vol. 2, p. 693.

Increase in compensation.—A board of supervisors has no power to increase the compensation of its members for service on the board. *Rept. of Atty. Genl.* (1912) Vol. 2, p. 564.

Mileage.—Supervisors are not entitled to mileage for each day's actual attendance at regular or special meetings, but only for once going and returning. *Wallace v. Jones* (1907), 122 App. Div. 497, 500, 107 N. Y. Supp. 288, *affd.* 195 N. Y. 511, 88 N. E. 1134.

Extending assessment rolls.—The process of ascertaining the amount of the tax by multiplying the assessed value by the rate and setting it down in the column as provided by section 55 of the Tax Law, is the extending of the line. Where a supervisor extends special taxes on the same line with the general tax, each extension of a special tax constitutes a new line for the purpose of ascertaining his compensation. *Pearsall v. Brower* (1907), 120 App. Div. 584, 105 N. Y. Supp. 207.

Where supervisors, after making a copy of the assessment roll for which they have been paid at the full rates, copy the extensions appearing upon the original tax-roll, upon the copy of the assessment-roll they have made, they are not entitled to compensation therefor at half the rate allowed for their work in extending the taxes on the original roll. (*Opinion of Atty. Genl.*, Sept. 28, 1916), 9 State Dept. Rep. 428.

Taxpayer's action is proper remedy for recovery of moneys paid by a county to a supervisor on improper audit by board. *Smith v. Hedges* (1915), 169 App. Div. 115, 154 N. Y. Supp. 867, *affg.* (1914), 87 Misc. 439, 150 N. Y. Supp. 899.

A taxpayer's action to recover, on behalf of a county, money allowed by its board of supervisors under this section to a supervisor for copying written lines of the assessment roll of his town, and extending certain lines of the tax rolls, based on the claim that defendant was allowed and paid for more lines than he had in fact copied and extended, is maintainable, and the audit of the board of supervisors is not conclusive. *Smith v. Hedges* (1914), 87 Misc. 439, 150 N. Y. Supp. 899, *affd.* (1915) 169 App. Div. 115, 154 N. Y. Supp. 867.

Greene county.—See *Rept. of Atty. Genl.* (1910) 429.

§ 23-a. Compensation of supervisors in certain counties.—In any county of the state having not more than four towns each supervisor, including any now in office or hereafter elected, shall receive from the county for all services in any official capacity, except services exclusively for the town in which he is elected or a district or subdivision thereof, an annual salary of three thousand dollars, and his actual and necessary expenses while performing services for the county, in lieu of all per diem or other compensation, fees, allowances, percentages and mileage. Any such supervisor shall receive from the town in which he shall have been elected, for all services performed for the town or any district or subdivision thereof, an annual salary of two thousand dollars, and his actual and necessary expenses while performing services for the town, in lieu of all other per diem or other com-

pensation, fees, allowances, percentages and mileage. In any such county, the foregoing provisions shall be controlling, notwithstanding section twenty-three or any other provision of this chapter or any provision of the town law or any other statute. Percentages and fees payable by law to such supervisor on account of duties relating to the affairs of the county shall belong to the county. Percentages and fees payable by law to such supervisor on account of duties relating to the affairs of the town or of any district or subdivision thereof shall belong to the town. (*Added by L. 1917, ch. 586, in effect May 21, 1917.*)

§ 24. **Form and presentation of accounts against the county.**—No account shall be audited by a board of supervisors, or by a committee thereof, or by superintendents of the poor, unless it shall be made out in items and accompanied with an affidavit that the items of such accounts are correct, and that the disbursements and services charged therein have been in fact made or rendered, or are necessary to be made or rendered at that session of the board, and stating that no part of the amount claimed has been paid or satisfied. But any such account so presented and verified may be disallowed in whole or in part, and the board or such superintendents may require any other or further evidence of the truth or propriety thereof. Each such account shall be numbered from one upwards in the order of presentation, and a memorandum of the time of presentation and the name of the claimant, and if assigned, the name of each assignor or assignee shall be entered in the proceedings of the board. No such account, after being so presented, shall be withdrawn without the unanimous consent of the board except to be used as evidence in an action or proceeding, and after being so used it shall be forthwith returned.

Source.—Former County L. (L. 1892, ch. 686) § 24; originally revised from R. S., pt. 1, ch. 12, tit. 4, §§ 1, 2, 4; L. 1839, ch. 369; L. 1845, ch. 180, §§ 24, 25, 28.

Consolidators' note.—No change is made in this section so far as its application to the counties of Kings, Queens and Richmond is concerned, where no superintendent of the poor exists. So far as the auditing of any account by the superintendent of the poor is concerned it can have no application to these counties by reason of the provisions of the charter of Greater New York which established a department which contains provisions superseding superintendents of the poor.

References.—Power to audit generally, County Law, § 12, subd. 2, and notes thereunder. Form and verification of accounts against towns and counties, Town Law, § 175. Clerk of board to designate items allowed or disallowed, County Law, § 50, subd. 5.

Unlawful audit and payment of claims a felony, Penal Law, § 1863; punishment for false audit, *Id.* § 1864; fraudulent presentation of claims, *Id.* § 1872.

Itemized account necessary.—Board may refuse to audit if claim is not properly presented. *People ex rel. Mason v. Supervisors of Wayne* (1887), 45 Hun 62. It is not the duty of the board to audit accounts not made out in items and verified as required by statute. *People ex rel. Board of Health v. Supervisors of Monroe* (1854), 18 Barb. 567.

Claimant is entitled to judgment of the board on each item. *People ex rel. Thurston v. Town Auditors* (1880), 82 N. Y. 80; *People ex rel. Johnson v. Supervisors of Delaware* (1871), 45 N. Y. 196.

A board of supervisors may properly refuse to allow a bill containing items for "expenses" to and at different places within the county on certain dates, where none of the items state the nature of the expenses, and only a portion of them specify the matter in connection with which the expenses were incurred. *Matter of White* (1909), 51 App. Div. 175, 64 N. Y. Supp. 726.

A charge for "traveling expenses," and "incidentals," is not sufficiently specific to comply with the requirements of the statute. *Matter of Pinney* (1896), 17 Misc. 24, 40 N. Y. Supp. 716.

Verification.—An affidavit stating that the services claimed for were performed (but not stating that they were rendered for the county), and that no part of the claim had been paid by the board or any one on their behalf, is not a sufficient verification. *People ex rel. Cagger v. Supervisors of Schuyler* (1866), 2 Abb. Pr. N. S. 78.

Where the board has allowed an account which is verified as a whole and not according to items, it is estopped from subsequently setting up this objection. *People ex rel. Sherman v. Supervisors of St. Lawrence* (1865), 30 How. Pr. 173.

Presentation.—Account must state that the services were necessarily rendered. *People ex rel. Toohey v. Webb* (1892), 50 St. Rept. 46, 21 N. Y. Supp. 298. As to criminal offense of fraudulent presentation of claim, see *People v. Bragle* (1882), 88 N. Y. 585, 42 Am. Rep. 269, affg. 26 Hun 378, 10 Abb. N. C. 300.

Authority of committees.—Supervisors may authorize their committees to make certain expenditures but may not delegate to them the audit of expenditures for which a county treasurer may make payment. Members of a committee have no right to audit bills, if they have ceased to be members of the board of supervisors, even though the expenditures were authorized by a committee of which they were primarily members. Rept. of Atty. Genl. (1909) 344.

Section cited.—*Smith v. Hedges* (1914), 87 Misc. 439, 150 N. Y. Supp. 899.

§ 25. Additional requirements.—Boards of supervisors may make such additional regulations and requirements, not in conflict with law, concerning the keeping and rendering of official accounts and reports of its county and town officers, and the presentation and auditing of bills presented to their board or to the town boards of their county, as they may deem necessary for the efficiency of the service and the protection of the interests of the public.

Source.—Former County L. (L. 1892, ch. 686) § 25; originally revised from L. 1886, ch. 355, § 1.

§ 26. County records.—Such boards shall have the general charge of the books and records of the county, subject to the legal rights of the officers using or having custody of the same, and shall provide for their safe-keeping. They may authorize county officers having the official custody or control of any such books and records, or of maps and papers, to cause copies thereof to be made and certified for the public use; and it shall be their duty to cause the same to be made and certified whenever by reason of age or exposure, or any casualty, the same shall be necessary. Any officers making such transcripts or copies shall be paid such sum therefor as may be just; but such payment shall not exceed a sum to be certified by the county judge, or a justice of the supreme court of the judicial district, as reasonable therefor. Such board of supervisors shall not accept and pay for any such services, until the work shall be examined and approved as

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to its manner and form of execution, by such judge or justice; nor shall any board of supervisors order any such work to be done until such judge or justice, after an examination, shall certify that such work is necessary for the security and safety of the public records.

Source.—Former County L. (L. 1892, ch. 686) § 26; originally revised from L. 1849, ch. 194, § 7; L. 1869, ch. 855, § 7.

References.—Supervision of custody of public records and regulations as to preservation, Education Law, §§ 1217–1223.

Indexing county records.—The board of supervisors has no authority, in the absence of special statute authorizing them so to do, to authorize the county clerk to make new indexes of the county records for additional compensation, or to compromise a claim for payment under a contract to make such indexes. *Wadsworth v. Supervisors of Livingston* (1916), 217 N. Y. 484, revg. 159 App. Div. 934, 144 N. Y. Supp. 1149. Compare *Wadsworth v. Supervisors of Livingston* (1910), 139 App. Div. 832, 124 N. Y. Supp. 334.

Kings county.—The term of office and right to salary of the assistant custodian of records and documents appointed by resolution of the board of supervisors of Kings county ceased upon the day when the Consolidation Act (L. 1895, ch. 954) took effect. *People ex rel. Farrell v. Sutton* (1896), 9 App. Div. 250, 41 N. Y. Supp. 398.

§ 27. Examination of witnesses and officers by the board.—Any such board may require the attendance of witnesses and may examine any person as a witness upon any subject or matter within its jurisdiction, or examine any officer of the county, or a town therein, in relation to the discharge of his official duties, or to the receipt or disbursement by him of any moneys, or concerning the possession or disposition by him of any property belonging to the county, or to use, inspect or examine, any book, account, voucher or document in his possession or under his control, relating to the affairs or interest of such county or town.

Source.—Former County L. (L. 1892, ch. 686) § 27; originally revised from L. 1858, ch. 190, § 1.

References.—Compelling attendance and testimony of witnesses, Code Civ. Pro. §§ 854–862.

Investigations.—Power is conferred upon board or a committee thereof to subpoena witnesses to testify as to matters within its jurisdiction. *Matter of Superintendent of Poor* (1896), 6 App. Div. 144, 39 N. Y. Supp. 878.

Section cited.—*People v. Bowman* (1912), 78 Misc. 425, 138 N. Y. Supp. 410.

§ 28. Committee of board.—When any such board shall have appointed any member or members thereof, a committee upon any subject or matter of which the board has jurisdiction, and shall have conferred upon such committee power to send for persons and papers, the chairman of such committee shall possess all the powers herein given to, and imposed upon the chairman of the board of supervisors.

The chairman of any committee appointed by a board of supervisors is authorized to administer an oath to any person presenting an account or claim before such committee to be audited, as to services rendered and the correctness of such claim.

Source.—Former County L. (L. 1892, ch. 686) § 28, and L. 1836, ch. 506, § 3; originally revised from L. 1858, ch. 190, § 3.

Disobedience of subpoena.—A committee of a board of supervisors has power to subpoena a witness, but neither the Supreme Court nor a judge of the court can punish as for contempt a disobedience of the command of the subpoena. Where a person fails to obey such subpoena any judge of the court may issue a warrant commanding the sheriff to apprehend the defaulting witness and bring him before the committee and if he then refuses to answer proper questions he may be committed to jail by a judge until he answers or is discharged according to law. *Matter of Superintendent of the Poor* (1896), 6 App. Div. 144, 39 N. Y. Supp. 878.

Term of committee expired.—When the official term of all of the supervisors who compose the committee of a board of supervisors has expired before the issuing of a warrant for the apprehension of a defaulting witness, the committee has no power to conduct an examination or to compel the attendance of witnesses, and consequently the judge has no authority to issue the warrant. *Matter of Superintendent of Poor* (1896), 6 App. Div. 144, 39 N. Y. Supp. 878.

§ 29. **Adjournment.**—Such board or committee may adjourn from time to time, and such committee may hold meetings in pursuance of such adjournments, or on call of the chairman thereof, during the recess, or after the final adjournment of the board of supervisors; but where a warrant shall have been issued as provided by section eight hundred and fifty-five of the code of civil procedure and not returned, such adjournment of the board or committee at whose instance it was issued, shall be to a time and place certain, of which notice shall be given by the chairman, to the judge before whom the warrant shall be returnable; and if the person against whom it was issued shall be arrested, he may, in the discretion of the judge who issued the warrant, be discharged from custody, upon entering into an undertaking to the county, with two sureties to be approved by such judge, to the effect that he will appear and submit to an examination before such board or committee, as required, at the time and place to which it shall have been adjourned, or pay to the county treasurer such sum of money as such judge may direct.

Source.—Former County L. (L. 1892, ch. 686) § 29; originally revised from L. 1858, ch. 190, § 6.

§ 30. **Filing and enforcement of undertaking.**—Such undertaking shall be filed in the clerk's office of the county, and if default shall be made in the condition thereof, the district attorney of the county may sue and collect the sum therein mentioned, and the money when received, and all moneys received for fines and penalties before such boards or committees, shall be paid into the treasury of the county.

Source.—Former County L. (L. 1892, ch. 686) § 30; originally revised from L. 1858, ch. 190, § 7.

§ 31. **Location of county buildings.**—The board of supervisors may, except in the county of Kings, by a majority vote of all the members elected thereto, fix or change the site of any county building, and the location of any county office; but the site or location of no county building or office

shall be changed when the change shall exceed one mile, and shall be beyond the boundaries of the incorporated village or city, where already situated, except upon a petition of at least twenty-five freeholders of the county, describing the buildings or office, the site or location of which is proposed to be changed, and the place at or near which it is proposed to locate such new building or office; which petition shall be published once in each week for six weeks immediately preceding an annual or special meeting of such board, in three newspapers of the county, if there be so many, otherwise, in all the newspapers published in the county as often as once a week. With such petition shall also be published a notice, signed by the petitioners, to the effect that such petition will be presented to the board of supervisors at the next meeting thereof. The board of supervisors of any county may acquire a new site or location for the county almshouse, erect suitable buildings thereon, and remove the inmates of the existing almshouse thereto, upon a majority vote of all the members elected to said board at a regular session thereof or at a special session called for that purpose, in any case where the state board of charities shall have certified to said board of supervisors that in the opinion of a majority of said state board of charities such change is necessary to the proper care of the inmates of such institution; in which case it shall not be necessary to receive or publish the petition hereinbefore provided or to submit the question of change or removal to the electors of such county as provided in sections thirty-two and thirty-three of this chapter; provided, however, that no site or location shall be selected or acquired by such board of supervisors which shall not have been approved by said state board of charities.

Source.—Former County L. (L. 1892, ch. 686) § 31, as amended by L. 1899, ch. 133; originally revised from L. 1849, ch. 194, § 6, as amended by L. 1881, ch. 264; L. 1885, ch. 160, § 1; L. 1891, ch. 5.

Consolidators' note.—The exception in this section of the county of Kings is not disturbed, as it indicates an intention on the part of the legislature that the provisions of the section should not apply to the county of Kings. Therefore, when the powers and duties of boards of supervisors were devolved upon the board of aldermen under the charter of the city of New York, there was no devolution so far as the county of Kings is concerned as to the powers of boards of supervisors contained in section 31. Such transfer, however, occurred in the case of Queens and Richmond which are not excepted.

References.—Power of board of supervisors to acquire sites for, and construct, county buildings, County Law, § 12, subd. 13. Legislature not to pass local act changing location of county buildings, Constitution, Article 2, § 18.

Constitutionality.—The provisions of this section and of §§ 32 and 33 post, as to removal of county buildings and offices from one part of a county to another, are not an invalid delegation of the legislative power to the people; the line of demarcation between legislative and administrative functions may not always be easily ascertained, but the deciding upon the site of county buildings is in its nature administrative and is not strictly and exclusively a legislative power within the meaning of the Constitution. *Stanton v. Supervisors of Essex* (1908), 191 N. Y. 428, 84 N. E. 380, affg. (1906), 112 App. Div. 877, 98 N. Y. Supp. 1059.

Exclusive power to erect county buildings and to fix or change the site is vested in the board of supervisors, except where a change in location exceeds one mile,

and a submission of the proposition to the electors of the county is not binding on the board. Rept. of Atty. Genl. (1911) 418.

Majority vote.—A resolution to change a county seat must be adopted by a majority vote of the members elected, and a member not legally elected is not to be counted; an act of the legislature attempting to legalize an illegal resolution of the board, locating or changing a county seat, is in violation of Article 3, § 18, of the Constitution. *Williams v. Boynton* (1895), 147 N. Y. 426, 42 N. E. 184, affg. (1893) 71 Hun 309, 25 N. Y. Supp. 60. See also *Trustees of Havana v. Supervisors of Schuyler* (1874), 2 Hun 600.

Changing site.—This section authorizes changing a site previously fixed in the manner provided by statute for the erection of county buildings although no county buildings have been erected thereon and is to be construed as though it provided for changing the site for any county building. *Smith v. Roberts* (1908), 60 Misc. 427, 113 N. Y. Supp. 672.

Where the board has attempted to comply with the law relative to a proposed change of location of county buildings it is the duty of all officials to treat such proceedings as regular until otherwise directed by the courts. Rept. of Atty. Genl. (1893) 353.

The board has no power to change the site of county buildings beyond the boundaries of the city or village where situated, except upon petition duly published and affirmative vote had of the electors of the county. Rept. of Atty. Genl. (1893) 421.

New courthouse.—The building of a new courthouse in addition to the two already existing in a county is not a change of location of a county building requiring the vote of the electors of the county under this section. *Lyon v. Supervisors of Steuben* (1906), 115 App. Div. 193, 100 N. Y. Supp. 676.

§ 32. **Proceedings on petition.**—On the presentation of such petition and notice, with due proof of their publication, if a majority of all the members elected to such board vote in favor of a resolution for the removal of the site of the buildings described in such petition, to the site also therein described, or the change of the location of its county offices or any of them, said board shall thereupon direct that such resolution, together with the notice that the question of such removal will be submitted to the electors of the county at the ensuing general election, be published in at least two newspapers published in the county to be designated by the board, once in each week for six consecutive weeks immediately preceding such general election. Such resolution and notice shall be published accordingly.

Source.—Former County L. (L. 1892, ch. 686) § 32; originally revised from L. 1849, ch. 194, § 6, as amended by L. 1881, ch. 264; L. 1885, ch. 160, § 2.

Reference.—See note to preceding section.

Form of resolution.—Resolution changing the location of county buildings need not comply with section 17 of the County Law. *Stanton v. Supervisors of Essex*, 112 App. Div. 877, 98 N. Y. Supp. 1059 (1906), affd. (1908) 191 N. Y. 428, 84 N. E. 380.

Section cited.—*Lyon v. Supervisors of Steuben* (1906), 115 App. Div. 193, 100 N. Y. Supp. 676.

§ 33. **How submitted to vote.**—The question of the removal of the site of such buildings, or the change of the location of any such office, shall thereupon be voted on by the electors of the county at such general elec-

tion by ballot. If a majority of the ballots cast shall be in favor of such removal, the proceedings of such board of supervisors shall be deemed ratified by the electors, and the change of the site of such buildings, or the removal of such offices, shall be made accordingly; but the old site and the buildings thereon shall be continued and used until new buildings upon the new site have been provided and accepted by the board of supervisors.

Source.—Former County L. (L. 1892, ch. 686) § 33; originally revised from L. 1885, ch. 160, §§ 3, 4.

Reference.—See note to § 31.

Ballots upon a proposition to change the location of a county building should be in the form prescribed by the Election Law. Rept. of Atty. Genl. (1893) 353.

Section cited.—*Lyon v. Supervisors of Steuben* (1906), 115 App. Div. 193, 100 N. Y. Supp. 676.

§ 34. After destruction of poor-house, petition for change of site.—Whenever any county poor-house or almshouse shall have heretofore been or shall hereafter be destroyed by fire or otherwise, twelve or more resident freeholders of the county may present to the chairman of the board of supervisors of the county a petition for the change of site of such county poor-house. If the annual meeting of the board of supervisors is to be held at any time within three months following the presentation of such petition to the chairman, he shall cause the same to be presented to such annual meeting for the consideration and action of such board; but if an annual meeting of the board is not to be held within three months following the presentation of such petition to the chairman, he shall, upon the presentation of such petition to him, cause a special meeting of such board to be convened for the purpose of considering and acting upon such petition. Such meeting may be called upon a notice signed by the chairman, directed to the members of the board and stating the time, place and object of the meeting, which shall be served upon each member of the board, either personally or by leaving it at his residence with some person of suitable age and discretion, at least three days before the time when such meeting is to be held, or by mail at least ten days before such time. The chairman shall call such meeting to be held upon some day within thirty days from the time of the presentation of the petition to him. At any such special meeting or at any annual meeting at which such petition shall be presented for the consideration and action of the board, the board may by a vote of two-thirds of all the members thereof, determine by resolution, to change the site of any such county poor-house, and to purchase a new site and farm for such county-house and for the support, care and maintenance of the poor of the county, and to sell and convey the old site of the county poor-house and the farm connected therewith. The board shall also, by resolution, direct that every such resolution, with a notice signed by the chairman and clerk of the board, that the question of such sale and disposal of the old site and farm, and the purchase of a new site and farm for the county poor-house, and for the support, care and maintenance of the poor of the

county, will be submitted to the electors of the county, at the ensuing town meeting to be held in the several towns thereof, shall be published in at least six newspapers published in the county designated by the board, if there be that number, if not, in all the newspapers of the county, at least one full week immediately preceding such town meeting, and posted for at least ten days before the town meeting in at least six public places in each town in the county. If the annual town meetings of the county are not to be held within three months after the passage of such resolution, the board shall, by resolution, direct that a special town meeting shall be held in each town of the county, on a day to be specified therein, at which such questions will be submitted to the electors of the county. Every resolution of the board calling such special town meeting shall be published in at least six newspapers of the county, to be designated by the board, for the period of at least four successive weeks immediately preceding the time when such special town meetings are to be held; or if a less number of newspapers than six are published in the county, such resolution shall be published in all the newspapers thereof. At any annual or special town meeting at which such question shall be submitted to the electors of the county, the vote shall be by ballot, which shall be in this form: "In favor of the sale and disposal of the present county poor-house site and farm; and of the purchase of a new site and farm"; or, "Against the sale and disposal of the present county poor-house site and farm, and the purchase of a new site and farm." The ballots shall be provided and delivered by the county clerk of the county; and the expense thereof shall be a county charge. The officers presiding at such town meeting shall canvass the votes cast thereat and make a correct statement of the number cast in favor of and the number cast against the question submitted, and certify the same in duplicate; one of which shall immediately be filed in the town clerk's office, and the other of which shall, within twenty-four hours after the conclusion of such canvass, be filed in the county clerk's office. Within twenty-four hours after the statements of the canvass of votes in all the towns of the county shall have been filed with the county clerk, he shall canvass and compile a statement of the whole number of votes cast in the county upon the question submitted, and of the number cast in favor of and against such question, respectively, and make and record a certificate of such result in his office; and within twenty-four hours thereafter cause a certified copy thereof to be delivered to the chairman of the board of supervisors, if a majority of the electors of a county voting upon such question at such town meetings shall have voted in favor of the question submitted. The chairman of the board, upon the receipt of the certified copy of such certificate from the county clerk, shall call a special meeting of the board, to be held at some time to be designated by him, not more than thirty days thereafter, and of which meeting notice shall be given to each member of the board, either personally or by mail, at least ten days before the time of the meeting. If the annual meeting of the board is to be held within such

period of thirty days a special meeting shall not be called. At any special meeting of the board, called and convened as herein provided, or at any annual meeting convened within such period of thirty days, such board of supervisors shall have full power and authority to sell and dispose of the site and farm then owned and used by the county for the support, care and maintenance of its poor, and to select, locate and purchase a new site or farm for the county poor-house, and for the support, care and maintenance of the poor of the county, and to raise all necessary sums of money upon the taxable property of the county to defray the expense and cost of the purchase of such new site and farm, and to carry out the provisions of this section over and above the amount that shall be realized from the sale and disposal of the old site and farm, and such moneys as may be in the hands of the county treasurer of the county applicable to such purchase. And the board may also, at any such meeting, provide for the erection of a new county poor-house, and other buildings to be used in connection therewith, and for the levy of a tax upon the taxable property of the county, to raise the necessary sums of money to defray the expense thereof. In case there shall be no chairman of the board of supervisors at a time when any notice required by this section is to be served, or any call of a meeting to be made by such chairman, the clerk of the board of supervisors, if there be one, or, if not, any member of the board of supervisors designated by such petitioners, shall serve the notices and call the meetings required by this section to be served or called by the chairman.

This section shall not apply to Kings county.

Source.—L. 1885, ch. 160, § 1, as amended by L. 1891, ch. 5, §§ 1, 2.

Consolidators' note.—New section inserted, being L. 1891, ch. 5. Statute cited amended L. 1885, ch. 160, § 6, "to read as follows." The original law was all repealed by former County Law (L. 1892, ch. 686) § 238, but this amendment was not repealed, and is consolidated into County Law. The exception at the end of this section has been omitted by striking out the county of New York, as the county of New York is excepted from the entire County Law. The exception of Kings county is retained as it indicated an intention on the part of the legislature that the provisions of this section shall not apply to Kings county. Therefore, when the charter of Greater New York was passed the provisions of this section were not transferred to the board of aldermen so far as Kings county is concerned under the provisions of section 1586 of the charter of the city of New York which transferred the powers of boards of supervisors of counties of Kings, Queens and Richmond to the board of aldermen of the city of New York.

Reference.—This and the preceding section were both taken in part from L. 1885, ch. 160, as amended, and are apparently in conflict with each other. This section is to be followed where it is sought to acquire a new site for an almshouse after the destruction of the old almshouse.

§ 35. Alteration and erection of towns.—Any such board may, at any meeting thereof, by a vote of two-thirds of all the members elected thereto, on the application of at least twelve freeholders of each of the towns to be affected, divide or alter the bounds of any town in the county, or erect a

new town therein. Notice of such application, signed by such freeholders, shall be posted in five conspicuous public places in each of such towns for four weeks next preceding a presentation of such application to the board; and a copy of such notice shall be published for at least six consecutive weeks next preceding the meeting of the board to which the application is to be made, in three newspapers published in the county, if there be so many, otherwise in all the newspapers published in the county as often as once a week. Such applicants shall present to the board with such application and notice due proof of the posting and publishing of such notice, and furnish the board with a map and survey of such towns, showing the proposed alteration. The board shall designate the name of any new town so erected. If the application be granted, a copy of such map, with a certified statement of the action of the board thereto annexed, shall be filed in the office of the secretary of state, who shall cause such statement to be printed and published with laws of the next legislature. Except as otherwise provided in section thirty-five-b, the provisions of this section shall not apply to the division of a town into two towns wholly within the boundaries of and together comprising the entire territory of the town so divided, in a county which does not then contain a city of over ten thousand inhabitants and which adjoins a county having a city containing a population of not less than two hundred thousand and not more than four hundred thousand, according to the preceding federal or state census or enumeration. (*Amended by L. 1911, ch. 250, and L. 1917, ch. 233, in effect April 20, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 34; originally revised from R. S., pt. 1, ch. 8, tit. 6, §§ 3-6; L. 1849, ch. 194, § 1, as amended by L. 1872, ch. 319; L. 1871, ch. 18.

Consolidators' note.—Sections 35-39 have no application to the counties of New York, Kings, Queens and Richmond because there are no towns in any of those counties. No specific exception, however, is made, as the application of the section must be determined in the light of other statutes relating to the counties of Kings, Queens and Richmond.

References.—Disposition of town property upon alteration of town boundaries, apportionment of debts, etc., Town Law, §§ 30-34.

Indefiniteness of description.—Where the act of the board, dividing a town and forming a new one only described the boundary line, the indefiniteness is cured by reference contained in the act to the application upon which it was founded, and from which it appeared that the new town was to lie south of the line of division. *People v. Carpenter*, 24 N. Y. 86 (1861).

Judgments against towns divided.—A judgment creditor of a town which has been divided is not entitled to a mandamus requiring the board of supervisors of the county to levy and assess the amount due upon the territory formerly included in the town. *People ex rel. McKenzie v. Supervisors of Ulster* (1883), 94 N. Y. 263.

Filing of statement and map.—It is not necessary to the validity of the action of the board of supervisors in changing town lines that a statement and map should be filed with the Secretary of State although this should be done for general information and as a state record. *Rept. of Atty. Genl.* (1899) 281, 296.

§ 35-a. Division of a town into two towns in certain counties not containing a city of over ten thousand inhabitants.—In any county which does not then contain a city of over ten thousand inhabitants, and which adjoins a county having a city containing a population of not less than two hundred thousand and not more than four hundred thousand, according to the preceding federal or state census or enumeration, a town of such county may be divided, in the manner provided in this section and section thirty-five-b, into two towns wholly within the boundaries of and together comprising the entire territory of the town so divided. The board of supervisors of such county, at any meeting thereof, by vote of two-thirds of all the members elected thereto, on the written application of qualified electors of the town affected, signed and acknowledged by them, to the number of twenty-five per centum of the votes cast in such town at the preceding general election, may make such application, subject to the action of the electors of such town by vote thereafter taken as herein provided. The acknowledgments to such application shall be taken and certified in manner and form as provided by law for the acknowledgment of a deed to be recorded. The application must describe with common certainty the boundaries of each of the proposed new towns. Such written application shall be filed with the clerk of such board, who, with the chairman of the board, shall fix a day, not less than five nor more than six weeks after the filing of the application, when the application shall be presented to the board for a hearing thereon. Such clerk shall prepare a notice of such hearing, which shall contain a brief description of the proposed division and recite the filing of the petition. He shall transmit such notice to the town clerk of the town affected, who shall cause copies thereof to be posted in five conspicuous public places in the town at least four weeks before such hearing and shall cause the notice to be published once each week for at least four weeks next preceding such hearing in a newspaper published in the county, which shall be a newspaper published in the town if there be one. Due proof of such posting and publication shall be filed with the clerk of the board of supervisors at or before the hearing. If the board is not to be otherwise in session at the time so fixed, the clerk shall call a special meeting for the purpose of this section. The applicants shall furnish the board with a map and survey of the proposed division. If the board shall grant the application, it shall make such determination by resolution, which shall provide for the submission of the following question to the qualified electors of such town: "Shall the town of (here insert name of the original town) be divided pursuant to a resolution of the board of supervisors of this county heretofore adopted, into two towns having the following boundaries: (here insert description as appearing in the map and application of each of such proposed towns)?" After the board of supervisors shall have granted any such application, no other application for a different division of the same town shall be presented or acted upon until after the determination of the proposition sub-

mitted as provided in the next section, nor unless such proposition shall have been decided in the negative. (*Added by L. 1917, ch. 233, in effect Apr. 20, 1917.*)

§ 35-b. Submission to town electors of proposition for a division under the preceding section.—The question provided for in section thirty-five-a shall be submitted at the next biennial town meeting occurring * not less than thirty nor more than sixty days after the receipt of such resolution by the town clerk; and if a biennial town meeting is not to occur within such times, then the town clerk shall call a special town meeting for the submission of such proposition. The clerk shall give notice of the fact that such proposition is to be submitted by posting the same in at least ten public places in the town and publishing such notice at least ten days before the meeting in a newspaper published in the county, which shall be a newspaper published in the town if there be one. If a special town meeting is called for such purpose, a statement of that fact shall be included in the notice together with a statement of the time and place of holding the same. The vote upon such question shall be taken by ballot, in the form prescribed in the election law. The ballots shall be provided by the authorities charged by law with the duty of furnishing official ballots for other town proposition. Any elector qualified to vote for town officers, if such officers were then to be chosen, shall be entitled to vote upon such proposition. A canvass and return of the votes, and canvass of the results, shall be made as provided by law. If the majority of votes cast on the proposition shall be in the affirmative, the town shall be thereby divided and two towns created in place thereof, to consist of the territory described in the proposition; but such division and such creation of new town shall not go into operation for the purpose of affecting the organization of the existing town and the powers and duties of such town and its officers until the election and qualification of officers for the new towns. A certified copy of a statement of the result of the vote shall be immediately filed with the clerk of the board of supervisors and another certified copy in the office of the county clerk. The board of supervisors shall designate the name of each new town so created, and shall cause a copy of the map, provided for in the preceding section, to be filed in the office of the secretary of state, together with a certificate that such new towns have been created in conformity with the provisions of this and the preceding section. Such certificate shall be published with the laws of the next legislature. It shall be the duty of the board of supervisors, within sixty days after such town meeting, if such proposition shall have been decided in the affirmative, to provide by resolution for the first election in each of such new towns in the manner provided in section thirty-six of this chapter. Such election shall be held not later than three months after such town meeting. A certified copy of the resolution fixing the date of such election shall also be filed

* So in original.

in the office of the secretary of state. No incorporated village shall be divided in the formation of new towns under the provisions of section thirty-five-a and of this section. If the majority of votes cast on such proposition be in the negative or be equal, the town shall not be so divided. The provisions of this and the preceding section shall not affect an application for the division of any town heretofore presented to any board of supervisors and now pending, but the same shall be determined as provided in section thirty-five. (*Added by L. 1917, ch. 233, in effect Apr. 20, 1917.*)

§ 36. **First election in new town.**—The board shall designate the time and place of holding the first town meeting in a new town so erected, and appoint three electors thereof, who shall post notice of such town meeting, signed by the chairman or clerk of the board of supervisors, in four conspicuous public places in such town, at least fourteen days before holding the same. Such electors shall preside at such town meeting, appoint a clerk, open and keep the polls, and exercise the same powers as justices of the peace when presiding at town meetings; but if such electors shall refuse or neglect to serve, the electors of the town present shall substitute one of their number for each one so neglecting or refusing to serve; and the posting of the notice of such meeting shall be valid if done by any elector of the town. Nothing herein shall affect the rights, or abridge the term of office of any town officer in any town, but they shall hold and exercise the offices in the town in which they shall respectively reside after the change or alteration.

Source.—Former County L. (L. 1892, ch. 686) § 35; originally revised from L. 1849, ch. 194, § 3.

§ 37. **Establishment of disputed town lines.**—Such board may establish and define boundary lines between the several towns of the county. A notice of intention to apply to the board to establish and define such boundary line, particularly describing the same, and the line as proposed to be acted upon by such board, signed by a majority of the members of the town board of some one of the towns to be affected thereby, shall be published for four consecutive weeks next preceding the meeting of the board at which the application is to be presented, in three newspapers published in the county in, or nearest to such towns, if so many, otherwise in all the newspapers published in the county as often as once a week. A copy of such notice shall also be served personally, at least fifteen days before the meeting of such board, on the supervisor and town clerk of each of the other towns to be affected thereby. A copy of the resolution, as adopted by the board, which shall contain the courses, distances and fixed monuments specified in such boundary line or lines, together with a map of the survey thereof, with the courses, distances and fixed monuments referred to therein, plainly and distinctly marked and indicated thereon, shall be filed in the office of the secretary of state within thirty days after the adoption of such resolution, who shall cause the same to be printed and

published with the laws of the next state legislature after the adoption thereof.

Source.—Former County L. (L. 1892, ch. 686) § 36; originally revised from R. S., pt. 1, ch. 8, tit. 6, §§ 3-6.

Jurisdiction.—If board proceeds to establish disputed lines without acquiring jurisdiction, an injunction will issue. Sufficiency of notice considered. *People ex rel. Town of Knox v. Supervisors of Albany* (1882), 63 How. Pr. 411. Power of supervisors to determine boundary lines of towns. *Rept. of Atty. Genl.* (1905) 307.

Effect of statute establishing line.—A board of supervisors may, under this section, ascertain and locate a disputed boundary line between two towns within the county which was established and settled by an early statute in accordance with an ancient designated map. The authorized action of a board of supervisors in determining such a boundary line cannot, in the absence of fraud, collusion or bad faith on the part of the board, be attacked in a taxpayer's action. *Govers v. Supervisors of Westchester* (1902), 171 N. Y. 403, 64 N. E. 193, affg. 55 App. Div. 40, 67 N. Y. Supp. 27 (1900).

Review by courts.—The resolution of a board of supervisors, classified in the Constitution as a legislative body, fixing the location of a disputed boundary line between a town and a city within the county, passed by a majority vote of all the members, is a legislative act not subject to judicial review. The fact that the board upon the hearing of the application of which notice had been given as required by the statute took the sworn testimony of witnesses did not deprive it of its power to act without evidence, the statute not requiring it to be taken. *People ex rel. Town of Scarsdale v. Supervisors of Westchester* (1912), 149 App. Div. 319, 133 N. Y. Supp. 760.

§ 38. Fire districts outside of incorporated villages.—1. Each board of supervisors may, on the written, verified petition of the taxable inhabitants of a proposed fire district outside of an incorporated village or city, and within the county, whose names appear on the last preceding assessment-roll of the town wherein such proposed fire district is located, as owning or representing more than one-half of the taxable real property of such district, or as owning or representing more than one-half of the taxable real property of such district, owned by the residents thereof, establish such district as a fire district. Where such proposed fire district is situated in two or more counties, the board of supervisors of each county in which a part of such fire district is located, may, by resolution, on the written, verified petition of the taxable inhabitants of that portion of the proposed fire district located in such county, whose names appear on the last preceding assessment-roll of the town or towns in which the proposed fire district is located, as owning or representing one-half of the taxable real property of that part of such proposed fire district located in such county owned by the residents thereof, direct that when a similar resolution is adopted by the board of supervisors of each of the other counties in which such proposed fire district is located, and upon the adoption of such resolution by each such board, such fire district shall be and be deemed to be legally established. No such district shall extend in any direction to exceed one mile from the nearest engine or hose or hook and ladder house

located within the district, or to exceed three miles from the nearest station at which an automobile fire engine or an automobile chemical engine is maintained within the district. When any two or more fire districts, established as above provided, not within an incorporated village, adjoin each other, the board of supervisors of the county in which said districts are located, may, upon a written, verified petition of the taxable inhabitants of each of said districts whose names appear on the last preceding assessment-roll of the town or towns within which said fire districts are located, as owning or representing more than one-half of the taxable real property of each of said districts, or as owning or representing more than one-half of the taxable real property of each of said districts owned by the residents thereof, consolidate such fire districts and establish the same into one fire district. The trustees of such fire district hereinafter provided may establish, equip and maintain such engine, hose or hook and ladder houses as they may deem necessary. (*Subd. 1 amended by L. 1914, ch. 381.*)

2. When any such fire district has been established or consolidated in the manner above provided, the legal voters thereof may elect not less than three nor more than five residents thereof to be the fire commissioners for a term of five years or such less term as a majority of such voters at the time of any such election may express on their ballots; and may also elect a treasurer in such fire district for a term of three years, who shall be entitled to receive and have the custody of the funds of the district and pay out the same for the purposes herein provided for, on the order of the fire commissioners, which treasurer before entering on the duties of his office, shall give such security as the board or boards of supervisors may require. The first election for such fire commissioners and treasurer shall be called by the clerk of the town within which any such district shall be established, or when any such district is within more than one town within the county, or if located in more than one county, by the clerks of such towns jointly and concurrently, within thirty days from the establishment or consolidation of such fire district or districts, and upon such notice and in the same manner as required for special town meetings. All subsequent elections shall be called in the same manner by the clerk or clerks of the town or towns, not less than thirty days prior to the expiration of the term of office of any such commissioners or of the treasurer; special elections to fill any vacancies shall be called in the same manner within thirty days after any such vacancy shall occur.

3. Any such district when established or consolidated shall be known by such name as the fire commissioners thereof may adopt at their first meeting for the organization, and thereafter such fire commissioners shall be authorized and empowered to purchase apparatus for the extinguishment of fires therein; rent or purchase suitable real estate and buildings or erect, alter or repair buildings, for the keeping and storing of the same; and to procure supplies of water, and have control and provide for the maintenance and support of a fire department in such district; and shall

have power to organize fire, hook, hose, ladder, axe and bucket fire patrol companies; and to appoint a suitable number of able and respectable inhabitants of said district as firemen and to prescribe the duties of the firemen and the rules and regulations for the government of all companies and of the fire department in such district; and who shall have power to make any and all contracts within the appropriations voted by the resident taxpayers of the district for the purpose of carrying out the authorization and powers herein granted.

4. Such fire commissioners may expend in any one year for any or all the purposes above specified a sum or sums not exceeding the total of one hundred dollars, and make a contract for a supply of water for fire purposes for a period not to exceed five years, without any appropriation voted therefor by the taxpayers of such district. For the purpose of giving effect to these provisions the fire commissioners are hereby authorized whenever a tax shall be voted to be collected in instalments for the purposes of carrying out the authorization and powers herein granted, to borrow so much of the sum voted as may be necessary at a rate of interest not exceeding six per centum per annum and to issue bonds or other evidences of indebtedness therefor, which shall be a charge upon the district and be paid at maturity; and such bonds shall not be sold below par; due notice of the time and place of the sale of such bonds shall be given at least ten days prior thereto; the payment or collection of the last instalment shall not be extended beyond ten years from the time when such vote was taken.

5. Whenever the fire commissioners in any such fire district shall submit a request in writing for an appropriation of any sum of money for the purposes herein authorized, the clerk or clerks of the town or towns in which such fire district shall be located, shall call a meeting of the resident taxpayers of the district for the purpose of voting upon the question of appropriating such money, such meeting to be called by a notice posted conspicuously in at least two of the most public places in such fire district, at least ten days before the holding of any such meeting, which notices shall state the time, place and purpose of the meeting. At any such meeting such resident taxpayers may appropriate the amount requested by the fire commissioners, or any less amount, and may determine that the sum so appropriated or some part thereof shall be raised by instalments. When any such appropriations is made, or when any amount less than the sum of one hundred dollars shall have been expended by such fire commissioners, as above authorized, the amount appropriated or expended and the amount contracted to be paid yearly for the supply of water for fire purposes, shall be assessed, levied and collected on such district, in the same manner, at the same time and by the same officers as the taxes of the town in which the district is located, are assessed, levied and collected, and when collected shall be paid over immediately by the supervisor of the town to the treasurer of the fire district; and the town

shall be responsible for any and all sums so collected until the same shall be paid over to such treasurer.

6. Such fire commissioners shall before the annual meeting of the board of supervisors present to the supervisor of the town or towns in which such fire district is situated an itemized and verified statement in duplicate of the amount expended by them during the preceding year, without an appropriation having been made therefor by the taxpayers of such district. The supervisors shall file one of such duplicates in the office of the town clerk, and one shall be presented by him to the board of supervisors.

7. All meetings of any such district called for the election of officers, or for the appropriation of money, shall be presided over by a resident taxpayer to be designated by the fire commissioners, except that the first meeting after any such fire district shall have been established shall be presided over by a resident taxpayer selected by the legal voters at the meeting; and all elections for fire commissioners and for treasurer shall be by ballot, in the same manner as is provided for the election of other town officers. Such meetings shall be open to receive ballots for not less than two hours, which hours shall be stated in the notice. There shall be one inspector to receive ballots and one clerk to record the names of the voters. The chairman, inspector and clerk shall receive the sum of three dollars each for their service as such.

8. The board of supervisors in any county in which any such fire district shall have been heretofore or shall be hereafter established, or, where such fire district is located in two or more counties, the several boards of supervisors of the counties in which a part of such fire district is located, by resolution adopted in the manner provided for the establishment of such district, may at any time, upon the written verified petition of the taxable inhabitants of any such district, whose names appear upon the last preceding assessment-roll of the town within which such district is located as owning or representing more than one-half of the taxable real property of such district, or as owning or representing more than one-half of the taxable real property in such district owned by the residents thereof, discontinue such district as a fire district, and upon such action being taken by the supervisors, the fire commissioners of such district, where it is wholly within a village incorporated since said district was formed, shall turn over to any fire corporation organized by the trustees of said village all the property thereof, such village to pay all the debts thereof, and in other than such last-named districts the fire commissioners shall proceed to sell the property belonging to such district at public sale; three notices of such sale shall be posted conspicuously in three of the most public places in the district, for a period of thirty days prior to the sale, and the proceeds of such sale shall be paid over by the treasurer of the district to the supervisor of the town and the sum so paid over shall be credited to

the taxable real property located in such district, in the next succeeding assessment of town taxes, provided, however, that, if there be outstanding any bonded or other indebtedness of such fire district, the proceeds of such sale shall be used to pay such bonds or obligations as shall then be due, and as to any bonds or obligations which are not due, such part of said proceeds as shall be sufficient to meet such outstanding bonds or obligations at their maturity shall be invested and held by the county treasurer under the supervision of the board of supervisors as a sinking fund for the redemption of such outstanding bonds or obligations at their maturity. Provided, however, that if it shall, at any time, be possible to purchase at par or less any of such bonds or obligations, such board of supervisors may cause to be bought in and canceled any such bonds or obligations of the fire district; and if such proceeds of such sale and the income therefrom be not sufficient to redeem such bonds or obligations at their maturity, and to pay the interest thereon, then there shall be levied and collected, in annual instalments, from the district charged with the payment of such bonds or obligations, such a sum as will be sufficient to pay the interest on such bonds or obligations and to redeem them at their maturity. If, however, there shall be any excess collected, such excess shall be paid over to the supervisor of the town, and the sum so paid over to the supervisor shall be credited to the taxable real property located in such district, in the next succeeding assessment of town taxes. (*Subd. 8, amended by L. 1910, ch. 115.*)

9. Whenever any portion of any such fire district heretofore or hereafter established shall be incorporated into the corporate limits of any incorporated village or city, the board of supervisors of the county in which such district is located, or where such fire district is located in two or more counties, the several boards of supervisors, by resolution adopted as herein provided for the establishment of such district, shall, upon the written verified petition of more than one-half in assessed valuation of the taxable inhabitants of such incorporated portion of the fire districts, or upon the written, verified petition of more than one-half in assessed valuation of the taxable inhabitants of such unincorporated portion of the fire district, change the boundaries of such district in such manner as shall exclude such incorporated portion of the district, if the petition be by such taxable inhabitants of the incorporated portion, or in such manner as to exclude such unincorporated portions of the district, if the petition be by such taxable inhabitants of the unincorporated parts and thereafter such excluded portion of the district shall not be entitled to the protection, nor liable to be assessed or taxed for the support of the fire department of such district, and the portion not excluded shall thereupon assume and be liable to pay all the bonded or other indebtedness of said district. (*Subd. 9 amended by L. 1910, ch. 115.*)

10. Where any two fire districts not within any incorporated village ad-

join each other, the boundary line between such districts may be changed by the board of supervisors of the county in which they are located, or, where such fire district is located in two or more counties, by resolution adopted in the manner herein provided for establishing such district, as the case may be, upon a written verified petition of the taxable inhabitants of the portion of the fire district applied to be changed, whose names appear upon the last preceding assessment-roll of the town within which said portion of said fire district is located, as owning or representing more than one-half of the taxable property of such portion of said fire district, or as owning or representing more than one-half of the taxable real property of such portion of said fire district owned by the residents thereof, provided the taxable inhabitants of both said fire districts and within the county, whose names appear upon the last preceding assessment-roll of the town or towns, owning or representing more than one-half of the taxable property of said district, or as owning or representing more than one-half of the taxable real property of such fire districts owned by the residents thereof, shall consent in writing to such change.

11. Territory not in a city, village or fire district may be annexed to an adjoining fire district as provided in this subdivision. A verified petition for such annexation describing the territory and signed by taxable inhabitants whose names appear on the last preceding assessment-roll of the town wherein such proposed annexed territory is located as owning or representing more than one-half of the taxable real property of such annexed territory or as owning or representing more than one-half of the taxable real property of such annexed territory owned by the residents thereof, may be presented to the commissioners of such fire district. Each person signing the petition shall state opposite his or her name the assessed valuation of the property assessed to him or her in such territory. Such petition must be verified by at least three persons signing the same to the effect that the petition represents in value more than one-half of the assessed valuation of the property as above described or that it represents in value more than one-half of the taxable real property of such territory owned by the residents thereof. Such petition must be accompanied by a resolution of the board of supervisors of the county in which such territory is situated consenting to such annexation. Upon the presentation of such petition and consent the fire commissioners shall cause a proposition for such annexation to be submitted at a special election. If the proposition be adopted, the petition and consent and the certificate of the election shall be recorded in the book of records of the commissioners of the district. Such annexation shall take effect upon the receipt by the fire commissioners of the certificate of the clerk of the board of supervisors, under the seal of his office, certifying that he has received and placed on file in the office of the board of supervisors an outline map and description of the corporate limits of such fire district as extended, together with the date of filing the same in his office. Such outline map and description shall plainly show and describe

the territory annexed. A certificate thereof containing a description of the territory annexed shall, within ten days after such election, be filed by the fire commissioners in the offices of the clerk of the town and of the county in which such annexed territory is situated. (*Subd. 11 added by L. 1913, ch. 127. Section amended by L. 1909, ch. 405.*)

Source.—Former County L. (L. 1892, ch. 686) § 37, as amended by L. 1895, ch. 937; L. 1896, ch. 902; L. 1897, ch. 329; L. 1902, ch. 142; L. 1903, ch. 196; L. 1906, ch. 249; originally revised from L. 1875, ch. 482, § 1, subds. 21, 34, as added by L. 1880 ch. 512, amended by L. 1880, ch. 512; L. 1889, ch. 264; L. 1890, ch. 180.

References.—Incorporation of fire companies in unincorporated villages, and the general powers of such companies. Membership Corporations Law, §§ 103–105.

Presumption is in favor of legality of petition, and those attacking it must show that the signers are not taxpayers. *People ex rel. O'Connor v. Supervisors of Queens* (1897), 153 N. Y. 370, 47 N. E. 790.

Recital of repealed statute does not invalidate the resolution of the board. *Matter of Rockaway Park Imp. Co.* (1894), 83 Hun 263, 31 N. Y. Supp. 386.

Review by courts.—Writ of certiorari will not issue to review the action of a board of supervisors in establishing a fire district, since such action is legislative. *People ex rel. O'Connor v. Supervisors of Queens* (1897), 153 N. Y. 370, 47 N. E. 790. Cited in *Weston v. City of Syracuse* (1899), 158 N. Y. 274, 286, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. Rep. 472.

Election of fire commissioners must follow act of board creating fire district. *Matter of Rockaway Park Imp. Co.* (1894), 83 Hun 263, 31 N. Y. Supp. 386.

Women may vote on an appropriation of money for a fire district. *Rept. of Atty. Genl.* (1904) 407.

Assessments for fire department purposes. *Rept. of Atty. Genl.* (1896) 188. **Taxation in fire districts in unincorporated villages.** *Rept. of Atty. Genl.* (1899) 356.

Who may vote on question of annexation.—Only qualified voters residing in the original fire district are entitled to vote at a special election called for the purpose of annexing territory. Those residing in the territory to be annexed are mere petitioners submitting their requests to the original fire district and can in no way participate in such special election. *Opinion of Atty. Genl.*, November (1916), 9 State Dept. Rep. 449.

§ 39. Effect of incorporation of village within limits of fire district.—Whenever any fire district is located entirely within the corporate limits of two or more villages by virtue of the incorporation of such villages after the establishment of such fire district, and the said villages or either of them has not been excluded from the limits or boundaries of such fire districts in accordance with the provisions of section thirty-eight of this chapter, the town board and the board of fire commissioners of such fire district, shall meet together on the Friday next preceding the annual meeting of the board of supervisors and estimate the amount necessary for the support of the fire department within such fire district, the purchase, lease and maintenance of suitable real estate and buildings for the keeping and storing of the same for the purchase of the water supply for fire purposes and for the payment of debts and accounts which may have become due and shall certify the same to the board of supervisors of the county, which said estimated amount shall, in the same manner as the expenses of the town are raised, be assessed,

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levied and collected only from the property within such fire district. The collector shall pay the sums thus collected to the supervisor of the town who shall pay the same to the treasurer of the fire district upon the order of the board of fire commissioners.

Source.—Former County L. (L. 1892, ch. 686) § 37-a, as added by L. 1904, ch. 277, § 1.

§ 40. **Soldiers' monument.**—Any such board may also, by a vote of two-thirds of its members, raise and appropriate such moneys as it may deem necessary, for the erection within the county of public monuments, in commemoration of the federal soldiers and sailors in the late war of the rebellion, or of any other public person or event, and for repairing and remodeling such monuments; all moneys so raised shall be expended by direction of the board of supervisors; but no county officer shall receive any compensation for services rendered pursuant to this section.

Source.—Former County L. (L. 1892, ch. 686) § 38; originally revised from L. 1869, ch. 855, § 4, as amended by L. 1892, ch. 23.

References.—Acquisition of lands for erection of soldiers' monuments in towns and villages, General Municipal Law, § 72. Incorporation of soldiers' monuments corporations, Membership Corporations Law, §§ 170-173. Town may vote to erect soldiers' monument, Town Law, § 45.

Power to raise money for the purpose of erecting soldiers' monument. Rept. of Atty. Genl. (1903) 408.

Appropriation for memorial of establishment of town.—This section permits supervisors by a two-thirds vote to authorize the appropriation of money for the erection of a monument as a memorial of the date of the establishment of the town, upon which may be recited other information of general historical interest. Rept. of Atty. Genl. (1912), Vol. 2, p. 508.

§ 41. **Temporary loans; issue of obligations therefor.**—Whenever moneys are borrowed by a county on temporary loans, pursuant to a resolution duly adopted by the board of supervisors of such county, in anticipation of the taxes of the current fiscal year and for the purposes for which such taxes are levied as provided by section five of the general municipal law, the notes, certificates of indebtedness or other county obligations issued for the moneys so borrowed shall be signed by the county treasurer and countersigned by the county clerk. The county clerk shall enter in a book in his office, to be provided therefor at the expense of the county, the date of each such note, certificate of indebtedness or other county obligation, the amount for which it was issued, the time when payable, and a general statement as to the resolution of the board of supervisors authorizing the issue thereof.

Source.—Former County L. (L. 1892, ch. 686) § 39, as added by L. 1904, ch. 20, § 1.

Consolidators' note.—The obligations which are required by this section to be signed by the county treasurer would be signed by the comptroller of the city of New York under the provisions of the charter of Greater New York transferring the powers, duties and obligations of the county treasurer upon the comptroller of the city of New York. See Greater New York Charter, § 1587.

The power is conferred upon the court as such and not upon the justices thereof,

and as the power is purely statutory, the court cannot punish a sheriff as for a contempt in refusing to obey an order made by the justices of the city court on his refusal to provide them with rooms. *People ex rel. Grant v. City Court of N. Y.* (1888), 16 N. Y. St. Rep. 537, 1 N. Y. Supp. 890.

One set of rooms sufficient.—Where the board has provided an office for a surrogate at one place in a county at his request, it has complied with the provisions of this section and may not be compelled to provide another. *People ex rel. Westbrook v. Supervisors of Montgomery* (1885), 34 Hun 599.

Insurance of court house and jail.—A board of supervisors has the right to insure the court house and jail. *Rept. of Atty. Genl.* (1913) Vol. 2, p. 43.

§ 42. Supervisors to furnish funds for necessities for courts of record.—

1. Except where other provision is made therefor by law, the board of supervisors of each county must provide each court of record, appointed to be held therein, with proper and convenient rooms and furniture, together with attendants, fuel, lights, telephone, postage and stationery suitable and sufficient for the transaction of its business. If the supervisors shall neglect so to do, the court may order the sheriff to make the requisite provision; and the expense incurred by him in carrying the order into effect, when certified by the court, is a county charge. (*Subd. 1, amended by L. 1913, ch. 394, and L. 1915, ch. 443.*)

2. Except where other provision is made therefor by law, the expense of providing suitable food and lodging, and other necessary expenses, for a jury in a court of record kept together either during the progress of a trial or after they retire for deliberation, and, except in the case of a salaried interpreter appointed under the provisions of section three hundred and eighty-seven of the judiciary law and except in a county in which the appointment or compensation of court interpreters is governed by a special or local act or by a special provision of a general act, the compensation and expense of procuring an interpreter for the court during a term or part of a term or for special services, may be incurred by direction of the court and accounts therefor audited by the judge or justice presiding, and shall be paid by the county treasurer, out of county funds available therefor, upon an order of the court directing such payment, without the audit or authorization of any other body or officer; and a certified copy of each such order shall be transmitted by the clerk of the court to the county treasurer. It shall be the duty of the board of supervisors to provide annually by taxation, and appropriate and set apart for the courts of record held within the county, sufficient moneys to meet the requirements of this subdivision. If at any time the funds available for such expenses be not provided or be insufficient, the court may order the sheriff to make the requisite provision therefor; and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge. (*Amended by L. 1913, ch. 394.*)

Source.—Code Civ. Pro. § 31, as amended by L. 1899, ch. 67.

Consolidators' note.—This section was last amended by L. 1899, ch. 67. This was subsequent to the adoption of the Greater New York charter of 1897. It con-

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tains a reservation that in the city of New York the municipal assembly must observe the provisions of the section. This portion has been bracketed out for insertion in the charter of the city of New York if not already contained therein. The "municipal assembly" will be changed to "board of aldermen." The provision applies to the counties of Kings, Queens and Richmond except that the powers vested in the boards of supervisors have been devolved upon the board of aldermen under the provisions of section 1586 of the charter of the city of New York.

§ 43. Board may establish county laboratory.—The board of supervisors of any county shall have the power, by the vote of a majority of said board, to establish a county laboratory and to appoint a thoroughly trained and competent county bacteriologist to have charge of such laboratory, and such assistants as may be required.

Source.—Former County L. (L. 1892, ch. 686) § 40, as added by L. 1908, ch. 255, § 1.

§ 44. Compensation and removal of bacteriologist and assistants.—Such board of supervisors shall have, by like vote, power to fix the compensation of such county bacteriologist and to remove him from office; fix the compensation of such assistants and remove them from office; also to provide any necessary supplies, equipments, and samples not otherwise provided. Such board of supervisors may from time to time make such rules and regulations concerning the duties and liabilities of such officers as said board may deem for the best interests of the county. Provided that the board of supervisors of any county having no county bacteriologist may, and such board is hereby authorized and empowered to make a contract with a county having such county bacteriologist and county laboratory, or with a city having a city bacteriologist and city laboratory, for the performance of such services as said board may deem necessary in the interests of public health.

Source.—Former County L. (L. 1892, ch. 686) § 41, as added by L. 1908, ch. 255, § 1.

§ 45. Establishment of county hospitals for tuberculosis.—The board of supervisors of every county in the state containing a population of thirty-five thousand or more, as determined by the latest state census, shall establish, as hereinafter provided, a county hospital for the care and treatment of persons suffering from the disease known as tuberculosis, unless there already exists in such county a hospital or institution provided by the county or other authority and caring for persons suffering from tuberculosis, which is approved by the state commissioner of health. Such county hospital shall be available for patients on or before the first day of July, nineteen hundred and eighteen. If the board of supervisors of any such county shall have failed to secure a site for a county tuberculosis hospital, and to have awarded contracts for the erection of suitable buildings thereon by the first day of January, nineteen hundred and eighteen, it shall be the duty of the state commissioner of health forthwith to proceed to lo-

cate, construct and place in operation a tuberculosis hospital in and for such county, the capacity of which shall not exceed the average number of deaths per annum from tuberculosis in such county during the past five years. For such purposes the state commissioner of health shall possess, and it shall be his duty to exercise all the powers which would have been possessed by the board of supervisors of such county, had such hospital been established and placed in operation by the board of supervisors thereof. All expenditures incurred by the state commissioner of health for and in connection with the location, construction and operation of such hospital, shall be a charge upon the county, and provision shall be made for the payment therefor by the board of supervisors of such county in the same manner as in the case of other charges against the county. At any time after such hospital has been in operation, the board of supervisors in such county may appoint a board of managers for such hospital, pursuant to the provisions of this act and thirty days after the appointment of such board of managers by such board of supervisors, such hospital shall be transferred to such board of managers, and such board of managers shall thereafter possess and exercise all the powers of the board of managers of a county hospital for tuberculosis under this act, and the state commissioner of health shall be relieved from any responsibility therefor except such responsibility as he exercises in regard to all county tuberculosis hospitals under the provisions of this act.

When deemed advisable by the board of supervisors and approved by the state commissioner of health, any such county may maintain more than one county hospital for the care and treatment of persons suffering from tuberculosis. Establishment of county hospital for tuberculosis. The board of supervisors of any other county shall have power by a majority vote to establish a county hospital for the care and treatment of persons suffering from the disease known as tuberculosis; or it may submit the question of establishing such a hospital to the voters of the county at any general election, and in any county in which town meetings at which all the voters of the county may vote are held in the spring of the year, the board of supervisors of such a county shall have authority also to submit the question of establishing such a hospital at said town meetings to the electors of the county who are qualified to vote at a general election. The board of supervisors shall fix the sum of money deemed necessary for the establishment of said hospital. The form of the proposition submitted shall read as follows: "Shall the county of.....appropriate the sum of.....dollars for the establishment of a tuberculosis hospital?" The clerk of the board of supervisors, immediately upon the adoption of such resolution, shall forward to the duly constituted election authorities of the county a certified copy of said resolution providing for the submission of the proposition. The election notices shall state that the proposition will be voted upon and in the form set forth above. Such proposition shall be submitted on a distinct and separate ballot without any other question being printed

thereon, any general or special law to the contrary notwithstanding. Provision for taking such vote and for the canvassing and returning of the result shall be made by the duly constituted election authorities.

If a majority of the voters voting on such proposition shall vote in favor thereof then such hospital shall be established hereunder and the sum of money named in the said proposition shall be deemed appropriated, and it shall be the duty of the board of supervisors to proceed forthwith to exercise the powers and authority conferred upon it in this section.

When the board of supervisors of any county shall have voted to establish such hospital, or when a referendum on the proposition of establishing such a hospital in a county, as authorized above, shall have been carried, the board of supervisors shall :

1. Purchase or lease real property therefor, or acquire such real property, and easements therein, by condemnation proceedings, in the manner prescribed by the condemnation law, in any town, city or village in the county. After the presentation of the petition in such proceeding prescribed in section three thousand three hundred and sixty of the code of civil procedure and the filing of the notice of pendency of action prescribed in section three thousand three hundred and eighty-one thereof, said board of supervisors shall be and become seized of the whole or such part of the real property described in said petition to be so acquired for carrying into effect the provisions of this act, as such board may, by resolution adopted at a regular or special session, determine to be necessary for the immediate use, and such board for and in the name of such county may enter upon, occupy and use such real property so described and required for such purposes. Such resolution shall contain a description of the real property of which possession is to be taken and the day upon which possession will be taken. Said board of supervisors shall cause a copy of such resolution to be filed in the county clerk's office of the county in which such property is situate, and notice of the adoption thereof, with a copy of the resolution and of its intention to take possession of the premises therein described on a day certain, also therein named, to be served, either personally or by mail, upon the owner or owners of, and persons interested in such real property, at least five days prior to the day fixed in such resolution for taking possession. From the time of the service of such notice, the entry upon and appropriation by the county of the real property therein described for the purposes provided for by this act, shall be deemed complete, and such notice so served shall be conclusive evidence of such entry and appropriation and of the quantity and boundaries of the lands appropriated. The board of supervisors may cause a duplicate copy of such papers so served, with an affidavit of due service thereof on such owner or person interested, to be recorded in the books used for recording deeds in the office of the county clerk of its county, and the record of such notice and such proof of service shall be prima facie evidence of the due service thereof. Compensations for property thus acquired shall be made in such condemnation proceeding.

2. Erect all necessary buildings and alter any buildings, on the property when acquired for the use of said hospital, provided that the location of the buildings and the plans and such part of the specifications as shall be required by the state commissioner of health for such erection or alteration together with the initial equipment shall first be approved by the state commissioner of health. Any changes in such location or plans shall also be first approved by the state commissioner of health and the state commissioner of health and his duly authorized representatives shall have the power to inspect such county hospitals during the course of their construction for the purpose of seeing that such plans are complied with.

3. Cause to be assessed, levied and collected such sums of money as it shall deem necessary for suitable lands, buildings and improvements for said hospital, and for the maintenance thereof, and for all other necessary expenditures therefor; and to borrow money for the erection of such hospital and for the purchase of a site therefor on the credit of the county, and issue county obligations therefor, in such manner as it may do for other county purposes.

4. Appoint a board of managers for said hospital as hereinafter provided.

5. Accept and hold in trust for the county, any grant or devise of land, or any gift or bequest of money or other personal property, or any donation to be applied, principal or income, or both, for the benefit of said hospital, and apply the same in accordance with the terms of the gift.

6. Whenever it shall deem it in the public interest so to do, and notwithstanding the provisions of any other general or special act, change the location of such hospital and acquire a new site by purchase, lease or condemnation, as provided in this section, and establish the hospital thereon. (*Added by L. 1909, ch. 341, and amended by L. 1913, chs. 166, 379, L. 1914, ch. 323, L. 1915, chs. 132, 427, and L. 1917, ch. 469, in effect May 15, 1917.*)

References.—Power and duties of state department of health as to hospitals or camps for treatment of tuberculosis, Public Health Law, §§ 319-332.

Constitutionality of section, as amended, upheld. *Smith v. Smith* (1916), 174 App. Div. 473, 160 N. Y. Supp. 574.

Referendum.—The general election at which public officers may be elected referred to in the statute authorizing a referendum upon the establishment of a county tuberculosis hospital, is the regular fall election held on the Tuesday next succeeding the first Monday in November. *Opinion of Atty. Genl.* (1914) 365.

Where, after a board of county supervisors had voted to establish a county hospital for tuberculosis and had acquired lands for that purpose, the County Law was amended to provide that the supervisors might submit the question of establishing such hospital to the voters of the county, it was proper for them to rescind their former resolution and submit the question to a popular vote, and in so doing they were not required to inform the voters as to all the considerations implied in the proposal relating to the possible future expenses of such an institution. *Smith v. Smith* (1916), 174 App. Div. 473, 160 N. Y. Supp. 574. Compare *Rept. of Atty. Genl.* (1914) Vol. 2, p. 331.

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Approval of State Commissioner of Health.—See *People ex rel. Buckbee v. Biggs* (1916), 171 App. Div. 373, 156 N. Y. Supp. 1038.

Section cited.—*Richardson v. County of Steuben* (1916), 174 App. Div. 491, 493, 160 N. Y. Supp. 445.

§ 46. **Appointment and terms of office of managers.**—When the board of supervisors shall have determined to establish a hospital for the care and treatment of persons suffering from tuberculosis, and shall have acquired a site therefor, and shall have awarded contracts for the necessary buildings and improvements thereon, it shall appoint five citizens of the county, of whom at least two shall be practicing physicians, who shall constitute a board of managers of the said hospital. The term of office of each member of said board shall be five years, and the term of one of such managers shall expire annually; the first appointments shall be made for the respective terms of five, four, three, two and one years. Appointments of successors shall be for the full term of five years, except that appointment of persons to fill vacancies occurring by death, resignation or other cause shall be made for the unexpired term. Failure of any manager to attend three consecutive meetings of the board shall cause a vacancy in his office, unless said absence is excused by formal action of the board of managers. The managers shall receive no compensation for their services, but shall be allowed their actual and necessary traveling and other expenses, to be audited and paid, in the same manner as the other expenses of the hospital, by the board of supervisors. Any manager may at any time be removed from office by the board of supervisors of the county, for cause after an opportunity to be heard. (*Added by L. 1909, ch. 341.*)

§ 47. **General powers and duties of managers.**—The board of managers.

1. Shall elect from among its members, a president and one or more vice-presidents. It shall appoint a superintendent of the hospital who shall be also the treasurer and secretary of the board, and it may remove him for cause stated in writing and after an opportunity to be heard thereon after due notice; and may suspend him from duty pending the disposition of such charges. Said superintendent shall not be a member of the board of managers, and, except in the county of Monroe, shall be a graduate of an incorporated medical college, with an experience of at least three years in the actual practice of his profession. (*Subd. 1, amended by L. 1915, ch. 132, and L. 1917, ch. 701, in effect June 1, 1917.*)

2. Shall fix the salaries of the superintendent and all other officers and employees within the limits of the appropriation made therefor by the board of supervisors, and such salaries shall be compensation in full for all services rendered. The board of managers shall determine the amount of time required to be spent at the hospital by said superintendent in the discharge of his duties.

3. Shall have the general superintendence, management and control of the said hospital, of the grounds, buildings, officers and employees thereof; of the inmates therein, and of all matters relating to the government, discipline, contracts, and fiscal concerns thereof; and make such rules and regulations as may seem to them necessary for carrying out the purposes of such hospital.

4. Shall maintain an effective inspection of said hospital, and keep itself informed of the affairs and management thereof; shall meet at the hospital at least once in every month, and at such other times as may be prescribed in the by-laws; and shall hold its annual meeting at least three weeks prior to the meeting of the board of supervisors at which appropriations for the ensuing year are to be considered.

5. Shall keep in a book provided for that purpose, a proper record of its proceedings which shall be open at all times to the inspection of its members, to the members of the board of supervisors of the county, and to duly authorized representatives of the state board of charities.

6. Shall certify all bills and accounts including salaries and wages and transmit them to the board of supervisors of the county, who shall provide for their payment in the same manner as other charges against the county are paid. The board of supervisors of a county not having a purchasing agent or auditing commission may make an appropriation for the maintenance of such hospital and direct the county treasurer to pay all bills, accounts, salaries and wages, which are approved by the board of managers, within the amount of such appropriation, subject to such regulations as to the payment and audit thereof as the board of supervisors may deem proper. (*Subdivision amended by L. 1913, ch. 40.*)

7. Shall make to the board of supervisors of the county annually, at such time as said supervisors shall direct, a detailed report of the operations of the hospital during the year, the number of patients received, the methods and results of their treatment, together with suitable recommendations and such other matter as may be required of them, and full and detailed estimates of the appropriations required during the ensuing year for all purposes including maintenance, the erection of buildings, repairs, renewals, extensions, improvements, betterments or other necessary purposes.

8. Shall notwithstanding any other general or special law erect all additional buildings found necessary after the hospital has been placed in operation and make all necessary improvements and repairs within the limits of the appropriations made therefor by the board of supervisors, provided that the location of the buildings and the plans and such part of the specifications as shall be required by the state commissioner of health for such additional buildings, improvements or repairs shall first be approved by the state commissioner of health. Any change in such location or plans shall also be first approved by the state commissioner of health and the

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state commissioner of health and his duly authorized representatives shall have the power to inspect such county hospitals during the course of the construction of such additional building for the purpose of seeing that such plans are complied with. (*Subd. 8, added by L. 1913, ch. 379, and amended by L. 1917, ch. 469, in effect May 15, 1917.*)

9. Shall employ a county nurse, or an additional nurse or nurses if it deems necessary, for the discovery of tuberculosis cases and for the visitation of such cases and of patients discharged from the hospital and for such other duties as may seem appropriate; and shall cause to be examined by the superintendent or one of his medical staff suspected cases of tuberculosis reported to it by the county nurse, or nurses, or by physicians, teachers, employers, heads of families or others; and it may take such other steps for the care, treatment and prevention of tuberculosis as it may from time to time deem wise. (*Subd. 9, added by L. 1914, ch. 323, and amended by L. 1917, ch. 469, in effect May 15, 1917. Section added by L. 1909, ch. 341.*)

Bills for equipment of a county tuberculosis hospital audited by the superintendent and board of managers should also be audited by the board of supervisors or the county auditor before they may be legally paid by the treasurer. Opinion of State Comptroller (1916), 10 State Dept. Rep. 532.

§ 48. General powers and duties of superintendent.—The superintendent shall be the chief executive officer of the hospital and subject to the by-laws, rules and regulations thereof, and to the powers of the board of managers:

1. Shall equip the hospital with all necessary furniture, appliances, fixtures and other needed facilities for the care and treatment of patients and for the use of officers and employees thereof, and shall in counties where there is no purchasing agent purchase all necessary supplies.

2. Shall have general supervision and control of the records, accounts, and buildings of the hospital and all internal affairs, and maintain discipline therein, and enforce compliance with, and obedience to all rules, by-laws and regulations adopted by the board of managers for the government, discipline and management of said hospital, and the employees and inmates thereof. He shall make such further rules, regulations and orders as he may deem necessary, not inconsistent with law, or with the rules, regulations and directions of the board of managers.

3. Shall appoint such resident officers and such employees as he may think proper and necessary for the efficient performance of the business of the hospital, and prescribe their duties; and for cause stated in writing, after an opportunity to be heard, discharge any such officer or employee at his discretion.

4. Shall cause proper accounts and records of the business and operations of the hospital to be kept regularly from day to day, in books and on records provided for that purpose; and see that such accounts and records

are correctly made up for the annual report to the board of supervisors, as required by subdivision seven of section forty-seven of this chapter, and present the same to the board of managers, who shall incorporate them in their report to the said supervisors.

5. Shall receive into the hospital in the order of application any person found to be suffering from tuberculosis in any form who is entitled to admission thereto under the provisions of this chapter, excepting that if at any time there be more applications for admission to said hospital than there are vacant beds therein, said superintendent shall give preference in the admission of patients to those who in his judgment, after an inquiry as to the facts and circumstances, are more likely to infect members of their households and others, in each instance signing and placing among the permanent records of the hospital a statement of the facts and circumstances upon which he bases his judgment as to the likelihood of transmitting infection, and reporting each instance at the next meeting of the board of managers; and shall also receive persons from other counties as hereinafter provided. Said superintendent shall cause to be kept proper accounts and records of the admission of all patients, their name, age, sex, color, marital condition, residence, occupation and place of last employment. (*Subd. 5 added by L. 1909, ch. 341, and amended by L. 1912, chs. 149 and 239, L. 1913, ch. 379, and L. 1915, ch. 132.*)

6. Shall cause a careful examination to be made of the physical condition of all persons admitted to the hospital and provide for the treatment of each such patient according to his need; and shall cause a record to be kept of the condition of each patient when admitted, and from time to time thereafter.

7. Shall discharge from said hospital any patient who shall wilfully or habitually violate the rules thereof; or who is found not to have tuberculosis; or who is found to have recovered therefrom; or who for any other reason is no longer a suitable patient for treatment therein; and shall make a full report thereof at the next meeting of the board of managers.

8. Shall collect and receive all moneys due the hospital, keep an accurate account of the same, report the same at the monthly meeting of the board of managers, and transmit the same to the treasurer of the county within ten days after such meeting.

9. Shall before entering upon the discharge of his duties, give a bond in such sum as the board of managers may determine, to secure the faithful performance of such duties. (*Section added by L. 1909, ch. 341.*)

10. May attend such courses in the diagnosis and treatment of tuberculosis and in hospital administration at the state hospital for the treatment of incipient pulmonary tuberculosis at Raybrook as may be established and which he may be authorized to attend by the board of managers of his hospital. The necessary expenses in traveling to and from the said state hos-

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pital for the treatment of incipient pulmonary tuberculosis at Raybrook for the purpose of taking such courses shall be a county charge. (*Subd. 10, added by L. 1917, ch. 469, in effect May 15, 1917. Section added by L. 1909, ch. 341, and amended by L. 1912, chs. 149, 239, L. 1913, ch. 379, L. 1915, ch. 132, and L. 1917, ch. 469, in effect May 15, 1917.*)

§ 49. Admission of patients from county in which hospital is situated.—Any resident of the county in which the hospital is situated desiring treatment in such hospital, may apply in person to the superintendent or to any reputable physician for examination, and such physician, if he find that said person is suffering from tuberculosis in any form, may apply to the superintendent of the hospital for his admission. Blank forms for such applications shall be provided by the hospital, and shall be forwarded by the superintendent thereof gratuitously to any reputable physician in the county, upon request. So far as practicable, applications for admission to the hospital shall be made upon such forms. The superintendent of the hospital, upon the receipt of such application, if it appears therefrom that the patient is suffering from tuberculosis, and if there be a vacancy in the said hospital, shall notify the person named in such application to appear in person at the hospital. If, upon personal examination of such patient, or of any patient applying in person for admission, the superintendent is satisfied that such person is suffering from tuberculosis, he shall admit him to the hospital as a patient. All such applications shall state whether, in the judgment of the physician, the person is able to pay in whole or in part for his care and treatment while at the hospital; and every application shall be filed and recorded in a book kept for that purpose in the order of their receipt. When said hospital is completed and ready for the treatment of patients, or whenever thereafter there are vacancies therein, admissions to said hospital shall be made in the order in which the names of applicants shall appear upon the application book to be kept as above provided, in so far as such applicants are certified to by the superintendent to be suffering from tuberculosis. No discrimination shall be made in the accommodation, care or treatment of any patient because of the fact that the patient or his relatives contribute to the cost of his maintenance in whole or in part, and no patient shall be permitted to pay for his maintenance in such hospital a greater sum than the average per capita cost of maintenance therein, including a reasonable allowance for the interest on the cost of the hospital; and no officer or employee of such hospital shall accept from any patient thereof any fee, payment or gratuity whatsoever for his services. (*Added by L. 1909, ch. 341.*)

§ 49-a. Maintenance of patients in the county in which hospital is situated.—Wherever a patient has been admitted to said hospital from the

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county in which the hospital is situated, the superintendent shall cause such inquiry to be made as he may deem necessary, as to his circumstances, and of the relatives of such patient legally liable for his support. If he find that such patient, or said relatives are able to pay for his care and treatment in whole or in part, an order shall be made directing such patient, or said relatives to pay to the treasurer of such hospital for the support of such patient a specified sum per week, in proportion to their financial ability, but such sum shall not exceed the actual per capita cost of maintenance. The superintendent shall have the same power and authority to collect such sum from the estate of the patient, or his relatives legally liable for his support, as is possessed by an overseer of the poor in like circumstances. If the superintendent find that such patient, or said relatives are not able to pay, either in whole or in part, for his care and treatment in such hospital, the same shall become a charge upon the county. When any indigent patient shall have been admitted to any such hospital as a resident of the county in which the hospital is located, and it shall be found that such patient has not acquired a settlement within such county under the provisions of the poor law, the superintendent of such hospital shall collect from the county in which such patient has a settlement the cost of his maintenance in such hospital, or may in his discretion return such patient to the locality in which he has a settlement. (*Added by L. 1909, ch. 341, and amended by L. 1912, chs. 149 and 239, L. 1913, ch. 379.*)

§ 49-b. Admission of patients from counties not having a hospital.—

In any county not having a county hospital for the care and treatment of persons suffering from tuberculosis, a county superintendent of the poor, upon the receipt of the application and certificate hereinafter provided for, shall apply to the superintendent of any such hospital established by any other county, for the admission of such patient. Any person residing in a county in which there is no such hospital, who desires to receive treatment in such a hospital, may apply therefor in writing to the superintendent of the poor of the county in which he resides on a blank to be provided by said superintendent for that purpose, submitting with such application a written certificate signed by a reputable physician on a blank to be provided by the superintendent of the poor for such purpose, stating that such physician has, within the ten days then next preceding, examined such person, and that, in his judgment, such person is suffering from tuberculosis. The superintendent of the poor, on receipt of such application and certificate, shall forward the same to the superintendent of any hospital for the care and treatment of tuberculosis. If such patient be accepted by such hospital, the superintendent of the poor shall provide for his transportation thereto, and for his maintenance therein at a rate to be fixed as hereinafter provided. (*Added by L. 1909, ch. 341, and amended by L. 1917, ch. 469, in effect May 15, 1917.*)

§ 49-c. **Maintenance of patients from counties not having a hospital.**—Whenever the superintendent of such a county hospital, shall receive from a superintendent of the poor of any other county an application for the admission of a patient, if it appear from such application that the person therein referred to is suffering from tuberculosis, the superintendent shall notify said person to appear in person at the hospital, provided there be a vacancy in such hospital and there be no pending application from a patient residing in the county in which the hospital is located. If, upon personal examination of the patient, the superintendent is satisfied that such patient is suffering from tuberculosis, he shall admit him to the hospital. Every patient so admitted shall be a charge against the county sending such patient, at a rate to be fixed by the board of managers, which shall not exceed the per capita cost of maintenance therein, including a reasonable allowance for interest on the costs of the hospital; and the bill therefor shall, when verified by the superintendent of the poor of the county from which said patient was sent, be audited and paid by the board of supervisors of the said county. The said superintendent of the poor shall cause an investigation to be made into the circumstances of such patient, and of his relatives legally liable for his support, and shall have the same authority as an overseer of the poor in like circumstances to collect therefrom, in whole or in part, according to their financial ability, the cost of the maintenance of such person in said hospital. (*Added by L. 1909, ch. 341.*)

§ 49-d. **Visitation and inspection.**—The resident officer of the hospital shall admit the managers into every part of the hospital and the premises and give them access on demand to all books, papers, accounts and records pertaining to the hospital and shall furnish copies, abstracts and reports whenever required by them. All hospitals established or maintained under the provisions of sections forty-five to forty-nine-e, inclusive, of this chapter, shall be subject to inspection by any duly authorized representative of the state board of charities, of the state department of health, of the state charities aid association and of the board of supervisors of the county; and the resident officers shall admit such representatives into every part of the hospital and its buildings, and give them access on demand to all records, reports, books, papers and accounts pertaining to the hospital. (*Added by L. 1909, ch. 341.*)

§ 49-e. **Hospitals at almshouses.**—Wherever a hospital for the care and treatment of persons suffering from tuberculosis exists in connection with, or on the grounds of a county almshouse, the board of supervisors may, after sections forty-five to forty-nine-e of this chapter take effect, appoint a board of managers for such hospital and such hospital, and its board of managers, shall thereafter be subject to all the provisions of this act, in

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like manner as if it had been originally established hereunder. Any hospital for the care and treatment of tuberculosis which may hereafter be established by any board of supervisors shall be subject to all the provisions of said sections. No hospital authorized under the provisions of this chapter shall hereafter be located on the grounds of an almshouse. (*Added by L. 1909, ch. 341, and amended by L. 1913, ch. 379.*)

The term "grounds" as used in this section means the immediate grounds or lands upon which the almshouse buildings are erected, and does not refer to all lands which may be used and cultivated and the products therefrom consumed at the almshouse. A board of supervisors may designate and set apart any portion of the lands of the county not immediately surrounding the almshouse buildings to be used exclusively for the erection thereon and maintenance of a tuberculosis hospital. Opinion of Atty. Gen. (1917), 10 State Dept. Rep. 504.

ARTICLE IV.

CLERKS OF BOARDS OF SUPERVISORS.

Section 50. Duties.

51. Annual statement.
52. Report of county indebtedness. (Repealed by L. 1917, ch. 361.)
53. Statement of railroad, telegraph, telephone and electric-light taxes.
54. Forfeiture.

§ 50. Duties.—Clerks of boards of supervisors shall:

1. Record in books provided for the purpose all the proceedings of such board.
2. Make regular entries of all their resolutions or decisions.
3. Record the vote of each supervisor on any question submitted to the board, when the law authorizing the vote requires an entry of the yeas and nays, and in other cases if required by any member present.
4. File and preserve all accounts acted upon by the board.
5. Designate upon every account audited and allowed by the board the amount so audited and allowed, and the items or amount disallowed; and deliver to any person who may demand it, a certified copy of any account on file in his office, on receiving from such person eight cents per folio therefor.
6. Keep the books and papers of the board open to public inspection without charge.
7. Transmit to the librarian of the state library at Albany, a copy of the proceedings of such board, annually, and within twenty days after the same shall be published.
8. Prepare the tax-rolls under the direction of the board.
9. Perform such other duties as may lawfully be required of him by the board.

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Source.—Former County L. (L. 1892, ch. 686) § 50; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 9-12; L. 1877, ch. 102.

References.—Appointment of clerk of board, County Law, § 10. Official undertaking, Id. § 247; Public Officers Law, §§ 11, 13, 15. Official oath, County Law, § 246; Public Officers Law, §§ 10, 13, 15. Form and presentation of accounts, County Law, § 24, and notes thereunder. Deputy clerks in Westchester county, L. 1903, ch. 483. Town abstracts to be delivered to clerks of boards of supervisors, Town Law, § 155. Transmission to comptroller of statement of equalized valuations, Tax Law, § 61; to county treasurer of abstracts of tax rolls, Id. § 62. Transmission to comptroller and state highway commission, of amount levied for highway purposes, Highway Law, § 100; of resolutions for construction of highways, Id. § 123. Reports of county officers to be filed with clerk, County Law, § 243.

Record of proceedings.—Duties of clerk are ministerial; simply to record correctly what took place at the sessions of the board, in the order in which it took place. He cannot alter or affect the action of the board in any way. *People ex rel. Burroughs v. Brinkerhoff* (1877), 68 N. Y. 259, 267.

The record of proceedings of the board of supervisors, kept pursuant to this section, is for public information and for authentic evidence, and it seems that the supervisors are not entitled to compensation for special services rendered to the county, in the absence of a record showing that such special duties were lawfully committed to them. *Wallace v. Jones* (1907), 122 App. Div. 497, 501, 107 N. Y. Supp. 288, *affd.* (1909) 195 N. Y. 511, 88 N. E. 1134.

Entries by clerk.—The proper mode by which a board of supervisors renders itself legally liable is by resolution entered in its minutes; its clerk is to make entries of all resolutions or decisions in questions concerning the raising or payment of moneys. *Chemung Canal Bank v. Supervisors of Chemung* (1848), 5 Den. 517.

Service of process in actions against the county may be made upon the clerk. *People ex rel. Van Keuren v. Town Auditors* (1878), 74 N. Y. 310.

Section cited as to power of board of supervisors to audit claim. *People ex rel. Outwater v. Green* (1874), 56 N. Y. 466.

§ 51. Annual statement.—The clerk shall annually, on or before the first day of January, make out and certify, and within two weeks cause to be published in a newspaper printed in the county, with the abstract of accounts furnished by town auditors, a statement for the preceding year, containing:

1. An abstract of all county accounts presented to the board at its last annual meeting, allowed or disallowed, with the amount claimed and allowed, and the name of each person presenting the same, and the general nature of the account.

2. The amount, items and nature of all compensation, audited by the board to each member thereof.

3. The number of days the board was in session, and the distance traveled by each member in attending the same.

Source.—Former County L. (L. 1892, ch. 686) § 51; originally revised from L. 1847, ch. 455, § 14.

Reference.—Town abstracts to be delivered to clerk of board of supervisors, Town Law, § 155.

Publication of abstracts.—The above section, and section 155 of the Town Law,

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only authorize the publication of town and county abstracts in a single publication. These accounts cannot be cut up and distributed for publication in a number of papers throughout the county. *Rogers v. Board of Supervisors* (1902), 77 App. Div. 501, 78 N. Y. Supp. 1081; Rept. of Atty. Genl. (1909) 910.

The evident purpose of the publication of statements is to assure publicity for certain acts of the board of supervisors and at a particular time. Thus, where publication of the abstract of the bills and accounts audited by the board of supervisors of a county was not made at the time fixed by statute, but was made within a reasonable time afterwards, the claim for such publication is a proper county charge. Rept. of Atty. Genl. (1911), Vol. 2, p. 544.

§ 52. Report of county indebtedness.—(*Repealed by L. 1917, ch. 361, in effect May 4, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 52, as amended by L. 1895, ch. 310, L. 1908, ch. 478; originally revised from L. 1836, ch. 117; L. 1872, ch. 17, § 1.

Consolidators' note.—The provisions in this section are made applicable expressly to the county of New York, although in that county there is no clerk of the board of supervisors and there are no towns, cities, villages or school districts. Nevertheless the section has been allowed to stand as it is for judicial interpretation in connection with other special legislation affecting New York. It may be applicable so far as certifying the indebtedness of the county of New York is concerned. It has an application to the counties of Kings, Queens and Richmond before the Greater New York charter was enacted, which charter transferred the powers and duties of the boards of supervisors in these counties to the board of aldermen. [Charter of the city of New York, § 1586.] Although there is no clerk of the board of supervisors of these counties by that name and although there are no towns, cities, villages or school districts in those counties, the section has been allowed to stand unamended, except in one particular, as to its application to the indebtedness of each county as the courts may determine. The only amendment made is the insertion of the word "state" before the word "comptroller," to make clear what the legislature evidently intended.

References.—Supervisor of town to report to board amount of town indebtedness, Town Law, §§ 190–192.

§ 53. Statement of railroad, telegraph, telephone and electric-light taxes.—The clerk shall, within five days after the making out, or issuing of the annual tax-warrant by the board of supervisors, prepare and deliver to the county treasurer of his county, a statement showing the title of all railroad corporations and telegraph, telephone and electric-light lines in such county as appear on the last assessment-roll of the towns or cities therein, the valuation of the property, real and personal, of such corporation and line in each town or city, and the amount of tax assessed or levied on such valuation in each town or city in his county.

Source.—Former County L. (L. 1892, ch. 686) § 53; originally revised from L. 1870, ch. 506, § 1; L. 1886, ch. 659, § 4.

Consolidators' note.—The words "county treasurer" in this section, so far as it relates to the counties of Kings, Queens and Richmond counties, must be read "comptroller of the city of New York." [Charter of the city of New York, § 1587.]

Reference.—Provision to same effect, Tax Law, § 60.

§ 54. Forfeiture.—1. Any such clerk, or any person or persons required under this article to make any report, return or statement who shall

refuse or neglect to make the same, shall forfeit to the county the sum of one hundred dollars, to be recovered by the district attorney thereof in the name of the county, and whenever such failure or neglect is caused by any such clerk, person or persons required to make such report, return or statement under the provisions of section fifty-two of this article, such district attorney shall forthwith proceed to obtain such forfeiture on notice in writing by the state comptroller of such failure or neglect; but such clerk shall not be subject to such forfeiture, in case he certify to the said comptroller, on or before the second Monday in December, the name or names of such person or persons who have refused or neglected to furnish him with the information necessary to make such report, return or statement required by said section fifty-two of this article; provided, however, that any such report, return or statement, which may have been made after said second Monday in December, shall be furnished by said clerk to the comptroller immediately upon its receipt.

2. The costs awarded upon the collection of such recoveries may be retained by the district attorney for his own use.

Source.—Former County L. (L. 1892, ch. 686) § 54, as amended by L. 1897, ch. 406, originally revised from L. 1872, ch. 17, § 2.

References.—Wilful neglect of duty by a public officer a misdemeanor, Penal Law, §§ 1841, 1857. Refusal or neglect to make reports, Penal Law, § 1842. Returns and reports of district attorney as to fines and penalties collected, County Law, § 201.

ARTICLE V.

DUTIES OF BOARDS OF SUPERVISORS RELATING TO HIGHWAYS AND BRIDGES.

Section 60. Limitation of article.

61. County highways and bridges.
62. Location and construction of bridges.
63. County aid to towns for the construction and repair of bridges.
64. Construction by county of destroyed bridges.
65. Apportionment of expenses when a bridge is intersected by town or county lines.
66. County's share of expenses to be raised and paid to the commissioners of highways of the towns.
67. Towns authorized to construct a bridge outside of a boundary line.
68. Bridges over county lines.
69. Towns authorized to purchase roads or toll bridges.
70. Streets outside of city limits.
71. Survey and records of highways.
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- 77. Further powers.
- 78. Powers as to tires on vehicles.
- 79. Abandoned turnpike, plank and macadamized roads.
- 80. Boundary lines.

§ 60. Limitation of article.—This article shall not apply to bridges on the Hudson river below Waterford, or on the East river, or over the waters forming a part of the boundaries of the state.

Source.—Former County L. (L. 1892, ch. 686) § 60.

Consolidators' note.—*Duties of boards of supervisors relating to highways and bridges.* This article has been allowed to remain substantially unamended for reasons stated more at length in previous notes. The article expressly provides that it "shall not apply to bridges on the Hudson river below Waterford, or on the East river, or over the waters forming a part of the boundaries of the state." Various sections contain specific exceptions. The whole article is excepted so far as the county of New York is concerned by section 2. It has such application to the counties of Kings, Queens and Richmond, as the courts may decide after a construction of the provisions of the article in conjunction with the provisions of the charter of the city of New York of 1901, transferring the powers and duties of boards of supervisors to the board of aldermen of the city of New York [§ 1586], and the powers, duties and obligations of county treasurers to the comptroller of the city of New York [§ 1597]. This article so far as it relates to towns obviously has no application to the counties comprised within the city of New York, as there are no towns in any of these counties.

§ 61. County highway and bridges.—A board of supervisors shall, on the application of twenty-five resident taxpayers, when satisfied that it is for the interest of the county, lay out, open, alter or discontinue a county highway therein, or cause the same to be done, and construct, repair or abandon a county bridge therein, or cause the same to be done when the board shall deem the authority conferred on commissioners of highways insufficient for that purpose, or that the interests of the county will be promoted thereby. All expenses so incurred shall be a county charge. Such powers shall not be exercised unless the applicants therefor shall prove to the board the service of a written notice, personally or by mail, on a commissioner of highways of each town in the county, at least twelve days prior to the presentation of such application, specifying therein the object thereof; and when the application is to lay out a highway, or construct a bridge, the route or location thereof; and in all other cases a designation of the highway or bridge to be affected thereby. Whenever the board of supervisors of a county shall determine to construct a bridge in accordance with the foregoing provisions of this section, such board, on behalf of the county, and the town board of a town or in case of a city the board of aldermen or any similar board exercising the functions of aldermen, on behalf of such town or city, may enter into an agreement with the county, to the effect that such town or city will operate and maintain such bridge, in case the bridge is located wholly in a town or a city. In case the bridge is constructed over a stream forming the boundary line between two towns or two cities or between a town and city, then they

may agree with the county to operate and maintain such bridge jointly, in proportion to the assessed valuation of such town or city. The sum which the town or towns, city or cities are obliged to pay under such an agreement is a charge upon such towns or cities and shall be paid as other town or city charges are paid. (*Amended by L. 1909, ch. 240, and L. 1914, ch. 233.*)

Source.—Former County L. (L. 1892, ch. 686) § 61; originally revised from L. 1838, ch. 314.

References.—Highways classified as state, county and town, Highway Law, § 3. Construction or improvement of county highways, *Id.* §§ 122–131. State to pay part of cost of maintenance where highway was built by County, *Id.* § 178. Joint liability of towns and counties to pay for construction and maintenance of bridges over boundary lines, *Id.* § 250. Adoption of county road system, *Id.* § 320.

Streets and highways.—Board cannot rescind a resolution to close a highway except on petition of property owners or certificate of the town officers as to its necessity. *Schafhaus v. City of N. Y.* (1899), 28 App. Div. 475, 51 N. Y. Supp. 114, *affd.* 159 N. Y. 557, 54 N. E. 1094.

The legislature may delegate to the board of supervisors power to lay out streets and to levy and collect assessments therefor; and the board may by resolution appoint grading commissioners; nor is such resolution within the inhibition of the Constitution, Article 3, § 16, which applies only to acts of the legislature. *Robert v. Supervisors of Kings* (1899), 3 App. Div. 366, 38 N. Y. Supp. 521, *affd.* 158 N. Y. 673, 52 N. E. 1126.

Bridges.—In the absence of action by the supervisors the highway commissioner of a town is empowered to erect a bridge and make valid contracts therefor. *Berlin Iron Bridge Co. v. Wagner* (1890), 57 Hun 346, 10 N. Y. Supp. 840. But see *Birge v. Berlin Iron Bridge Co.* (1892), 133 N. Y. 477, 31 N. E. 609.

Liability of county.—General system prevailing in this state makes towns liable for maintenance of highways and bridges. *Hill v. Supervisors of Livingston* (1854), 12 N. Y. 52. County is not liable for failure of supervisors to maintain bridges in a safe condition. *Ahern v. County of Kings* (1895), 89 Hun 148, 34 N. Y. Supp. 1023; *Godfrey v. County of Queens* (1895), 89 Hun 18, 34 N. Y. Supp. 1052.

§ 62. **Location and construction of bridges.**—The board may authorize the location, change of location and construction of any bridge, applied for by any town or towns, jointly, or by other than a municipal corporation, created under a general law, or by any corporation or individual for private purposes; and if a public bridge, erected other than by a municipal corporation, establish the rates of toll for crossing such bridge; but if such bridge is to cross a navigable stream, provision shall be made in the resolution or permission authorizing the same, for the erection and maintenance of a suitable draw, to prevent any obstruction of the navigation of such stream; and if a private bridge, provision shall be made that the draw shall be kept open as may be required to permit all vessels to pass without loss of headway. When such bridge shall be intersected by the line of counties, the action of the board of supervisors of each county shall be necessary to give the jurisdiction herein permitted. But this section shall not apply to a pier bridge erected or to be erected over the Mohawk river above the state dam by a

corporation organized under the transportation corporations law, provided such corporation shall comply with all the provisions of said transportation corporations law applicable thereto; such a corporation, without further proceeding, shall have the right to erect and maintain piers in said river for the purposes of such a bridge.

Source.—Former County L. (L. 1892, ch. 686) § 62, as amended by L. 1898, ch. 225; originally revised from L. 1875, ch. 482, § 1; L. 1881, ch. 439, § 1.

References.—Rates of toll may be regulated by boards of supervisors, County Law, § 72; Transportation Corporations Law, § 136.

Construction of bridges by county.—At common law bridges were to be maintained at the expense of the county. *Wrought-Iron Bridge Co. v. Attica* (1890), 49 Hun 513, 2 N. Y. Supp. 359, affd. in 119 N. Y. 204, 23 N. E. 542; *Hill v. Supervisors of Livingston* (1854), 12 N. Y. 52. Under the statute as it existed prior to the passage of the Highway Law of 1890, counties could not be compelled to contribute to the maintenance of bridges. *Town of Wirt v. Supervisors of Allegany* (1895), 90 Hun 205, 35 N. Y. Supp. 887.

When the general interests of the county demand it, the board of supervisors has the power to act in respect to bridges. *Huggans v. Riley* (1890), 125 N. Y. 88, 25 N. E. 993. In executing the power the board may exercise their sound discretion. *People v. Meach* (1870), 14 Abb. (N. S.) 429.

Construction of bridges by town.—Board of supervisors cannot authorize town to issue bonds to build bridge, unless the town meeting requesting such action be a regular one or a special meeting called for that particular purpose; and the vote must be by ballot. *Berlin Iron Bridge Co. v. Wagner* (1890), 57 Hun 346, 10 N. Y. Supp. 840.

In the absence of legislative enactment a town has no power to contract for the building of a bridge. *Donnelly v. Town of Ossining* (1879), 18 Hun 352.

Power of superintendent of highways.—The power conferred on boards of supervisors as to location, erection and repair of bridges does not deprive town superintendent of highways of power to construct a bridge. *Huggans v. Riley* (1890), 125 N. Y. 88, 25 N. E. 993. See also *Berlin Iron Bridge Co. v. Wagner* (1890), 57 Hun 346, 10 N. Y. Supp. 840.

Railroads may construct draw-bridges across streams after obtaining consent of board of supervisors. *Doxsey v. Long Island R. R. Co.* (1885), 35 Hun 362 (dissenting opinion).

Private individuals owning lands on both sides of a stream may build and maintain bridges for their own use provided they do not interfere with public easements. *Chenango Bridge Co. v. Paige* (1880), 83 N. Y. 178, 38 Am. Rep. 407. See also *People ex rel. Howell v. Jessup* (1889), 160 N. Y. 249, 54 N. E. 682, revg. 28 App. Div. 524, 51 N. Y. Supp. 228.

Construction of pier bridge over Mohawk river.—Rept. of Atty. Genl. (1898) 384.

Former law construed.—*Town of Kirkwood v. Newbury* (1890), 122 N. Y. 571, 26 N. E. 10.

Section cited.—*Hall v. Town of Oyster Bay* (1901), 61 App. Div. 508, 70 N. Y. Supp. 710, affd. 171 N. Y. 646, 63 N. E. 1117.

§ 63. County aid to towns for the construction and repair of bridges.—If the board of supervisors of any county shall deem any town in the county to be unreasonably burdened by its expenses for the construction and repair of its bridges, the board may cause a sum of money, not exceeding two thousand dollars in any one year, to be raised by the county and paid to such town to aid in defraying such expenses.

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Source.—Former County L. (L. 1892, ch. 686) § 63; originally revised from L. 1890, ch. 568, § 131; R. S., pt. 1, ch. 18, tit. 1, §§ 119, 120.

Unreasonable burden.—Since 1801 statutes have existed relieving towns from unreasonable burdens in the construction of bridges. *People ex rel. Root v. Supervisors of Steuben* (1895), 81 Hun 216, 30 N. Y. Supp. 729, *affd.* in 146 N. Y. 107, 40 N. E. 738; as to liability of county to contribute. See *Hill v. Supervisors of Livingston* (1854), 12 N. Y. 52; *People ex rel. Highway Comrs. v. Supervisors of Dutchess* (1841), 1 Hill 50; *Phelps v. Hawley* (1873), 52 N. Y. 23.

Aid of county.—The board of supervisors may appropriate county moneys for the aid of a town which is unreasonably burdened by the construction of bridges, although the town has already bonded itself for such purpose. The money so appropriated may be expended for the payment of bonds. *Knowles v. Supervisors of Chemung* (1906), 112 App. Div. 138, 97 N. Y. Supp. 1111. See also *Opinion of Comptroller*, July 7, 1916, 9 State Dept. Rep. 517.

§ 64. **Construction by county of destroyed bridges.**—If any bridge within a county, or intersected by any boundary line of a county, shall be destroyed by the elements, and the board of supervisors of the county shall deem that the expenses of the construction of a new bridge at or near the site of the bridge so destroyed would be too burdensome upon the town or towns within such county, which would otherwise be liable therefor, the board of supervisors of any such county may provide for the construction and completion of a bridge and all necessary approaches thereto, at or near the site of the bridge so destroyed. If the bridge so destroyed shall have been constructed by a corporation created under a general law, and the sight thereof, and the approaches thereto, or either, shall be the property of such corporation, such board of supervisors may purchase the interest of such corporation, or any other person, in such site or approaches, if such purchase can be accomplished upon reasonable terms; but if such site or approaches can not be lawfully acquired by such purchase, or otherwise, upon reasonable terms, such board may acquire title to premises on either side of such site, and provide for the construction of a bridge and approaches thereto, at such place, at the expense of the county, or of the two counties jointly, as the case may be, provided such bridge shall be so located as not to increase the distance to be traveled upon the highway to reach each end of such bridge more than five rods. Any board of supervisors providing for the construction of any such bridge may determine by resolution whether the expenses of the maintenance and repair thereof shall thereafter be a county charge, or a charge upon such town or towns.

Source.—Former County L. (L. 1892, ch. 686) § 64; originally revised from L. 1875, ch. 482, § 1, as amended by L. 1881, ch. 439.

§ 65. **Apportionment of expenses when a bridge is intersected by town or county lines.**—If any public free bridge, intersected by the boundary line of a county, shall also be intersected by the boundary line of two or more towns in such county, the board of supervisors of such county shall apportion as it shall deem equitable, between such towns, their respective shares of the expenses of the construction, maintenance and repair of such bridge,

and the amount to be received by each town of the money raised by the county to be paid toward defraying the expenses of constructing and repairing such bridge.

The provisions of chapter four hundred and thirty-nine of the laws of eighteen hundred and eighty-one shall apply and continue in force so far as relates to or affects any bridges constructed thereunder before the sixth day of May, eighteen hundred and ninety.

Source.—Former County L. (L. 1892, ch. 686) § 65, and L. 1890, ch. 287; originally revised from L. 1875, ch. 482, § 1, as amended by L. 1881, ch. 439; L. 1886, ch. 126.

Consolidators' note.—Last paragraph added from L. 1890, ch. 287. This statute providing for the apportionment of the expense of building and maintenance of certain bridges, also provides that bridges erected under the provisions of L. 1881, ch. 439, shall be maintained as directed by the last statute cited.

References.—County is liable for at least one-sixth the cost of the construction and maintenance of a bridge over a stream constituting the boundary line of the county. Highway Law, §§ 250, 251. Apportionment of cost among towns, *Id.* § 97.

Apportionment of expense.—Supervisors may apportion expense on their own motion. *People ex rel. Morrell v. Supervisors of Queens* (1889), 112 N. Y. 585, 20 N. E. 549. The power of apportioning vested in the supervisors is permissive only. *Surdam v. Fuller* (1884), 31 Hun 500. But see *People ex rel. Root v. Supervisors of Steuben* (1894), 81 Hun 216, 30 N. Y. Supp. 729, *affd.* (1895), 146 N. Y. 107, 40 N. E. 738; *People ex rel. Otsego Co. Bank v. Supervisors of Otsego* (1873), 51 N. Y. 401.

Board of supervisors may compel erection of a bridge between towns and impose tax on such towns to pay cost thereof, notwithstanding one of the towns be opposed thereto. *Town of Kirkwood v. Newbury* (1890), 122 N. Y. 571, 26 N. E. 10, *affg.* 45 Hun 323.

As to power of legislature to impose tax, see *People ex rel. Kilmer v. McDonald* (1877), 69 N. Y. 362; *People ex rel. McLean v. Flagg* (1871), 46 N. Y. 401.

§ 66. County's share of expenses to be raised and paid to the commissioners of highways of the towns.—The board of supervisors shall cause to be raised and collected the amount to be paid by the county to any town toward the expenses of a bridge and when collected the same shall be paid to the commissioners of highways of the town, to be applied by them toward the payment of such expenses.

Source.—Former County L. (L. 1892, ch. 686) § 66; originally revised from L. 1875, ch. 482, § 1, as amended by L. 1881, ch. 439; L. 1886, ch. 126.

References.—Section probably superseded by Highway Law, § 251. Supervisor is custodian of moneys raised by tax for construction and maintenance of bridges, *Id.* § 104. The office of highway commissioner abolished and duties performed by town superintendent of highways, *Id.* § 43.

§ 67. Towns authorized to construct a bridge outside of a boundary line.—The board of supervisors of any county may authorize any town, on a vote of a majority of the electors thereof voting at a regular town meeting, to appropriate a sum, or pledge its credit, to partly or wholly construct and maintain a bridge outside the boundaries of the town or county, or from or within the boundary line of any town into another town or county, but forming a continuation of highways leading from such town or county, and deemed necessary for the public convenience.

Source.—Former County L. (L. 1892, ch. 686) § 67; originally revised from L. 1875, ch. 482, § 1, as amended by L. 1881, ch. 439; L. 1886, ch. 126.

§ 68. **Bridges over county lines.**—The board shall provide for the care, maintenance, preservation and repair of any draw or other bridge intersecting the boundary line of counties or towns, which bridge is by law a joint charge on such counties or towns, or on the towns in which it is situated; and to severally apportion, as it may deem equitable, the expenses thereof on the towns respectively liable therefor, or on the respective counties when liable; but when such bridge shall span any portion of the navigable tide-waters of this state, forming, at the point of crossing, the boundary line between two counties, such expense shall be a joint and equal charge upon the two counties in which the bridge is situated, and the board of supervisors in each of such counties shall apportion such expense among the several towns and cities in their respective counties, or upon any or either of such towns and cities, as in their judgment may seem proper; and if there be in either of said counties, a city, the boundaries of which are the same as the boundaries of the county, then it shall be the duty of the common council of such city, to perform the duty hereby imposed upon the boards of supervisors; but no town or city not immediately adjacent to such waters at the points spanned by said bridge shall be liable for a larger proportion of such expense than the taxable property of such town or city bears to the whole amount of taxable property of such county. The board of supervisors of such counties or, in any city embracing the entire county and having no board of supervisors, the common council, shall have full control of such bridges. No such bridge shall be constructed unless the board of supervisors in each of such counties, and the common council of the city whose boundaries are the same as the boundary of the other county adjacent to such waters, shall first by resolution determine that such bridge is necessary for public convenience, in which case such common council, with the consent of the mayor, may authorize the issue of bonds for the purpose of constructing such bridge, to be issued as other bonds are issued in said city. Whenever any bridge now spanning any such navigable tide-waters or hereafter erected across any such navigable tide-waters, shall be condemned by the United States authorities as an obstruction to navigation, and shall be ordered removed, the county and city authorities having charge of such bridge, if they shall determine that such bridge shall be rebuilt, shall, as soon as practicable after such determination, cause plans to be prepared for the erection of the new bridge and the removal of any bridge so condemned as aforesaid, and within a reasonable time after the approval of any such plans by the United States authorities, the proper officers shall proceed with the construction of said new bridge. In case of any unreasonable delay on the part of the officer or officers charged with the duty of construction of such new bridge, such duty may be enforced by mandamus upon the application of any citizen interested in its performance.

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L. 1909, ch. 16.

Source.—Former County L. (L. 1892, ch. 686) § 68, as amended by L. 1896, ch. 995; originally revised from L. 1875, ch. 482, § 1, as amended by L. 1880, ch. 320.

References.—Joint liability of towns, Highway Law, § 250; liability may be enforced by one town against another, *Id.* §§ 254–262.

Application.—From the fact that the building of a bridge between two towns in the same county is provided for in the Highway Law, and other sections of the article of the County Law in which this section is found, relate more particularly to bridges intersecting the county line, it may be inferred that these provisions are not intended to repeal or destroy the effect of sections 254 and 255 of the Highway Law, which provide the manner in which bridges shall be built across the dividing lines of towns situated in the same county. *People ex rel. Canton Bridge Co. v. Town Auditors of Horicon* (1909), 136 App. Div. 166, 120 N. Y. Supp. 696, *affd.* 204 N. Y. 609, 97 N. E. 1113.

See *Matter of Town of Saratoga*, 160 App. Div. 60, cited under Highway Law, section 250.

Duty mandatory.—The duty imposed on the boards of supervisors is mandatory, and mandamus will lie to compel its performance. *People ex rel. Keene v. Supervisors* (1896), 142 N. Y. 271, 36 N. E. 1062; *s.c.* 91 Hun 241, 36 N. Y. Supp. 1131, *affd.* 151 N. Y. 190, 45 N. E. 453.

Liability of county to construct bridge over dividing stream only exists where there is a lawful highway which would be connected by, and which becomes a part of such highway. *People ex rel. Keene v. Supervisors* (1896), 151 N. Y. 190, 45 N. E. 453; *Beckwith v. Whalen* (1877), 70 N. Y. 430. As to right of town to make county contribute to support of bridges, see *Town of Wirt v. Supervisors of Allegany* (1895), 90 Hun 205, 35 N. Y. Supp. 887.

Bridges over tidal streams.—Expense of constructing bridge over navigable tide waters between two counties should be apportioned equally between counties. *Markey v. County of Queens* (1898), 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46.

§ 69. **Towns authorized to purchase roads or toll bridges.**—The board may authorize a town or towns to purchase for public use, any plank road, turnpike, toll road or toll bridge in such town, and may authorize the company owning the same, to sell the same, or any part thereof, or the franchise thereof, and may authorize such town or towns to borrow such sums of money as may be necessary therefor for or on the credit of such towns, after the same shall have been directed by a vote of a majority of the electors at a town meeting, or special town meeting as provided in section ninety-seven of the highway law.

Source.—Former County L. (L. 1892, ch. 686) § 69-a, as added by L. 1903, ch. 469, § 2.

References.—Acquisition of toll roads and bridges by county, Highway Law, §§ 298–302. Apportionment of bonds against towns, *Id.* § 300.

§ 70. **Streets outside of city limits.**—When any territory in a county containing an incorporated city of one hundred thousand inhabitants or upward, lying outside the limits of such city, has been mapped into streets and avenues pursuant to law, the board of supervisors may authorize the establishment of a plan for the grade of such streets and avenues; the alteration of such plan of grades, or of any plan thereof that shall have been established by law; the laying out, opening, grading, constructing,

closing and change of line or width, of any one or more of them, and provide for the assessment on property intended to be benefited thereby, and fixing assessment districts therefor, and for the levy, collection and payment of the amount of damages sustained and the charges and expenses incurred, or which may be necessary to incur in carrying out such provisions; the laying out of new or additional streets and avenues upon the established map or plan thereof, the acceptance by town officers of conveyances of lands, for public highways, the naming and changing of names of streets and avenues laid down on said map or plan, and the numbering or renumbering of houses and building lots fronting on such streets and avenues. But such last named power in regard to the alteration of said map or plan, laying out, opening, grading, constructing, closing and change of line, of such streets or avenues, or the numbering or naming thereof, or defraying the expenses thereof, shall only be exercised on the petition of the property owners, who own more than one-half of the frontage on any such street or avenue, or on a certificate of the town board and commissioners of highways of the town, that the same is, in their judgment, proper and necessary for the public interest. If the streets and avenues, in respect to which such action is proposed to be taken, shall lie in two or more towns, a like certificate shall be required of the town board and commissioners of highways, of each town. Before making such certificate, such town board, or boards and commissioners of highways, shall give ten days' notice by publication in one of the daily papers of the county, and by conspicuously posting in six public places in each of such towns, of the time and place at which they will meet to consider the same, at which meeting the public, and all persons interested, may appear and be heard in relation thereto. No such street or avenue shall be laid out, opened or constructed, upon or across any lands acquired by the right of eminent domain, and held in fee for depot purposes by any railroad corporation, or upon or across any lands now held by a corporation formed for the purpose of improving the breed of horses, without the consent of such corporations. No town officer shall charge anything for his services under this section, nor shall any charge be made against any such town or the property therein, for the expense of the publication of the notice herein required.

Source.—Former County L. (L. 1892, ch. 686) § 71, and L. 1892, ch. 289; originally revised from L. 1875, ch. 482, § 1, as amended by L. 1892, ch. 289.

Consolidators' note.—L. 1892, ch. 289, relates to powers of boards of supervisors in counties containing an incorporated city of 100,000 inhabitants or upwards, over streets and avenues. The former County Law (L. 1892, ch. 686, § 71) contained similar provisions. The difference between statute cited and the provisions of County Law, § 71, is in the requirement relating to certificate of propriety and necessity. Under L. 1892, ch. 289, this certificate is to be made by the "supervisors, justices of the peace and commissioners of highways of the town, or two-thirds of such officers"; under the provisions of former County Law, § 71, the certificate is required to be made by the town board and commissioners of highways. Under the provisions of General Construction Law, § 100, the enactment of former County Law, § 71, did not repeal or supersede L. 1892, ch. 289. The provisions of L. 1892,

ch. 289, have been consolidated with those of County Law, § 71, and constitute § 70, County Law.

The words "except the towns of Flatbush and New Lots in the county of Kings," are omitted because no such towns now exist.

Under the Constitution, Article 3, § 27, the legislature is empowered to grant the powers herein provided. *Robert v. Supervisors of Kings* (1896), 3 App. Div. 366, 38 N. Y. Supp. 521, *affd.* (1899), 158 N. Y. 673, 52 N. E. 1126.

A resolution is not objectionable which embraces more than one street, under Article 3, § 16, of the Constitution, the constitutional inhibition applying only to acts of the legislature. *Robert v. Supervisors of Kings* (1896), 3 App. Div. 366, 38 N. Y. Supp. 521, *affd.* (1899), 158 N. Y. 673, 52 N. E. 1126.

Power of supervisors over streets.—Boards of supervisors are vested with legislative discretion to lay out and construct streets outside of city limits in certain counties. General control as to method and mode of accomplishing the specified purpose is conferred upon such boards. *Hubbard v. Sadler* (1887), 104 N. Y. 223, 10 N. E. 426.

The rescinding of an order closing a street by the board of supervisors is equivalent to the adoption of a resolution to open it, and the same formalities must be observed as are necessary in opening a street in the first instance. *Schaffhaus v. City of N. Y.* (1898), 28 App. Div. 475, 51 N. Y. Supp. 114, *affd.* (1899), 159 N. Y. 557, 54 N. E. 1094.

A delegation of its powers by the board to carry out the provisions of this section to commissioners is not lawful. *Robert v. Supervisors of Kings* (1896), 3 App. Div. 366, 38 N. Y. Supp. 521, *affd.* (1899), 158 N. Y. 673, 52 N. E. 1126.

The cost of improvement may be levied upon property within an area which, in opinion of the board, is benefited. *Matter of Church* (1883), 92 N. Y. 1.

Assessments may not be levied unless the road has been legally laid out, and user for twenty years will not make it a highway where there has been no acceptance upon the part of the authorities. *Speir v. Town of New Utrecht* (1890), 121 N. Y. 420, 24 N. E. 692.

Resolution may have effect of judgment.—A board of supervisors has power to provide by resolution that an order confirming the report of commissioners to open and grade streets shall have the effect of a judgment. *Robert v. Supervisors of Kings* (1896), 3 App. Div. 366, 38 N. Y. Supp. 521, *affd.* (1899), 158 N. Y. 673, 52 N. E. 1126.

Extension of street beyond limit shown on map.—Where in accordance with ch. 482, Laws 1875, as amended by ch. 554, Laws 1881, from which this section is derived, the board of supervisors of Kings county, a county within the provisions of this section, laid out streets between the city limits as they existed in 1885, and the Atlantic Ocean, the court has no jurisdiction to open one of such streets beyond the point shown on the map as filed in connection with the resolution of the board of supervisors. *Neumann v. City of New York* (1910), 137 App. Div. 55, 122 N. Y. Supp. 62.

§ 71. Survey and records of highways.—The board may authorize and direct the commissioners of highways of any town to cause a survey to be made, at the expense of the town, of any or all of the highways therein, and to make or complete a systematic record thereof, or to revise, collate and rearrange existing records of highways, and correct and verify the same by new surveys and to establish the location of highways by suitable monuments. Such records so made, or revised, corrected and verified, shall be deposited with the town clerk of the town, and shall thereafter be

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the lawful records of the highways which they describe; but shall not affect rights pending in any judicial proceeding commenced before the deposit of such revised records with the town clerk.

Source.—Former County L. (L. 1892, ch. 686) § 72; originally revised from L. 1875, ch. 482, § 1, subd. 11.

References.—Town superintendent of highways to cause surveys to be made, Highway Law, § 47, subd. 8. Survey to be made by town superintendent where new highway is laid out, Id. § 190.

§ 72. Regulation of toll rates.—Such boards shall have power by a vote of two-thirds of all the members elected to authorize an alteration, reduction or change of the rates of toll charged or received by any turnpike, plank or gravel road, or other toll road within such county, or by any bridge company or ferry within such county, or, if within more than one county, then by joint action with the supervisors of such counties, provided such alteration shall be asked for by the directors, trustees or owners of such road, bridge or ferry; but that no increase of toll shall be so authorized unless notice of intention to apply for such increase shall have been published in each of the newspapers published in such county, once in each week for six successive weeks next before the annual election of supervisors in such county; and any alteration in rates of toll authorized by any board of supervisors may be changed or modified by any subsequent board, on their own motion, by a like vote of two-thirds of all the members elected to such board; but nothing herein contained shall affect or abridge the powers of any city.

Source.—Former County L. (L. 1892, ch. 686) § 73; originally revised from L. 1869, ch. 355, § 3.

References.—Toll rates of turnpike or plankroad corporation. Transportation Corporations Law, § 130. Rate of ferriage must be posted, Highway Law, § 274.

§ 73. Highways in counties of more than 300,000 acres of unimproved land.—The board may establish separate highway districts in counties containing more than three hundred thousand acres of unimproved unoccupied forest lands, for the purpose of constructing highways through such lands; such highway districts to be established upon the application of the owners of more than one-half of the non-resident lands therein. Any such highway district shall consist of contiguous tracts or parcels of land, and may include parts of one or more towns; and they may be changed, altered or abolished at any time by the board. Such board may appoint one or more commissioners to lay out and construct such highways in any such district, and prescribe the powers and duties, and direct the manner in which highway taxes shall be assessed, levied and collected upon the lands within the district, and the manner of expenditure thereof.

They may also authorize such commissioners to borrow money on such terms as they may deem just, but not exceeding the amount of ten years' highway taxes upon such lands; and may, for the purpose of repaying such loan, set apart and appropriate the highway taxes upon such lands,

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for a period not exceeding ten years from the time of making such loan.

Source.—Former County L. (L. 1892, ch. 686) § 74; originally revised from L. 1880, ch. 175.

§ 74. **Appropriation of certain non-resident highway taxes.**—The board may upon the application of the owners representing a majority in value, as shall be ascertained from the last annual assessment-roll of the real estate lying along the line of any highway, laid out through unimproved lands, in cases not provided for in the last preceding section, authorize the appropriation of the non-resident highway tax on the lands lying along such line, for the improvement of such highways.

Source.—Former County L. (L. 1892, ch. 686) § 75; originally revised from L. 1875, ch. 482, § 1, subd. 2.

§ 75. **Balance of state appropriations.**—The board may direct the expenditure of any non-resident highway or bridge tax, set apart by an act of the legislature, in counties wherein such non-resident lands are situated, when the official life of commissioners appointed to receive and expend such taxes has expired.

Source.—Former County L. (L. 1892, ch. 686) § 76; originally revised from L. 1879, ch. 275.

§ 76. **Alteration of state roads.**—The board may authorize the commissioners of highways of any town in their county to alter or discontinue any road or highway therein, which shall have been laid out by the state under the same conditions that would govern their actions in relation to highways that have been laid out by local authorities.

Source.—Former County L. (L. 1892, ch. 686) § 77; originally revised from L. 1882, ch. 317.

Roads cannot be abandoned arbitrarily, but the procedure as laid down by statute must be followed, compensation allowed and suitable means of access to their property left to abutting owners. *Egerer v. N. Y. C. & H. R. R. Co.* (1891), 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381.

New York and Albany Post Road.—This section does not operate to prevent town officers in Dutchess county from making alterations in the route of the Albany Post Road. *People ex rel. Dinsmore v. Vandewater* (1903), 176 N. Y. 500, 68 N. E. 876, revg. (1903), 83 App. Div. 54, 82 N. E. 627.

§ 77. **Further powers.**—The board may make such other local and private laws and regulations concerning highways, alleys, bridges and ferries within the county, and the assessment and apportionment of highway labor or taxes therefor, not inconsistent with law, as it may deem necessary and proper, when the purposes of such laws and regulations can not be accomplished under the foregoing provisions, or the general laws of the state.

Source.—Former County L. (L. 1892, ch. 686) § 78.

§ 78. **Powers as to tires on vehicles.**—The board of supervisors may enact local and private laws regulating the width of tires used on vehicles

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built to carry a weight of fifteen hundred pounds or upwards, and may provide penalties for the violation thereof.

Source.—Former County L. (L. 1892, ch. 686) § 79, as added by L. 1894, ch. 644, amended by L. 1899, ch. 155.

Reference.—State commission of highway may prescribe width of tires to be used on state and county highways, Highway Law, § 22.

Defective law.—A wide tire law passed by a board of supervisors which imposes a penalty, but neither authorizes any one to bring an action for its recovery nor provides for the disposition to be made of the penalty when recovered, is defective. *Town of Stamford v. Calhoun* (1910), 69 Misc. 558, 125 N. Y. Supp. 910.

§ 79. **Abandoned turnpike, plank and macadamized roads.**—Boards of supervisors shall have power to provide for the use of abandoned turnpike, plank or macadamized roads within any town as public highways; but jurisdiction in such a case shall not be exercised without the assent of two-thirds of all the members elected to such board, to be determined by yeas and nays, which shall be entered on its minutes.

Source.—Former County L. (L. 1896, ch. 686) § 80, as added by L. 1895, ch. 756.

§ 80. **Boundary lines.**—Wherever the words “upon its borders” are used in this article in reference to the boundary line between two towns, the same are and were intended and shall be construed to mean “upon,” “along,” and “across its borders.”

Source.—Former County L. (L. 1892, ch. 686) § 81, as added by L. 1900, ch. 163.

ARTICLE VI.

COUNTY JAILS.

Section 90. Use of jails.

91. Rooms therein.
92. Custody and control of prisoners.
93. Food and labor.
94. Reading matter; divine service.
95. Record of commitments.
96. Commitment by United States courts.
97. Keepers to present calendars to courts.
98. Prisoner to be discharged if unable to pay fine.
99. Houses of detention for women, children and witnesses.
100. County work-houses.
101. Who may visit jails and work-houses.

§ 90. **Use of jails.**—Each county jail shall be used,

1. For the detention of persons duly committed to secure their attendance as witnesses in any criminal case;
2. For the detention of persons charged with crime, and committed for trial or examination;
3. For the confinement of persons duly committed for any contempt, or upon civil process;
4. For the confinement of persons convicted of any offense, other than

a felony, and sentenced to imprisonment therein, or awaiting transportation under sentence to imprisonment in another county.

5. The buildings, now used as the jails of the counties of the state, shall continue to be the jails of those counties respectively, until other buildings have been designated or erected for that purpose, according to law.

Source.—Former County L. (L. 1892, ch. 686) § 90, and Code Civ. Pro., § 121; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 1; L. 1847, ch. 460.

Consolidators' note.—The words excepting New York county are omitted because the county of New York is excepted from the entire chapter and no special exception of the county of New York is necessary in any section or subdivision. Under chapter 14 of the charter of the city of New York, the commissioner of correction has charge of all institutions for the care and custody of criminals and misdemeanants which belong to the city of New York. The provisions of this article like the other articles of the chapter are excepted in their application to the county of New York.

References.—Powers and duties of state commission of prisons, Prison Law, § 46–49. Power of board of supervisors to erect jails, County Law, § 12, subd. 13. Either of several jails may be used, Prison Law, § 347. Other provisions relating to jails, *Id.* §§ 340–361.

Section cited.—*People ex rel. Rodenberg v. Warden of Penitentiary* (1913), 154 App. Div. 473, 139 N. Y. Supp. 212; *People ex rel. Gray v. Supervisors of Livingston* (1910), 89 App. Div. 152, 85 N. Y. Supp. 284.

§ 91. Rooms therein.—Each county jail shall contain,

1. A sufficient number of rooms for the confinement of persons committed on criminal process, or detained for trial, or examination as witnesses in a criminal case, separately from prisoners under sentence;

2. A sufficient number of rooms for the separate confinement of persons committed on civil process, or for contempt;

3. A sufficient number of rooms for the solitary confinement of prisoners under sentence.

Source.—Former County L. (L. 1892, ch. 686) § 91; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 1; L. 1847, ch. 460.

§ 92. Custody and control of prisoners.—Each sheriff shall receive and safely keep, in the county jails of his county, every person lawfully committed to his custody for safe-keeping, examination or trial, or as a witness, or committed or sentenced to imprisonment therein, or committed for contempt. He shall not, without lawful authority, let any such person out of jail. Persons in custody on civil process, or committed for contempt, or detained as witnesses, shall not be put or kept in the same room with persons detained for trial or examination upon a criminal charge, or with convicts under sentence. Persons detained for trial or examination upon a criminal charge shall not be put or kept in the same room with convicts under sentence. Minors shall not be put or kept in the same room with adult prisoners. A woman detained in any county jail or penitentiary upon a criminal charge, or as a convict under sentence, shall not be kept in the same room with a man; and if detained on civil process, or for

contempt, or as a witness, she shall not be put or kept in the same room with a man, except with her husband, in a room in which there are no other prisoners. If a woman committed to any county jail or penitentiary is then the mother of a nursing child in her care, under one year of age, or if a child be born to such woman after her said commitment, such child may accompany its mother to and remain in such institution until it is two years of age, or until the mother's discharge from custody before the child reaches that age. The sheriff, superintendent or other officer in charge of any county jail or penitentiary shall cause such child, when it attains the age of two years, while its mother is still in custody, or at the expiration of the extension of such time hereinafter mentioned, to be placed in an asylum for children in this state, or may commit such child to the care and custody of some relative or proper person willing to assume such care; provided, however, that the said child shall continue to remain with its said mother in such jail or penitentiary after it becomes two years of age for such a period as the physician employed to treat and visit prisoners in said jail or penitentiary certifies in writing to be necessary or advisable. If such woman at the time of such commitment shall be the mother of, and have in her exclusive care, a child more than one year of age which might otherwise be left without care or guardianship, the justice or magistrate committing such woman shall cause such child to be committed to such asylum as may be provided for such purposes, or to the care and custody of some relative or proper person willing to assume such care. All persons confined in a county jail or penitentiary shall, as far as practicable, be kept separate from each other, and shall be allowed to converse with their counsel, or religious adviser, under such reasonable regulations and restrictions as the keeper of the jail may fix. Convicts under sentence shall not be allowed to converse with any other person, except in the presence of a keeper. The keeper may prevent all other conversation by any other prisoner in the jail when he shall deem it necessary and proper.

Source.—Former County L. (L. 1892, ch. 686) § 92, as amended by L. 1906, ch. 426; L. 1907, ch. 275; originally revised from R. S., pt. 4, ch. 3, tit. 1, §§ 3-7; L. 1847, ch. 460.

References.—Separation of civil prisoners, Prison Law, § 345. Male and female prisoners to be separated, Id. § 346. Violation of either provision a misdemeanor. Penal Law, § 1875. Rent for rooms in jails not to be charged. Prison Law, § 344. Sheriff to have custody of jail, County Law, § 183. Appointment of jail physician, Prison Law, § 348; sale of liquors to persons confined in jails, Id. § 349; violation of provision a misdemeanor, Penal Law, § 1791. Communications with prisoners restricted, Id. § 1691; who may visit jails, Prison Law, § 47; designation of other place as jail, Id. §§ 351-353, 356. Care and custody of civil prisoners, Id. §§ 340-344; jail liberties, establishment, Id. §§ 357, 358; board of supervisors may alter boundaries, Id. § 359. Escape of civil prisoners, Code Civil Procedure, §§ 155-158.

Liability for injuries to prisoner.—It may well be that a correlative duty is imposed on the sheriff to exercise reasonable care to protect his prisoner from dangers known to him; but this responsibility does not necessarily arise from the statute. *Gunther v. Johnson* (1899), 36 App. Div. 437, 55 N. Y. Supp. 869.

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Prisoner with contagious disease.—Where the sheriff of a county jail, situate in a village of a town and containing many prisoners and their custodians, discovers that one of the prisoners is suffering from a contagious disease it is his right and duty at once to remove that prisoner from the jail, to a suitable place and keep him there in custody until he has served his sentence if necessary. *Matter of Boyce* (1904), 43 Misc. 297, 88 N. Y. Supp. 841.

It is an escape if the sheriff take a civil prisoner not to the jail proper, but to that part of it used by the sheriff's family as a sitting-room, and the prisoner be not actually locked therein. *People ex rel. Backus v. Stone* (1844), 10 Paige 606.

Section cited.—*People ex rel. Gray v. Supervisors of Livingston* (1903), 89 App. Div. 152, 85 N. Y. Supp. 284; *Franklin County v. Henry* (1913), 148 N. Y. Supp. 627.

§ 93. **Food and labor.**—Prisoners detained for trial, and those under sentence, shall be provided with a sufficient quantity of plain but wholesome food, at the expense of the county; such food shall be purchased in the manner and subject to the regulations provided in section two hundred and thirty-eight of this chapter; but prisoners detained for trial may, at their own expense, and under the direction of the keeper, be supplied with any other proper articles of food. Such keeper shall cause each prisoner committed to his jail for imprisonment under sentence, to be constantly employed at hard labor when practicable, during every day, except Sunday, and the board of supervisors of the county, or judge of the county, may prescribe the kind of labor at which such prisoner shall be employed; and the keeper shall account, at least annually, with the board of supervisors of the county, for the proceeds of such labor. Such keeper may, with the consent of the board of supervisors of the county, or the county judge, from time to time, cause such of the convicts under his charge as are capable of hard labor, to be employed outside of the jail in the same, or in an adjoining county, upon such terms as may be agreed upon between the keepers and the officers, or persons, under whose direction such convicts shall be placed, subject to such regulations as the board or judge may prescribe; and the board of supervisors of the several counties are authorized to employ convicts under sentence to confinement in the county jails, in building and repairing penal institutions of the county and in building and repairing the highways in their respective counties or in preparing the materials for such highways for sale to and for the use of such counties or towns, villages and cities therein; and to make rules and regulations for their employment; and the said board of supervisors are hereby authorized to cause money to be raised by taxation for the purpose of furnishing materials and carrying this provision into effect; and the courts of this state are hereby authorized to sentence convicts committed to detention in the county jails to such hard labor as may be provided for them by the boards of supervisors. This section as amended shall not affect a county wholly included within a city. (*Amended by L. 1917, ch. 352, in effect May 3, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 93, as amended by L. 1896, ch.

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826; originally revised from R. S., pt. 4, ch. 3, tit. 1, §§ 8-11; L. 1847, ch. 460; L. 1875, ch. 482, § 1.

L. 1917, ch. 352, § 3.—All acts or parts of acts conflicting with this act are hereby repealed including all acts and parts of acts contained in any local or special laws.

§ 4. This act shall take effect immediately except that counties in which the feeding of prisoners confined in the county jails is at present provided for by the payment to the sheriff of the county of a per capita amount for such feeding, may continue to provide for the feeding of such prisoners in the same manner, during the term of office of the present sheriff of such county.

References.—Board of supervisors may contract with sheriff for board of prisoners, County Law, § 12, subd. 15. Contracts for support of civil prisoners, *Id.* § 12, subd. 22. When charges not to be made for food or for keeping a prisoner out of jail, Prison Law, §§ 340, 341. Prisoner may send for necessities, *Id.* § 343. Sale of liquors to prisoners prohibited, except upon permit of physician, *Id.* 349, 350; Penal Law, § 1791; Liquor Tax Law, § 29, subd. 6.

Prisoner in county jail may supervise the electrical wiring of the building. Rept. of Atty. Genl. (1903) 385.

Section cited.—*People ex rel. Gray v. Board of Supervisors of Livingston* (1903), 89 App. Div. 152, 85 N. Y. Supp. 284.

§ 94. Reading matter; divine service.—Each keeper shall provide a bible to be kept in each room of the jail in his charge, and he shall permit the persons therein confined to be supplied with other suitable and proper books and papers, and if practicable, he shall cause divine service to be conducted for the benefit of the prisoners, at least once each Sunday, if there shall be room in the prison that may be safely used for that purpose.

Source.—Former County L. (L. 1892, ch. 686) § 94; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 13; L. 1847, ch. 460.

§ 95. Record of commitments.—Each keeper shall keep in a book to be provided at the expense of the county a daily record of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The book containing such record shall be a public record, and shall be delivered by each sheriff to his successor, and kept on file in the office of the sheriff or keeper.

Source.—Former County L. (L. 1892, ch. 686) § 95, as amended by L. 1904, ch. 83; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 15; L. 1847, ch. 460.

§ 96. Commitment by United States courts.—Such keeper shall receive and keep in his jail every person duly committed thereto, for any offense against the United States, by any court or officer of the United States, until he shall be duly discharged; the United States supporting such person during his confinement; and the provisions of this article, relative to the mode of confining prisoners and convicts, shall apply to all persons so committed by any court or officer of the United States.

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Source.—Former County L. (L. 1892, ch. 686) § 96; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 16; L. 1847, ch. 460.

Reference.—Civil prisoners committed under a process from U. S. courts, Code Civ. Pro. § 133.

Section cited.—Franklin County v. Henry (1913), 148 N. Y. Supp. 627.

§ 97. **Keepers to present calendars to courts.**—Such keeper shall present to the court at the opening of every term of the supreme court, and at every term of the county court, having a grand jury, to be held in his county, a calendar stating:

1. The name of every prisoner then detained in such jail.
2. The time when he was committed, and by virtue of what precept.
3. The cause of his detention.

Source.—Former County L. (L. 1892, ch. 686) § 97; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 25; L. 1847, ch. 460.

Consolidators' note.—Change of wording made necessary by the abolition of the court of oyer and terminer and the court of sessions by the Constitution of 1894.

Reference.—Reports as to disorderly persons, Code Crim. Pro. § 908.

§ 98. **Prisoner to be discharged if unable to pay fine.**—When any person shall be confined in a jail for the non-payment of a fine, not exceeding two hundred and fifty dollars, imposed for any criminal offense, and against whom no other cause of detention shall exist, on satisfactory proof being made to the county court of the county in which such prisoner may be confined, that he is unable, and has been ever since his conviction, to pay such fine, the court may in its discretion, order his discharge.

Source.—Former County L. (L. 1892, ch. 686) § 100; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 28; L. 1847, ch. 460.

§ 99. **Houses of detention for women, children and witnesses.**—The board of supervisors of any county, except the county of Kings, may procure, by lease or purchase, a suitable place or places, other than the jail, for the safe and proper keeping and care of women and children charged with crime not punishable by death or imprisonment in state prison for a term exceeding five years or with second offense, and persons detained as witnesses, to be termed houses of detention; and when so provided, any magistrate in the county shall commit women and girls, and boys under sixteen years of age, and all persons held as witnesses thereto, instead of the jail. The sheriff shall have the same charge and control of such house, and shall be entitled to the same compensation for the care and keeping of prisoners therein, as in the county jail.

Source.—Former County L. (L. 1892, ch. 686) § 101; originally revised from L. 1875, ch. 464, §§ 1-4.

Consolidators' note.—The exception of the county of Kings is preserved in this section as showing an intention on the part of the legislature to make a different rule as to that county. The powers and duties of the boards of supervisors of the counties of Queens and Richmond, under this section, have been devolved upon the board of aldermen of the city of New York. [Charter of the city of New York, § 1586.]

§ 100. County work-houses.—The board of supervisors of any county may establish and maintain a work-house for the confinement of persons convicted within the county of crimes and criminal offenses, the punishment for which is imprisonment in the county jail, and may provide for the imprisonment and employment therein of all persons sentenced thereto, and any court or judicial officer may sentence such person to such work-house instead of to the county jail.

Source.—Former County L. (L. 1892, ch. 686) § 102; originally revised from L. 1891, ch. 277.

§ 101. Who may visit jails and work-houses.—The following persons may visit at pleasure all county jails and work-houses. The governor and lieutenant-governor, secretary of state, comptroller and attorney-general, members of the legislature, judges of the court of appeals, justices of the supreme court and county judges, district attorneys and every minister of the gospel having charge of a congregation in the town in which such jail or work-house is located. No other person not otherwise authorized by law shall be permitted to enter the rooms of a county jail or work-house in which convicts are confined, unless under such regulations as the sheriff of the county shall prescribe.

Source.—Former County L. (L. 1892, ch. 686) § 103; originally revised from R. S., pt. 4, ch. 3, tit. 1, § 150, amended by L. 1889, ch. 382.

References.—Grand jury may visit jails, Code Crim. Pro. § 261. Visitation and inspection by state commission of prisons, its secretary and officers, Prison Law, § 47.

ARTICLE VII.

DOGS.

[Entire article repealed by L. 1917, ch. 800, in effect July 1, 1917, adding article 5-B to Agricultural Law, ante p. 394.]

Section 110. Tax on dogs.

111. Rate of taxation when not fixed by the board.
112. Owner to deliver description.
113. Tax, how collected.
114. Application of proceeds of tax and other moneys.
115. Collector's fees.
116. When payment of tax to be proved.
117. Liability of owners of dogs for injuries.
118. Duties and powers of fence viewers.
119. Certificate to be evidence.
120. Duties of town board.
121. Tax to pay orders for sheep or angora goats killed.
122. When owners shall refund.
123. Dogs chasing sheep or angora goats to be killed.
124. Owner to kill dog after notice.
125. When justice may order dog killed.
126. Who deemed owner of dog.
127. Penalties, collection and application of.

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- 128. Adoption by county of dog registration provisions.
- 129. Payment of fees; issue of tags; definition of dog.
- 130. Duties of assessors.
- 131. Duty of town clerk.
- 132. Penalties; actions therefor.
- 133. Seizure of dogs not tagged or registered.
- 134. Value to be recovered.
- 135. Disposition of registration fees and penalties.
- 136. Actions for injury or destruction of unregistered dogs.

§ 110. Tax on dogs.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 110, as amended by L. 1895, ch. 332; L. 1905, ch. 261; originally revised from L. 1875, ch. 482, § 1, subd. 14, as amended by L. 1891, ch. 202.

Consolidators' note.—The provisions of this article have been preserved without any changes made necessary by the establishment of the boards of supervisors of the counties of Kings, Queens and Richmond, leaving the question of the application of the provisions of the article to these counties through the board of aldermen to judicial determination. The provisions of §§ 128–136 of this article do not apply to an incorporated city. See § 136.

The new matter is inserted in § 110 inasmuch as L. 1902, ch. 294, provides for the taxation of dogs in cities of the second class.

References.—Dog licenses in New York city, L. 1894, ch. 115.

Rate of taxation.—If rate of taxation is not fixed as provided herein the rate is arbitrarily fixed by the following section of the statute. *Arnold v. Ford* (1900), 53 App. Div. 25, 65 N. Y. Supp. 528.

Section cited.—*Jordan v. McGill* (1899), 43 App. Div. 264, 60 N. Y. Supp. 33.

§ 111. Rate of taxation when not fixed by the board.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 111; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 1, as amended by L. 1862, ch. 244; L. 1889, ch. 466; L. 1890, ch. 245.

Consolidators' note.—The reference to the exception of the city of Albany is omitted from § 111 for the reason that Albany is a city of the second class.

Constitutionality.—A statute (Laws of 1896, ch. 448) that provides that license fees on dogs be paid to a certain society is unconstitutional; it is a gift of public moneys to aid an association or private undertaking. *Fox v. Mohawk & H. R. Humane Society* (1901), 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681. The legislature may require that no one keep an unlicensed dog; but where it has not declared such unlicensed dog a nuisance and provides for its destruction if unlicensed, the owner is deprived of his property without due process of law. *Fox v. Mohawk & H. R. Humane Society* (1898), 25 App. Div. 26, 48 N. Y. Supp. 625, *affd.* (1901) 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681, 80 Am. St. Rep. 767.

Harboring a dog.—Affording protection or shelter to a dog, temporarily or permanently, is "harboring" a dog within the meaning of this section. *Robinson v. Rowland* (1882), 26 Hun 501. See also *Lynt v. Moore* (1896), 5 App. Div. 487, 38 N. Y. Supp. 1095; *Kessler v. Lockwood* (1892), 62 Hun 619, 16 N. Y. Supp. 677; *Bundschuh v. Mayer* (1894), 81 Hun 111, 30 N. Y. Supp. 622, 1 Am. Neg. Cas. 201.

Situs of dog is where he is harbored, not where his owner lives. *Arnold v. Ford* (1900), 53 App. Div. 25, 65 N. Y. Supp. 528.

Section cited.—*Jordan v. McGill* (1899), 43 App. Div. 264, 60 N. Y. Supp. 33.

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Dogs.

§§ 112-117.

§ 112. Owner to deliver description.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 112 ; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 3.

Description and penalty.—Presence of dog and keeper in his jurisdiction is sufficient to warrant the assessor in requiring the written description; the action for the penalty may be brought by the supervisor; where but one demand has been made, and one refusal thereof, but a single penalty can be recovered, and not a separate one for each dog owned by defendant. *Arnold v. Ford* (1900), 53 App. Div. 25, 65 N. Y. Supp. 528.

§ 113. Tax, how collected.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 113; originally revised from R. S., pt. 1, ch. 20, tit. 17, §§ 4-6; L. 1862, ch. 244.

Section cited.—*Jordan v. McGill* (1899), 43 App. Div. 264, 60 N. Y. Supp. 33.

§ 114. Application of proceeds of tax and other moneys.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 114, as amended by L. 1900, ch. 560; L. 1902, ch. 38; L. 1907, ch. 294; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 8; L. 1864, ch. 197, § 2.

Section cited.—*Jordan v. McGill* (1899), 43 App. Div. 264, 60 N. Y. Supp. 33.

§ 115. Collector's fees.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 115; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 17; L. 1862, ch. 244.

Section cited.—*Jordan v. McGill* (1899), 43 App. Div. 264, 60 N. Y. Supp. 33.

§ 116. When payment of tax to be proved.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 116; originally revised from L. 1862, ch. 244, § 9.

Failure to prove payment of tax cannot be raised on appeal; *it seems* that plaintiff is not required in the first instance to prove payment where it is not shown that the dog is taxable or that it has been assessed. *Jordan v. McGill* (1899), 43 App. Div. 264, 60 N. Y. Supp. 33.

§ 117. Liability of owners of dogs for injuries.—(*Amended by L. 1912, ch. 200 and repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 117, as amended by L. 1902, ch. 38; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 9.

Notice of viciousness of dog not necessary where sheep are wounded or killed; but otherwise where injury does not consist in wounding or killing. *Osincup v. Nichols* (1867), 49 Barb. 145, and see *Auchmuty v. Ham* (1845), 1 Den. 495. See also *Hinckley v. Emerson* (1825), 4 Cow. 351, 15 Am. Dec. 383; *Fairchild v. Bentley* (1858), 30 Barb. 147, 1 Am. Neg. Cas. 210.

Where several dogs were engaged in the killing, each owner is responsible only for the damage done by his dog; the evidence in most cases is such that the jury can apportion the damage. *Auchmuty v. Ham* (1845), 1 Den. 495. See also *Partenheimer v. Van Order* (1855), 20 Barb. 479. Where injuries were caused by two

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dogs belonging to different owners, jury may assess more than half damage against owner of larger dog. *Wilbur v. Hubbard* (1861), 35 Barb. 303. A joint action will not lie against separate owners of dogs. *Partenheimer v. Van Order* (1855), 20 Barb. 479. See also *Van Steenburgh v. Tobias* (1837), 17 Wend. 562, 31 Am. Dec. 310.

As to evidence tending to identify particular dog, see *Carroll v. Weiler* (1874), 1 Hun 605, 1 T. & C. 131; *Wilbur v. Hubbard* (1861), 35 Barb. 303.

Exemplary damages cannot be recovered. *Auchmuty v. Ham* (1845), 1 Den. 495.

Proceedings before fence-viewers.—Section is independent of those relating to proceedings by fence viewers and the owner of the sheep need not resort to them. *Fish v. Skutt* (1856), 21 Barb. 333.

Injury to cow.—This section is not applicable where injury is inflicted on a cow by a dog suffering from rabies. *Van Etten v. Noyes* (1908), 128 App. Div. 406, 112 N. Y. Supp. 888.

Section cited.—Rept. of Atty. Genl. (1907) 421.

§ 118. Duties and powers of fence viewers.—(*Repealed by L. 1917, ch. 800 in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 118, as amended by L. 1902, ch. 38; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 10; L. 1862, ch. 244; L. 1864, ch. 197, § 3.

Reference.—Who are fence viewers of town, Town Law, § 46.

Liability does not depend upon the residence of the owner of the sheep, but upon the fact of the sheep being killed in the town to which application is made for compensation. Rept. of Atty. Genl. (1894) 240.

Dog belonging to owner of sheep causing part of damage. See Rept. of Atty. Genl. (1907) 421.

Duties of assessors to determine damage. See Rept. of Atty. Genl. (1907) 422.

§ 119. Certificate to be evidence.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 119; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 11; L. 1862, ch. 244.

§ 120. Duties of town board.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 120; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 12; L. 1862, ch. 244; L. 1864, ch. 196, § 4.

Reference.—Meeting of town board for audit of accounts, Town Law, § 133.

Amount of certificates exceeding amount of dog fund.—If the amount of the certificates issued for claims against the dog fund of a town having a population of less than 4,000 exceeds the amount of the fund in the possession of the supervisor, the town board may not borrow on temporary loan, but may add the excess to the town abstract and raise the same by tax, not exceeding, in any one year, the sum of \$300. (Opinion of Comptroller, Jan. 6, 1916), 8 State Dept. Rep. 560.

Section cited.—Rept. of Atty. Genl. (1894) 240; Rept. of Atty. Genl. (1907) 421.

§ 121. Tax to pay orders for sheep or angora goats killed.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 121, as amended by L. 1897, ch. 171; L. 1902, ch. 38; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 13; L. 1862, ch. 244; L. 1889, ch. 466; L. 1862, ch. 197, § 5; L. 1878, ch. 228, § 1.

L. 1909, ch. 16.

Dogs.

§§ 122-125.

§ 122. When owner shall refund.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 122, as amended by L. 1902, ch. 38; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 14; L. 1864, ch. 197, § 6.
Section cited.—Rept. of Atty. Genl. (1907) 421.

§ 123. Dogs chasing sheep or angora goats to be killed.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 123, as amended by L. 1902, ch. 38; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 15.

Limitations of provision.—Though the killing of a dog so engaged be justifiable, the owner of the sheep cannot trespass on the land of the dog's owner to commit the act. *Gibbons v. Van Alstyne* (1890), 29 N. Y. St. Rep. 461, 9 N. Y. Supp. 156.

Provision making owner of dog killing or wounding sheep liable without knowledge that he was mischievous, has no application where sheep are only chased or worried. *Auchmuty v. Ham* (1845), 1 Den. 495.

When killing justifiable.—Except in case of worrying or killing sheep no one but its master may kill the dog; the statute follows the common law doctrine. *Hinckley v. Emerson* (1825), 4 Cow. 351, 15 Am. Dec. 383. The killing of a dog while in the act of chasing and worrying sheep, being justifiable, no recovery can be had for its value. *Brown v. Hoburger* (1868), 52 Barb. 15.

Recovery of damages for killing dog.—In an action brought to recover damages for the killing of a dog, the defendant who seeks to justify such killing under the above section need not show that at the time the dog was killed he was chasing, worrying or wounding sheep; the protection of the statute extends to a case where a man who had seen a dog chasing sheep in his pasture followed the dog upon the adjoining premises and there shot him. *Smith v. Wetherill* (1902), 78 App. Div. 49, 79 N. Y. Supp. 782.

§ 124. Owner to kill dog after notice.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 124, as amended by L. 1902, ch. 38; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 16.

§ 125. When justice may order dog killed.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 125, and L. 1890, ch. 203; originally revised from R. S., pt. 1, ch. 20, tit. 17, §§ 17, 18; L. 1890, ch. 203.

Consolidators' note.—L. 1890, ch. 203, amends R. S., pt. 1, ch. 20, tit. 17, § 17, "of dogs," "so as to read as follows." The whole of this title is repealed by L. 1892, ch. 686, § 238, but this amendment was not repealed. It is therefore consolidated in this section of the County Law.

Property in dogs.—There is but a qualified property in dogs, cats and like animals, and there may be said to be none as against the police power of the state. *Fox v. Mohawk & H. R. Humane Society* (1901), 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681, 80 Am. St. Rep. 767, affg. (1898), 25 App. Div. 26, 48 N. Y. Supp. 625.

While property, dogs are sometimes nuisances and it is the policy of the law to make summary disposition of them. An order directing the owner to kill his dog immediately, without previous notice or giving an opportunity to him to be heard, does not deprive him of his property without due process of law. *People ex rel. Renshaw v. Gillespie* (1898), 25 App. Div. 91, 48 N. Y. Supp. 882. But see

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People ex rel. Shand v. Tighe (1894), 9 Misc. 607, 30 N. Y. Supp. 368, where a city ordinance to same effect was held invalid.

Fees of officers.—The proceeding is in the nature of a criminal proceeding and the magistrate is entitled to same fees as in any other criminal proceeding. Constable's fees for killing and burying dog are a county charge, unless done under authority of a town ordinance. Matter of Town of Hempstead (1899), 36 App. Div. 321, 333, 335, 55 N. Y. Supp. 345, affd. (1899), 160 N. Y. 685, 55 N. E. 1101.

§ 126. Who deemed owner of dog.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 126, as amended by L. 1902, ch. 38; originally revised from R. S., pt. 1, ch. 20, tit. 17, § 20.

Ownership presumed by possession of dog or by suffering it to remain about the house for the time specified; but not in the case of a dog following and belonging to defendant's hired laborer, and which returned home with him to a different house each night. Auchmuty v. Ham (1845), 1 Den. 495.

A person harboring dogs on premises occupied by himself and family and feeding them from his table is responsible for their acts, even though he does not in fact own them and the title of the premises is in his wife's name. Bundschuh v. Mayer (1894), 81 Hun 111, 30 N. Y. Supp. 622, 1 Am. Neg. Cas. 201.

Where wife knew of dog's viciousness and harbored it on premises owned by herself and husband, her allowing it to escape and injure others is her personal tort. Quilty v. Battie (1891), 61 Hun 164, 15 N. Y. Supp. 765, mod. (1892), 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521, 1 Am. Neg. Cas. 177.

See also notes under section 111, ante.

§ 127. Penalties, collection and application of.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 127, as added by L. 1896, ch. 680, amended by L. 1902, ch. 38.

Due process of law.—In such action owner of dog has full opportunity to be heard, and thus his right to due process of law is secured to him. People ex rel. Renshaw v. Gillespie (1898), 25 App. Div. 91, 48 N. Y. Supp. 882.

§ 128. Adoption by county of dog registration provisions.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1896, ch. 686) § 128, as added by L. 1901, ch. 455, amended by L. 1902, ch. 158; L. 1906, ch. 212; L. 1907, ch. 294; L. 1908, ch. 373.

Where a village is located in two towns, a resolution of the board of supervisors of the county regarding the registration of dogs does not apply unless a resolution is in force applying this section to all parts of the town in which the village is situated. Rept. of Atty. Genl. (1909) 883.

§ 129. Payment of fees; issue of tags; definition of dog.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 129, as added by L. 1901, ch. 455, amended by L. 1902, ch. 158; L. 1906, ch. 212; L. 1907, ch. 294.

§ 130. Duties of assessors.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 130, as added by L. 1901, ch. 455, amended by L. 1907, ch. 294.

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County treasurers.

§§ 131-136, 140.

§ 131. Duty of town clerk.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 131, as added by L. 1901, ch. 455, amended by L. 1906, ch. 212; L. 1907, ch. 294.

§ 132. Penalties; actions therefor.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 132, as added by L. 1901, ch. 455; L. 1907, ch. 294.

§ 132-a. Special provisions for Monroe county.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

§ 133. Seizure of dogs not tagged or registered.—(*Amended by L. 1913, ch. 629 and repealed by L. 1917, ch. 800 in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 133, as added by L. 1901, ch. 455, amended by L. 1902, ch. 158; L. 1906, ch. 212; L. 1907, ch. 294.

§ 134. Value to be recovered.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 134, as added by L. 1901, ch. 455.

§ 135. Disposition of registration fees and penalties.—(*Repealed by L. 1917, ch. 800 in effect July 1, 1917.*)

Source.—Former County L. (L. 1892, ch. 686) § 135, as added by L. 1901, ch. 455, amended by L. 1907, ch. 294.

§ 136. Actions for injury or destruction of unregistered dogs.—(*Repealed by L. 1917, ch. 800, in effect July 1, 1917.*)

Source.—Former County L. (L. 1896, ch. 686) § 136, as added by L. 1901, ch. 455.

ARTICLE VIII.

COUNTY TREASURERS.

Section 140. Election, appointment, term of office and undertaking of county treasurer.

141. Deputy county treasurers in certain counties.

142. General powers and duties.

143. Time for making report extended.

144. Designate banks of deposit.

145. Depositary to give undertaking.

146. Treasurer not relieved from liability.

147. Moneys drawn, for what claims.

148. Delivery of books and funds to successor.

149. Penalty for neglect to report.

150. Extension of time for the collection of taxes.

151. Late county treasurer may maintain action for recovery of moneys.

152. County treasurer as trustee of cemetery lots.

153. Court may direct action on bond of county treasurer.

§ 140. Election, appointment, term of office and undertaking of county

treasurer.—There shall continue, (1) to be elected in each of the counties except in the counties of Kings, Queens and Richmond, a county treasurer, who shall hold his office for three years from and including, in the county of Monroe, the first Tuesday of October, and in the other counties, the first day of January, succeeding his election, and until his successor is duly elected and qualified; (2) to be appointed by the governor, by and with the consent of the senate, if in session, a county treasurer, when a vacancy shall occur in such office, and the person so appointed shall hold the office until and including, in the county of Monroe, the first Monday of October, and in the other counties, the last day of December, succeeding his appointment, and until his successor shall be duly elected and qualified. Every person elected or appointed to the office of county treasurer shall, before he enters upon the duties of his office, and if appointed, within fifteen days after notice thereof, give an undertaking to the county, with three or more sufficient sureties, with the approval of the board of supervisors, if in session, indorsed thereon by the clerk, otherwise with the approval of the county judge and county clerk, and in such sum as such board or judge and clerk approving the same shall direct, to the effect that such person shall faithfully execute the duties of his office, and shall pay over according to law, and account for all moneys, property and securities which shall come to his hands as treasurer, and render a just and true account thereof to the board of supervisors when required, and obey all orders and directions of a competent court relating thereto. When, in the opinion of the board of supervisors, the moneys intrusted to such person as treasurer shall be unsafe, or the surety insufficient, such board may require from such treasurer a new or further undertaking to the same effect as at first, and with like sureties; and if such county treasurer shall fail to renew such undertaking as required within twenty days after he shall be notified by such board of such request, such omission shall work a forfeiture of his office and the same shall become vacant. Such undertaking, with the approval indorsed thereon, shall be filed in the office of the county clerk. The sureties and county therein named shall be liable to the state for the payment to the state treasurer, according to law, of all moneys belonging to the state, which shall come into his hands as county treasurer, and for the rendering of a just and true account thereof to the state comptroller.

Source.—Former County L. (L. 1892, ch. 686) § 140, as amended by L. 1893, ch. 222; originally revised from R. S., pt. 1, ch. 5, tit. 5, § 13; R. S., pt. 1, ch. 12, tit. 2, §§ 18, 19, as amended by L. 1874, ch. 502; L. 1848, ch. 136, as amended by L. 1849, ch. 360; L. 1850, ch. 346; L. 1859, ch. 386, § 2.

Consolidators' note.—The county treasurers of the various counties are not constitutional officers and the office may be abolished by legislative enactment. The office of county treasurer in each of the counties of Kings, Queens and Richmond was abolished by section 1587 of the charter of the city of New York, and all the powers, duties and obligations of the county treasurers of these counties were devolved upon the comptroller of the city of New York. Wherever the words "county

treasurer," therefore, appear in the sections of this article the words "comptroller of the city of New York" must be understood.

This section provides for the election of county treasurers and as there are no county treasurers to be elected in the counties of Kings, Queens and Richmond, reference to these counties has been eliminated from the section.

References.—Election of county treasurers, Constitution, Article 10, § 2; filling vacancy in office, Id. § 5. Removal of county treasurer by governor and proceedings thereon, Public Officers Law, §§ 33-35.

Official oaths, when and how taken, County Law, § 246. Effect of failure to take oath, Public Officers Law, § 13. Vacancy created by failure to take oath, Id. § 30.

Official undertaking, County Law, § 247; Public Officers Law, §§ 11-13. Money not to be paid to treasurer before bond is executed, Id. § 12.

County treasurer not eligible to office of supervisor, Town Law, § 81; nor to that of superintendent of poor, County Law, § 220.

Term.—Where a county treasurer resigns and the vacancy is filled by appointment, and at the next general election the office is filled, the person elected at such general election is chosen for a full term. Rept. of Atty. Genl. (1912) Vol. 2, p. 398.

Sufficiency of bond.—A bond, though not in the words of the statute but in which there is nothing not prescribed by statute and which contains in substance all the statutory requirements, is in legal effect and operation the same. Supervisors of Allegany v. Van Campen (1829), 3 Wend. 48. See also People v. Holmes (1829), 2 Wend. 281; Fellows v. Gilman (1830), 4 Wend. 414; Sloan v. Case (1833), 10 Wend. 370, 25 Am. Dec. 569; Cornell v. Barnes (1844), 7 Hill 35. Additional securities may be required by board of supervisors. Denton v. Merrill (1888), 43 Hun 224.

Unnecessary conditions in bond.—Where the bond was conditioned "to render a just and true account to the board of supervisors, or to the comptroller of the state when thereunto required" it was held that the words "or to the comptroller of the State," did not increase the obligations of the obligor, or oblige or permit him to render an account other than to the supervisors, and should be rejected as surplusage. Supervisors of Schoharie County v. Pindar (1870), 3 Lansing 8.

Time of filing.—A county treasurer may file his bond at any time before entering upon the duties of his office. McRoberts v. Winant (1874), 15 Abb. Pr. N. S. 210.

Default.—The relation of the treasurer to the county and his duties have the nature of an agency; and all losses sustained by reason of his default are chargeable on the county. Supervisors of Monroe v. Otis (1875), 62 N. Y. 88. See also Denton v. Merrill (1888), 43 Hun 224; Newman v. Supervisors of Livingston (1871), 45 N. Y. 676, 686.

The moneys due to state are payable by the county treasurer, not as the county's officer or agent, but as an individual; and not until the remedy against both the treasurer and his bail has been exhausted can the county be required to act. First Nat. Bank of Ballston Spa v. Supervisors of Saratoga (1887), 106 N. Y. 488, 13 N. E. 439.

Liability of sureties.—The sureties are not discharged by reason of any neglect of duty by the board of supervisors, or even of any malfeasance on their part in dealings with the principal of the bond. Supervisors of Monroe v. Otis (1875), 62 N. Y. 88. In the case of the obligations assumed by sureties on bonds of public officers, the parties contract with reference to the acknowledged power of the legislature to vary the power and duties of such officers. Supervisors of Monroe Co. v. Clark (1883), 92 N. Y. 391. See also People v. Vilas (1867), 36 N. Y. 459, 93 Am. Dec. 520.

A county treasurer is liable for interest on deposits of county funds, and hence

his sureties are liable for his failure to account for such interest. *Supervisors of Richmond v. Wandel* (1872), 6 Lans. 33, *affd.* (1874), 59 N. Y. 645.

Action on bond.—Where the complaint in an action by the supervisors on a county treasurer's bond states that the treasurer entered upon and continued in the discharge of his duties as treasurer, an allegation that he took the oath of office is unnecessary. Nor is it necessary to allege that the bond has been forfeited to the knowledge of the board of supervisors. *Supervisors of Schoharie County v. Pindar* (1870), 3 Lansing 8.

Allegations of money in hands of treasurer and refusal to pay on orders of the board of supervisors, are material to constitute the breach, in an action on the bond. *Supervisors of Monroe v. Beach* (1832), 9 Wend. 143.

The bond of a county treasurer running to the county, conditioned for the faithful performance of the duties of his office, and for the payment over to the proper authorities of all moneys received by him as such treasurer may be sued upon by a town or supervisor thereof to recover school money which had been converted by the treasurer to his own use. *Town of Ulysses v. Ingersoll* (1905), 182 N. Y. 369, 75 N. E. 225, 3 Ann. Cas. 455, *revg.* (1903), 81 App. Div. 304, 80 N. Y. Supp. 924.

Salary of treasurer.—For history of statutes making office a salaried one, see *Supervisors of Erie v. Jones* (1890), 119 N. Y. 339, 23 N. E. 742. An act allowing board of supervisors to fix salary of county treasurer can affect compensation of future treasurers only. *Supervisors of Seneca v. Allen* (1885), 99 N. Y. 532, 2 N. E. 459.

Additional compensation.—Where, by a resolution of the board of supervisors passed in 1889, pursuant to chapter 346 of the Laws of 1877 and chapter 233 of the Laws of 1880, the salary of a county treasurer was fixed at a certain sum which it was provided should be in full of any and every interest, fee or compensation, he is, nevertheless, entitled, in addition to such salary, to the compensation subsequently provided by the Legislature in the Liquor Tax Law for collecting the liquor taxes, making reports and issuing licenses, and also to the compensation provided by the bank tax law (chapter 550 of 1901) for the additional duties imposed upon him by the latter act. *Montgomery County v. Vosburgh* (1911), 74 Misc. 562, 134 N. Y. Supp. 457.

Commissions.—Where the county treasurer's salary is fixed by law his compensation is limited to that salary, and he may retain commissions on state taxes only for the benefit of the county. *Supervisors of Seneca v. Allen* (1885), 99 N. Y. 532, 2 N. E. 459. See also *Matter of N. Y. C. R. R. Co.* (1880), 7 Abb. N. C. 408. As to rate of commissions allowed county treasurers, see *Supervisors of Otsego v. Hendryx* (1870), 58 Barb. 279.

Where the compensation of a county treasurer is fixed by the supervisors, he is not entitled to a fee on the state tax in addition to such compensation. L. 1871, ch. 110, amending L. 1846, ch. 189, did not authorize the county treasurer to retain for his own use fees for receiving and paying over the state and school taxes. *People ex rel. Conine v. County of Steuben* (1903), 41 Misc. 590, 85 N. Y. Supp. 244, *affd.* (1904), 93 App. Div. 604, 87 N. Y. Supp. 1144, *affd.* (1905), 183 N. Y. 114, 75 N. E. 1108.

A county treasurer is not allowed commissions on moneys not received by him, as on collector's fees retained by the collectors, back taxes and taxes levied on non-residents' lands returned to the comptroller's office. *Supervisors of Chenango v. Birdsall* (1830), 4 Wend. 453.

§ 141. **Deputy county treasurers in certain counties.**—The county treasurer of any county, having a population of less than fifty thousand according to the last preceding state or federal census, may, when authorized by a

resolution of the board of supervisors, appoint and at pleasure remove a deputy county treasurer, who shall perform all the duties and possess all the powers of a county treasurer, during his absence, or inability to act. The compensation of such deputy shall be paid by the treasurer out of the fees or salary allowed to him by law and shall not be a county charge. The appointment of such deputy shall not release the treasurer, from any liability in relation to the moneys in his hands or under his control, or in any manner affect such liability, but any default by such deputy shall be deemed a default of such treasurer, and he shall be liable therefor. The undertaking of the county treasurer required by section one hundred and forty of this chapter given after this chapter takes effect shall cover the acts and default of such deputy. In all other cases the county treasurer shall, before said deputy enters upon the discharge of his duties, give an undertaking with three or more sufficient sureties to the effect that such deputy shall faithfully execute the duties of his office and shall not make default therein, the amount thereof to be fixed and the same to be approved as provided in section one hundred and forty of this chapter for the fixing of the amount and the approval of the undertaking of the county treasurer.

Source.—Former County L. (L. 1892, ch. 686) § 140-a, as added by L. 1905, ch. 276.

Reference.—Powers and duties of deputies to public officers, Public Officers Law, § 9.

§ 142. General powers and duties.—The county treasurer shall:

1. Receive all moneys belonging to the county, and all other moneys by law directed to be paid to him, and apply them, and render an account thereof, as required by law.

2. Keep a true account of the receipt and expenditures of all such moneys, in books prepared for the purpose, at the expense of the county.

3. Yearly, and at such other times as the board of supervisors shall by resolution require, make a true, written statement of his accounts generally, verified by his oath to be in all respects true, and file the same with the clerk of the county, and transmit a copy thereof by mail to the comptroller and state treasurer.

4. On or before the first day of March in each year transmit to the state comptroller a statement of all moneys received by him during the preceding year for penalties belonging to the people of the state; and at the same time, pay to the treasurer of the state, the amount of such penalties, after deducting his compensation, in the same manner as state taxes are directed to be paid.

5. On or before the fifteenth day of April in each year pay to the treasurer of the state one-half of the state tax raised and paid over to him; and on or before the fifteenth day of May, the other half, retaining the compensation to which he may be entitled, which shall not in any case exceed the sum of two thousand dollars. If any county treasurer shall not pay over the state tax as herein directed, the comptroller shall charge on all sums

withheld, such rate of interest as shall be sufficient to repay all expenditures incurred by the state in borrowing money, equivalent to the amount so withheld, and such additional rate as he shall deem proper, not exceeding ten per centum, from the first day of April in each year, which shall be regarded as funds in the hands of the county treasurer, belonging to the state, and for which his sureties and county shall be liable.

6. Within ten days after the first day of July in each year, make and file in the office of the clerk of his county, a special report, which shall contain a statement of all moneys or securities in his hands belonging to infants, or other persons, for whom invested, and how invested, with a particular description of such securities, containing a statement of the amount due thereon for principal and interest, with a statement of his account with each infant, up to the first day of July preceding the date of such report, the amount of fees charged by him, the amount in his hands invested and uninvested, and to whom the same belongs; and if he has in his hands any money not invested, such report shall state the amount thereof, the length of time the same has been in his hands uninvested, and the reasons therefor; and whether the moneys so uninvested are for principal and interest, and the length of time any principal sum thereof shall have remained so uninvested, during the year preceding the date of such report; which report he shall verify to be in all respects true.

7. Exhibit to the board of supervisors, at their annual meeting, or whenever they direct, all his books and accounts, and all vouchers relating thereto, to be audited and allowed.

Source.—Former County L. (L. 1892, ch. 686) § 141, as amended by L. 1896, ch. 281; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 20-23, 27, 28; L. 1859, ch. 386, § 1; L. 1863, ch. 393, § 5; L. 1870, ch. 360; L. 1877, ch. 436, §§ 7, 10.

Consolidators' note.—The powers and duties devolved upon county treasurers under this section have been transferred to the comptroller of the city of New York by the charter of that city. [§ 1587.] The word "state" should be inserted before the word "comptroller," in the fourth subdivision of this section to make the reference to the "state comptroller" and not to the "city comptroller" plain.

References.—Payment of money into court and duties of county treasurer in respect thereto, Code Civ. Pro. §§ 745-758. Penalty for neglect to pay on order of court, County Law, § 153. See also duties referred to in Bender's Supervisors' and Town and County Officers' Manual (8th ed.), pp. 104-105.

Duties as to taxes.—County treasurer may receive taxes of telegraph, telephone and electric light companies, Tax Law, §§ 73, 74, and taxes on railroads in bonded towns, General Municipal Law, § 13. Duties as to non-residents' taxes, Tax Law, §§ 76, 77. County treasurer may extend time for collection of taxes, Id. § 85. Cancellation of collector's bond, Id. § 88. Reassessment of unpaid taxes, Id. § 89. Payment of county creditors, Id. § 90, post. Duties of treasurer as to state tax, Id. §§ 91, 92. Sales by county treasurer for unpaid taxes, Id. §§ 150-160, subdivision 5 appears to be in part superseded by Tax Law, § 91.

Support of poor, money expended for, to be charged to towns, Poor Law, § 9. Overseers to pay to county treasurer money in their hands, when distinction between town and county poor is abolished, Id. § 139 post.

School moneys, treasurer to furnish statement of amount on hand, Education Law, § 495. Unpaid school taxes, duties as to, Id. §§ 435, 436.

Liquor tax.—Duties as to collection of, Liquor Tax Law, § 13. Issue of certificates, *Id.* § 19. Refusal to grant certificates, *Id.* § 28. Treasurer to make complaint of violations, *Id.* § 37.

Highways, moneys received from the state to be paid supervisors, Highway Law, § 103.

Penal provisions.—Misappropriation by county treasurer, Penal Law, § 1867; falsification of accounts, etc., *Id.* § 1865.

Miscellaneous.—Fees of county treasurer, Code Civ. Pro. § 3321. Actions by late county treasurer to recover money or property deposited with county treasurer, County Law, § 151.

Powers.—County treasurers are not the officers to sue or be sued concerning the affairs of the county; they are mere depositories and disbursing agents. *Huff v. Knapp* (1851), 5 N. Y. 65.

Payment of accounts audited by supervisors.—If the subject matter of an account is within the jurisdiction of the board of supervisors, and they allow it, the county treasurer has no right to refuse payment on the ground that the allowance was for too much, or was made upon insufficient evidence, but if it appears on the face of the account that the subject matter was not within the jurisdiction of the board the treasurer is right in withholding payment. *People v. Lawrence* (1843), 6 Hill 244.

County moneys illegally loaned by county treasurer.—*Greene v. County of Niagara* (1896), 8 App. Div. 409, 40 N. Y. Supp. 862.

Accounts.—County treasurer is required to keep accurate accounts. Supervisors of *Monroe v. Clark* (1883), 92 N. Y. 391. A copy of accounts duly certified by treasurer may be used in evidence. *Herendeen v. De Witt* (1888), 49 Hun 53, 1 N. Y. Supp. 467. See also *Erickson v. Smith* (1869), 2 Abb. Dec. 64, 38 How. Pr. 454.

Examination of claims by county treasurer; judicial functions.—A county treasurer in deciding upon the validity of claims against the county is charged with judicial rather than ministerial functions, and should not countersign a warrant for the payment of an illegal claim. *People ex rel. Baumann v. Lyon* (1912), 77 Misc. 377, 136 N. Y. Supp. 534, *affd.* (1912), 154 App. Div. 266, 138 N. Y. Supp. 773.

Fees of a county treasurer, enumerated and specified. Rept. of Atty. Genl. (1898) 95.

The limitation contained in subdivision 5 authorizing a county treasurer to retain compensation on account of the state tax received and paid over by him in a sum not exceeding \$2,000 does not supersede the limitation of \$500 fixed by L. 1871, ch. 110, § 1, amending L. 1846, ch. 189, and, therefore, the treasurer of a county not excepted from the provisions of the act of 1871, cannot receive more than \$500 for receiving and paying over state tax and school moneys. *Upham v. State of New York* (1903), 174 N. Y. 336, 66 N. E. 987, *affg.* (1901), 62 App. Div. 631, 71 N. Y. Supp. 1150.

State tax.—County chargeable with interest on state tax retained after certain date. *People v. Fitch* (1895), 148 N. Y. 71, 42 N. E. 520.

Taxation of infant's property.—Property of an infant held by a county treasurer as general guardian is taxable in his hands. Rept. of Atty. Genl. (1913), Vol. 2, p. 595.

Investment of infant's money.—A county treasurer holding moneys belonging to infants, deposited by order of the court, cannot invest the same in bonds and mortgages except upon order of the court authorizing such investment. *County of Erie v. Diehl* (1909), 129 App. Div. 735, 114 N. Y. Supp. 80, *affd.* (1909), 196 N. Y. 501, 89 N. E. 1100.

Ministerial duties may be delegated to deputies, as the signing of checks. Rept. of Atty. Genl. (1895) 66.

See *People v. Neff* (1908), 191 N. Y. 210, 83 N. E. 970, *affg.* (1907), 122 App. Div. 105, 106 N. Y. Supp. 747, cited § 147 post.

§ 143. Time for making report extended.—The time for making and filing any report herein required, may be extended twenty days by a justice of the supreme court, upon good cause shown; but no order shall be made, unless notice of the application of the same shall have been served on the district attorney of the county; and no such order shall be of any force or effect, until the original order signed by the justice, with the papers on which the same was granted, shall have been filed in the office of the county clerk.

Source.—Former County L. (L. 1892, ch. 686) § 142; originally revised from L. 1859, ch. 386, § 3.

§ 144. Designate banks of deposit.—Each county treasurer shall, within twenty days after he shall have entered upon the duties of his office, except in counties whose boards of supervisors shall otherwise direct, designate by written instrument in duplicate, one copy of which shall be filed in the office of the county clerk, and the other in the office of the state treasurer, one or more good and solvent banks, bankers or banking associations, in such county; or if there shall be no such, then in an adjoining county within the state, for the deposit of all moneys received by him as such treasurer, and agree with such bank or banks, banker or bankers, or banking associations, upon the rate of interest to be paid on the moneys so deposited. The accrued interest thereon shall, as often as once in six months, be credited by such depositary to the account of such county treasurer, for the use of his county; and he shall deposit with such depositary, or depositaries, at least once in each week, and in a county containing a city having more than ten thousand inhabitants, daily, all such moneys so received by him. But nothing herein shall limit the power of any court or officer, by whose direction any moneys shall be paid over to, or received by, such treasurer, to direct in relation to the custody or investment thereof, or the disposition to be made of the interest thereon; and no interest received from any moneys so deposited which are not received for some public use, shall belong to the county.

Source.—Former County L. (L. 1892, ch. 686) § 143, as amended by L. 1904, ch. 174; originally revised from L. 1877, ch. 436, § 1.

Authority of supervisors.—A resolution of the board of supervisors of a county to limit the designation of depositaries of moneys received by the county treasurer to banks and trust companies does not except the county from the provisions of this section making it the duty of the county treasurer, within twenty days after entering upon the duties of his office, to designate depositaries. *People ex rel. Glens Falls Trust Co. v. Reoux* (1908), 60 Misc. 139, 112 N. Y. Supp. 1025, *affd.* (1908), 128 App. Div. 933, 113 N. Y. Supp. 1142.

The board of supervisors has no power to direct the county treasurer where he shall deposit the moneys of the county that come into his hands. It would be a grave injustice to compel the county treasurer to deposit moneys contrary to his judgment for which he is obliged to give a bond and for which he remains on that bond liable to the county, notwithstanding the fact that the depositary selected is

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also required to give a bond for the faithful performance of its duties as such depository. Rept. of Atty. Genl. (1911), Vol. 2, p. 608.

Treasurer succeeding himself.—The necessity of designating banks is in no way eliminated by the fact that a county treasurer succeeds himself. Rept. of Atty. Genl. (1903) 210.

Interest on county tax moneys.—The Comptroller may direct the county treasurer to deposit county tax moneys so as to bear interest, but such interest is to be credited to the account of the county treasurer for the use of his county. Rept. of Atty. Genl. (1909) 364.

See *People v. Neff* (1908), 191 N. Y. 210, 83 N. E. 970, affg. (1907), 122 App. Div. 135, 106 N. Y. Supp. 747, cited under § 147 post.

§ 145. **Depository to give undertaking.**—Each bank, banker or banking association, so designated, shall, for the benefit and security of the county, and before receiving any such deposit, give to the county a good and sufficient undertaking, with two or more sureties to be approved by the county judge of the county in which such bank, banker or banking association shall be located, the chairman of the board of supervisors of the county of which such treasurer is an officer, and such treasurer, or any two of them. Such undertaking shall specify the amount which such treasurer shall be authorized to have on deposit at any one time, with such depository, and shall be to the effect that such depository shall faithfully keep and pay over on the order, or warrant, of such treasurer, or on any other lawful authority, such deposits, and the agreed interest thereon; and for the payment of such bonds or coupons, as by their terms are made payable at a bank or banks, for the payment of which a deposit shall be made by such treasurer with such depository. Such undertaking shall be filed by the clerk of the board of supervisors with the clerk of the county.

Source.—Former County L. (L. 1892, ch. 686) § 144; originally revised from L. 1877, ch. 436, § 2, amended by L. 1886, ch. 673.

§ 146. **Treasurer not relieved from liability.**—Such designation and deposit of moneys shall not release the treasurer, or his sureties, from any liability in relation to such moneys, or in any manner affect such liability; but any default by such depository shall be deemed a default of such treasurer, and he and his sureties shall be liable therefor.

Source.—Former County L. (L. 1892, ch. 686) § 145; originally revised from L. 1877, ch. 436, § 4.

§ 147. **Moneys drawn, for what claims.**—The county treasurer shall draw the moneys so deposited only for the payment of claims ordered to be paid by the board of supervisors, or other lawful authority, or of salaries of county officers, or pursuant to the lawful direction of some court; and if he shall draw or appropriate any money for any other purpose, it shall be deemed a malfeasance in office, and cause for removal therefrom. Nothing herein shall prevent such county treasurer from transferring any such moneys from one depository to another, which shall have duly qualified by giving security as herein provided.

Source.—Former County L. (L. 1892, ch. 686) § 146; originally revised from L. 1877, ch. 436, § 4.

Reference.—Malfeasance in office by county treasurer, Penal Law, § 1867.

Audit.—It is well settled that the duties imposed upon the board of passing and auditing claims and ordering their payment cannot be delegated to a county auditor. *People v. Neff* (1908), 191 N. Y. 210, 83 N. E. 970, *affg.* (1907), 122 App. Div. 135, 106 N. Y. Supp. 747.

Checks signed by deputy treasurer.—The State Comptroller has authority to make rules and regulations touching the care and disposition of state funds, and may determine whether a County Treasurer's deputy may sign the Treasurer's name to checks for public money. *Rept. of Atty. Genl.* (1895) 66.

Bankruptcy of treasurer.—Where a county treasurer, who has deposited money belonging to the county in a bank, the account being kept in his name as "treasurer," and no money of his own being mixed therewith, becomes bankrupt, the balance of such account belongs to the county, and payment thereof by the bank to an assignee in bankruptcy, constitutes no defense to an action brought by the county for its recovery. *Supervisors of Schuyler v. Bank of Havana* (1875), 5 Hun 649, *affd.* 76 N. Y. 598.

Application of levy to sinking fund.—County treasurer cannot determine of himself the amount of a levy to be applied to a sinking fund. *Clark v. Sheldon* (1884), 20 Wk. Dig. 274.

§ 148. Delivery of books and funds to successor.—When the right of a county treasurer to his office expires, the books and papers belonging to the office, and all moneys in his hands by virtue thereof, shall, upon his oath, or if not living, upon the oath of his executor or administrator, be delivered to his successor. Any person violating this section shall forfeit to the county the sum of twelve hundred and fifty dollars. Such successor may recover such forfeitures, books, papers or money due, by action or other legal proceedings, in the name of his county, upon the official undertaking of such former county treasurer, or as otherwise authorized by law. Whenever required so to do by the state comptroller, he shall bring and maintain such action at the expense of the county, for the recovery of all moneys and securities paid into court, or that belong to any heir, litigant or party, or that stand to the credit of any action or proceeding which have come into the hands of any county treasurer whose right to office already has expired, or hereafter shall expire, or which have been placed to his credit in any bank or depository, or with which he is in any way chargeable, and which have not been delivered to his successor; and for all increase, loss, penalty, damage or expense lawfully chargeable to such treasurer in connection therewith. A party to whom such county treasurer may have transferred or assigned any security or other property belonging to any fund held by him, may be made a defendant in the same action, and the rights of the several parties determined therein. Any action so brought at the direction of the state comptroller shall not be discontinued or compromised without the approval of the state comptroller.

Source.—Former County L. (L. 1892, ch. 686) § 147, as amended by L. 1901, ch. 112; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 24, 25, as amended by L. 1879, ch. 447.

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References.—Proceedings to compel delivery of books to successor, Public Officers Law, § 80. Payment of money on order of court, County Law, § 153. Refusal to deliver books and papers a misdemeanor, Penal Law, § 1836.

Delivery of funds.—County treasurer cannot set up invalidity of act by which funds were received by him, and claim them himself. *Supervisors of Seneca v. Allen* (1885), 99 N. Y. 532.

Where a trust, upon which certain securities are held, terminates during the term of the county treasurer, he is not bound to deliver them to his successor; *it seems* that he must turn them over when the trust has not expired; *quære* as to military fund. *Supervisors of Tompkins v. Bristol* (1878), 15 Hun 116, *affd.* (1885), 99 N. Y. 316, 1 N. E. 878.

Failure to collect bond and mortgage.—Neglect of county treasurer not shown by his failure to collect a bond and mortgage in his hands. *Woolley v. Baldwin* (1886), 101 N. Y. 688, 5 N. E. 573.

County not liable until remedies against both the treasurer and his bail are exhausted. *First Nat. Bank of Ballston Spa v. Supervisors of Saratoga* (1887), 106 N. Y. 488, 13 N. E. 439.

Illegal investments of infants' moneys.—The penalty provided by this section is imposed on a county treasurer only in case he fails to turn over to his successor his books, papers and other emoluments of office; he is not liable for the penalty by reason of illegal investments of moneys belonging to infants. *County of Erie v. Diehl* (1909), 129 App. Div. 735, 114 N. Y. Supp. 80, *affd.* (1909), 196 N. Y. 501, 89 N. E. 1100.

Complaint, sufficiency of, in an action in the name of the county against the sureties of its treasurer. *County of Erie v. Baltz* (1908), 125 App. Div. 144, 109 N. Y. Supp. 304.

§ 149. Penalty for neglect to report.—If a county treasurer shall neglect to make any report or statement herein required of him, except as herein otherwise provided, he shall forfeit to the county a sum to be determined by the jury or court before whom the trial is had, not less than one hundred nor more than five hundred dollars, to be recovered by the district attorney, by action in the name of the county, against such treasurer and his sureties, or one or more of them.

Source.—Former County L. (L. 1892, ch. 686) § 148; originally revised from 1859, ch. 386, § 4.

Reference.—Wilful neglect to make a report, a misdemeanor, Penal Law, § 1742.

Complaint, sufficiency. *County of Erie v. Baltz* (1908), 125 App. Div. 144, 109 N. Y. Supp. 304.

§ 150. Extension of time for the collection of taxes.—The county treasurer may extend the time for the collection of taxes in any town or ward, but no extension shall be permitted until the collector of taxes of the town, city or ward in which such extension shall be asked shall pay over to the county treasurer all the taxes collected by him, and renew his undertaking as the supervisor of his town shall approve, and furnish evidence by his oath, and other competent testimony, if any, as such treasurer shall require, that he has been unable, for cause stated, to collect all the taxes within the time required by his warrant; but such extension shall not in any case be made beyond the first day of April in any year, unless ninety per centum of such taxes shall have been collected and paid over to him.

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Source.—Former County L. (L. 1892, ch. 686) § 149; originally revised from L. 1875, ch. 482, § 1, subd. 13.

Reference.—Similar provision as to extension of time, Tax Law, § 85.

Extension of time.—See Rept. of Atty. Genl. (1898) 163.

§ 151. Late county treasurer may maintain action for recovery of moneys.—The county treasurer of any county in this state, within three years after he has ceased to be county treasurer, may maintain an action in any court of record in this state as late county treasurer to recover any moneys, funds or properties belonging to the county or deposited with such county treasurer pursuant to law, without right obtained, received, converted or appropriated, disposed of or withheld by any party or parties, association or corporation, their legal representatives and assigns, during the term or terms of office of such county treasurer.

Any and all monyes, funds and properties recovered in such an action, shall be paid to and deposited with the then treasurer of the county from which such moneys, funds and properties were taken.

Upon the payment of any moneys or the depositing of any funds by a late county treasurer bringing such action, he shall be forthwith credited with the amount and value of such deposit.

This section shall apply to all county treasurers of this state elected to office on or after the seventh day of November, eighteen hundred and eighty-two.

Source.—L. 1896, ch. 937, §§ 1-4.

§ 152. County treasurer as trustee of cemetery lots.—A person residing in this state may create a trust in perpetuity for the maintenance of a cemetery lot, the preservation of a building, structure, fence, or walk therein, the renewal or preservation of a tomb, monument, stone, fence, railing or other erection or structure on or around such lot, or the planting or cultivation of trees, shrubs, flowers or plants in or about such lot, or for any of such purposes, by transferring, conveying, devising or bequeathing to the county treasurer of the county in which such person resides or in which such cemetery is located, or if such person resides or such cemetery is located in a county wholly within a city, to the chamberlain of such city, real or personal property, and designating such county treasurer or chamberlain as trustee in the instrument creating such trust. Such instrument may direct that the income derived from such property shall be applied to one or more of the purposes specified in this section. A county treasurer or city chamberlain designated as trustee in pursuance of this section, may in his discretion accept the property so transferred, and if he accepts the same, he shall cause the same to be invested in accordance with the terms of the trust, if any are prescribed, and otherwise shall invest and reinvest such property in securities in which savings banks are authorized to invest. The income derived from such property shall be collected by the county treasurer or chamberlain who shall be entitled to receive five per centum

of such income for administering the trust. The balance of such income shall be paid by the county treasurer or chamberlain to the person or corporation owning or conducting such cemetery, provided such person or corporation is willing to accept the same and apply the money so received, so far as the same may be applicable, in furtherance of the purposes for which such trust was created. Such money shall not be paid to an individual unless he shall give to the county treasurer or chamberlain a bond in an amount to be approved by him conditioned for the faithful application of such money, in accordance with the terms of the trust. If at any time after the creation of such trust there is no person or corporation willing to receive and apply the income thereof in accordance with the terms of the trust, the county treasurer or chamberlain shall present a petition to the county judge of the county, or a justice of the supreme court of the district wherein such cemetery is located, praying for directions as to the manner in which such trust shall be administered by him. Such county judge or justice of the supreme court may, by order, direct that the trust shall be directly administered by the county treasurer or city chamberlain or may otherwise provide for the administration thereof in such manner as shall, so far as practicable, carry out the intent of the creator of the trust.

Source.—Former County L. (L. 1892, ch. 686) § 150, as added by L. 1906, ch. 362.

§ 153. Court may direct action on bond of county treasurer.—Whenever any county treasurer, after service on him personally, or by leaving at his office, in his absence, with some person having charge thereof, or if such service can not be made, by leaving with some person of suitable age and discretion at his place of residence, or at his last place of residence in the county, if he has departed therefrom, of a certified copy of an order of the court, directing the payment or delivery of any money or securities held by him pursuant to an order of the court, to any person or persons, shall fail or neglect so to do, or where any county treasurer has invested or loaned any moneys held by him pursuant to an order of the court, to any person or persons on inadequate or worthless securities, and shall fail or neglect, when required so to do, to pay over the amount of the moneys so invested to the person or persons entitled thereto, the court may, by order, direct that an action be brought upon the official bond of such treasurer, against him and his sureties, to recover the amount of the money or securities so directed to be paid or delivered, or of the moneys so invested on inadequate or worthless security, for the benefit of the person or persons in whose behalf the direction shall have been by such order given, and whose name or names appear therein, or their assigns, and thereupon such action may be brought for such purpose.

Source.—L. 1879, ch. 447, § 2.

Action on bond.—Where county treasurer has converted money to his own use and an action is brought upon his bond to recover same, the action is properly brought in the name of the board of supervisors, and the recovery will inure to

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the benefit of the individual whose property was converted. *Supervisors of Tompkins v. Bristol* (1885), 99 N. Y. 316, 1 N. E. 878.

ARTICLE IX.

COUNTY CLERKS.

- Section 160. Election, appointment, term of office and undertaking of county clerk.
- 161. General powers and duties.
 - 162. Deputy clerk.
 - 163. Duties of deputy.
 - 164. Statement to board of supervisors.
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 - 168. County clerk shall keep register of moneys deposited with county treasurer under order of court.
 - 169. Special deputy clerks.

§ 160. Election, appointment, term of office and undertaking of county clerk.—There shall continue:

1. To be elected in each of the counties a county clerk, who shall hold his office for three years from and including the first day of January succeeding his election;

2. To be appointed by the governor, a county clerk, when a vacancy shall occur in such office, and the person so appointed shall hold the office until and including the last day of December succeeding the first annual election after the happening of the vacancy.

Every person elected or appointed to the office of county clerk shall, before he enters on the duties of his office, and if appointed, within fifteen days after notice thereof, execute an undertaking to the county, with at least two sureties, with the approval of the board of supervisors, if in session, indorsed thereon by the clerk of the board, otherwise with the approval of the county judge, or a justice of the supreme court residing in the county, and in such sum as such board, judge or justice approving the same shall direct, to the effect that he will faithfully execute and discharge the duties of county clerk, and account for all moneys deposited with him pursuant to law, or the order of any court, or by his predecessor in office, and pay them over as required by law, or directed by such order. (*Section amended by L. 1914, ch. 62.*)

Source.—Former County L. (L. 1892, ch. 686) § 160; originally revised from L. 1889, ch. 331, § 1.

References.—Election of county clerks, Constitution, Article 10, § 1, ante. Removal of county clerk, *Id.*; and for procedure, see Public Officers Law, §§ 33-35. Expense of removal a county charge, County Law, § 240, subd. 16, post. Oaths and undertakings, Public Officers Law, §§ 11-15; County Law, §§ 246, 247. Expiration of term, to hold until successor has qualified, Public Officers Law, § 5.

Compensation for services rendered as clerk of the Supreme Court or County

Court the clerk is limited to the fees specifically prescribed by statute. *People v. Sutherland* (1912), 207 N. Y. 22, 100 N. E. 440.

§ 161. General powers and duties.—The county clerk shall:

1. Have the custody of all books, records, deeds, parchments, maps and papers, deposited in his office in pursuance of law, and attend to their arrangement and preservation.

2. Provide at the expense of the county, all necessary books for recording all papers, documents or matters authorized by law to be recorded in his office.

3. When a certificate of election, or appointment to any county office, or revocation thereof, is received at his office, give immediate notice thereof, at the expense of the county, to every person named therein. When any other commission or appointment to office, or order of removal from office is received at his office, give immediate notice thereof, at the expense of the state, to every person named therein.

4. Give immediate notice to the governor, at the expense of the state, when there is a vacancy in any county office which he is authorized to fill; and the names of all persons elected or appointed to any such office who have neglected, within the time required by law, to file the constitutional oath of office, or the undertaking severally required of them; and on or before the fifteenth day of January in each year, the names of all persons elected or appointed to a county office in his county during the preceding year, who have duly qualified.

5. On or before the first day of January in each year, report to the secretary of state, at the expense of the state, the names of all corporations whose certificates of incorporation have been filed in his office during the previous year.

6. Record at length in the book kept in his office for recording certificates of incorporation an order entered in his office changing the name of a corporation. This subdivision also applies to the county of New York.

7. Annually, in the month of December, report to the secretary of state all changes of names of individuals or of corporations, which have been made in pursuance of orders filed in his office during the past year and since the last previous report, and also report in like manner to the superintendent of banks all changes of the names of banking corporations, and to the superintendent of insurance all changes of names of corporations authorized to make insurances. This subdivision also applies to the county of New York.

8. Keep in his office a book, free at all times to public inspection, in which shall be entered all fees charged or received by him for any official service, the time of receiving it, its nature and the persons for whom rendered.

9. Except as otherwise specially prescribed by law, each county clerk or register, who receives a salary, must account for, under oath, and pay to

the treasurer of his county, in the manner prescribed by law, all fees, perquisites, and emoluments, received by him, for his official services. This subdivision also applies to the county of New York.

10. Upon request, and upon payment of, or offer to pay, the fees allowed by law, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, can not be found. This subdivision also applies to a register of a county and to the county of New York.

11. Be clerk of the county court in his county.

Source.—Former County L. (L. 1892, ch. 686) § 161; Code Civ. Pro. § 2414, as amended by L. 1893, ch. 366; L. 1895, ch. 946; L. 1901, ch. 374, Id. § 2417, as amended by L. 1893, ch. 366; Id. §§ 961, 3285; L. 1847, ch. 280, § 65; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 52, 53, 60-64; L. 1844, ch. 125, §§ 1, 2.

Consolidators' note.—Subdivisions 7, 9-10 are inserted here from the Code of Civil Procedure. As they appear in the Code they are applicable to the county of New York, and as this chapter is excepted in its application to the county of New York it is necessary to preserve its application to the county of New York by inserting the words "this subdivision applies to the county of New York."

References.—Notary publics, county clerk to notify persons appointed as, Executive Law, § 103.

Elections.—Notices of submissions of propositions, etc., Election Law, § 294. Compensation for duties respecting, Id. § 318, 319. Election laws to be submitted to clerk, Id. § 320. Nominations to be published by clerk, Id. § 130. To send lists of nominations, Id. § 131. Preparation of ballots, Id. §§ 331-343. County clerk to act as clerk of board of canvassers, Id. § 430.

District superintendents of schools, designation of places for meeting of school directors to elect, Education Law, § 383, subd. 1. Certificates of election of, to be furnished to commissioner of education, Id. § 383, subd. 6.

Business hours in office of county clerk, County Law, § 165; holidays and half-holidays, General Construction Law, § 24, and Public Officers Law, § 62.

Penal provisions.—False certificates and recording instruments without acknowledgment, Penal Law, §§ 1860-1864. Failure to publish statement required by law, Id. § 1869.

Miscellaneous.—Receiving papers for safe keeping, County Law, § 167. Signing incomplete records of court, County Law, § 166. Register of money paid by judgment or order into county treasury, County Law, § 168; Code Civ. Pro. §§ 3306-a. Assistants for care of records of superior courts, L. 1896, ch. 885. Registration of titles to real property, Real Property Law, Art. 12. Jurors, duties as to drawing, Judiciary Law, §§ 504-535. Filing liens, Lien Law, § 10, building loan contracts, Id. § 22; marriage licenses and records of marriages, Domestic Relations Law, §§ 19-23. Certificate of incorporation not to be filed until tax is paid, Tax Law, § 180. Searches for state officers to be free, Executive Law, § 84.

Fees of county clerk, Code Civ. Pro. §§ 3301-3306.

Books and papers.—The clerk has the power to repair damage accidentally done to books, papers, etc., in his office at a reasonable expense, and the cost thereof is a county charge. *Worth v. City of Brooklyn* (1898), 34 App. Div. 223, 54 N. Y. Supp. 484.

Local officer; state officer.—The county clerk in all his administrative duties is a local officer elected by the electors of the county and paid by taxes collected from

the people included in the territory comprising the county. It is only when he performs state functions that he is to be treated as a state officer. *People ex rel. Plancon v. Prendergast* (1916), 219 N. Y. 252, 114 N. E. 433.

Making new indexes.—A board of supervisors has no power to contract with a county clerk to make an entirely new set of indexes of the county records for a compensation in addition to his regular fees where the old indexes have become dilapidated and inadequate. *Wadsworth v. Supervisors of Livingston* (1916), 217 N. Y. 484, 112 N. E. 161, revg. 159 App. Div. 934, 144 N. Y. Supp. 1149.

Presumption as to existence of document.—The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence. *Deshong v. City of New York* (1903), 176 N. Y. 475, 68 N. E. 880.

Appointment of chief clerk of county court.—A law which operates to prevent an incoming county clerk from appointing a new chief clerk of the county court, or which operates to vest such clerk with all of the powers and authorizes him to fulfill all the duties of the county clerk at any term of the court to the exclusion of the county clerk, is unconstitutional. *People ex rel. Wogan v. Rafferty* (1913), 208 N. Y. 451, 102 N. E. 532.

New York county; number of subordinates.—While the selection and appointment by the county clerk of his subordinates is an incident to his office of which he cannot be deprived, he may be reasonably controlled therein so far as the number of his subordinates is concerned and in the amount to be expended therefor, and the board of estimate and apportionment of the city of New York may in good faith refuse to make an appropriation for unnecessary employees. *People ex rel. Plancon v. Prendergast* (1916), 219 N. Y. 252, 114 N. E. 433.

Money paid to employees of the county clerk by commercial agencies for information may be retained by such employees. *Rept. of Atty. Genl. (1913), Vol. 2, p. 414.*

§ 162. Deputy clerk.—Every county clerk shall, within ten days after entering upon the duties of his office, make, under his hand and seal, and record in his office, a written appointment of some suitable person to be deputy clerk of his county. In counties containing a population of more than one hundred thousand by the last preceding federal census or state enumeration, the county clerk may, in like manner, appoint not to exceed two additional deputies. The clerks of the counties of New York, Kings, Bronx, Queens and Richmond may also designate assistants or clerks appointed by him and employed in the naturalization of aliens to be special deputy county clerks authorized to administer oaths required by the naturalization laws; but such special deputy county clerks shall not receive any compensation other than the salaries paid them as such assistants or clerks. Every such deputy, and every such special deputy designated pursuant to the provisions of this section, shall hold such office during the pleasure of the clerk. When any such deputy is temporarily absent, disqualified, or disabled, the clerk shall appoint some one of his assistants to act as a deputy in his place for a period of not exceeding thirty days and without any additional compensation. Before any such deputy so appointed, or special deputy so designated pursuant to the provisions of this

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section, enters on his duties as such he shall take the constitutional oath of office. If there shall be no county clerk, or deputy county clerk, or assistant authorized to act as deputy, the county judge may designate in writing, to be recorded in the county clerk's office, a suitable person to act as county clerk with all the powers, duties and privileges of the office, and subject to the liabilities thereof, until a county clerk shall have been elected, or appointed, and qualified. This section shall not apply to or affect any special deputy clerk to the county clerk appointed pursuant to the provisions of the judiciary law of this state. (*Amended by L. 1911, ch. 727, and L. 1916, ch. 452.*)

Source.—Former County L. (L. 1892, ch. 686) § 162, as amended by L. 1896, ch. 48; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 56, 57. See *People v. Fisher* (1840), 24 Wend. 215.

References.—Special deputies to attend courts, County Law, § 170. Deputy to public officer, Public Officers Law, § 9.

Signing of records and receipts of a mortgage tax sale must be by the recording officer in person or by a duly appointed deputy. The signing of such receipts and records by an ordinary clerk will not satisfy the requirements of the statute. *Rept. of Atty. Genl.* (1908) 321.

Liability for acts of deputy.—A county clerk is liable for the damage caused by the failure of his deputy to index a lis pendens against the names of all defendants as directed. *Hartwell v. Riley* (1900), 47 App. Div. 154, 62 N. Y. Supp. 317.

§ 163. Duties of deputy.—Any such deputy may perform such duties of the clerk as may be assigned to him by an order of the clerk to be entered in his office and shall also perform all the duties of the clerk when the clerk shall be absent from his office, or shall be incapable of performing the duties thereof, or when the office shall become vacant, until it shall be filled, except that of deciding upon the sufficiency of sureties, which duty shall devolve upon the county judge.

Source.—Former County L. (L. 1892, ch. 686) § 163, as amended by L. 1896, ch. 48; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 58, 59, 66, as amended by L. 1830, ch. 320, § 4.

Reference.—Powers of deputy as to drawing jury in absence of county clerk, Judiciary Law, § 535.

The authority of a deputy clerk, discharging the duties of clerk in consequence of the death of his principal, ceases on the appointment by the governor of a person to be clerk during the vacancy. *People ex rel. Smith v. Fisher* (1840), 24 Wend. 215.

Oath may be administered by deputy, who may sign name of clerk to jurat. *People ex rel. Springsteen v. Powers* (1865), 19 Abb. Pr. 99.

Hearing of charges against employees.—A deputy county clerk may conduct a trial of charges against an exempt fireman employed in the county clerk's office and determine whether the charges are sustained, and if he concludes that they are, he may dismiss the accused employee. *People ex rel. Devries v. Hamilton* (1903), 84 App. Div. 369, 82 N. Y. Supp. 884.

§ 163-a. Duties of assistant clerks in counties.—The clerk of any county may designate one of his assistants to be the calendar clerk of such county who may in the absence of any deputy clerk or for the purpose of assisting any deputy clerk, and after taking the required oath, perform such duties

of the clerk as may be assigned to him by an order of the county clerk to be entered in his office. The compensation of any such assistant of the clerk shall be fixed by the county clerk, and when so fixed, no additional compensation shall be paid to any such assistant of the clerk for the performance of any duties whatsoever which the county clerk may assign to him. (*Added by L. 1913, ch. 368.*)

§ 164. Statement to board of supervisors.—Every county clerk shall present to the board of supervisors of his county, upon the first day of their annual meeting, a statement, verified by his oath to be true, showing for the year preceding the first day of January:

1. The amount of all fees charged or received for searches, and for certificates thereof.

2. The amount of all fees charged or received for recording any documents in his office, and for certificates thereof.

3. The amount of all sums charged or received for services rendered the county.

4. The amount of all sums charged or received for official services.

5. The sums paid by him for assistance, fuel, lights, stationery and other incidental expenses, the names of the persons paid and the items thereof; but he shall not make any charge against the county for stationery, except record books and stationery furnished by him for courts held in his county, but the board of supervisors may allow the county clerk the necessary expenses incurred by him for lighting and heating his office.

Source.—Former County L. (L. 1892, ch. 686) § 164, as amended by L. 1896, ch. 593; originally revised from L. 1844, ch. 125, §§ 3-6.

Reference.—Failure to publish statement required by law, Penal Law, § 1869.

§ 165. Business hours in clerks', registers', sheriffs' and commissioner of jurors' offices.—Clerks of counties, courts of record, and registers of deeds, except in the counties of New York, Kings, Queens, Erie, and Westchester, as hereinafter provided, shall respectively keep open their offices for the transaction of business every day in the year, except Sundays and other days and half-days declared by law to be holidays or half-holidays, between the thirty-first day of March and the first day of October next following, from eight o'clock in the forenoon to five o'clock in the afternoon, and between the thirtieth day of September and the first day of April next following, from nine o'clock in the forenoon to five o'clock in the afternoon. In the counties of New York, Kings and Queens, said offices, the sheriff's office and the offices of the commissioner of jurors shall remain open during the months of July and August in each year from nine o'clock in the forenoon to two o'clock in the afternoon, and during the other months in the year from nine o'clock in the forenoon to four o'clock in the afternoon; and in Erie county the county clerk's office shall remain open from nine o'clock in the forenoon to five o'clock in the afternoon; and in Westchester county the offices of clerks of counties, courts of record, registers of deeds,

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sheriffs, commissioner of jurors and surrogates shall remain open from nine o'clock in the forenoon to five o'clock in the afternoon, except during the months of July and August, when they shall remain open from nine o'clock in the forenoon to three o'clock in the afternoon. (*Amended by L. 1909, ch. 199.*)

Source.—Former County L. (L. 1892, ch. 686) § 165, as amended by L. 1895, ch. 144; L. 1895, ch. 961; L. 1902, ch. 401; L. 1903, ch. 534; L. 1908, ch. 42; originally revised from R. S., pt. 3, ch. 3, tit. 2, § 54, as amended by L. 1860, ch. 276.

References.—Holidays and half-holidays, General Construction Law, § 24; Public Officers Law, § 62.

Business before or after office hours.—Keeping open the clerk's office after or before the hours mentioned is not unlawful; and a certificate of nomination may be filed at 11 P. M. on the last day allowed for such filing. *Matter of Norton* (1898), 34 App. Div. 79, 53 N. Y. Supp. 1093, appeal dis. 158 N. Y. 130, 52 N. E. 723.

Judgments docketed out of office hours must be considered as docketed and become liens equally at the next office hour thereafter. *France v. Hamilton* (1862), 26 How. Pr. 180.

Over time work.—A clerk in the office of a county clerk is not entitled to pay in excess of his regular salary for work within the duties of his clerkship although performed before and after the hours the office was open for business and at the request of the county clerk. *Bloodgood v. Wuest* (1902), 69 App. Div. 356, 74 N. Y. Supp. 913.

Hours in Onondaga county.—See Rept. of Atty. Genl. (1895) 137.

§ 166. County clerk may complete records of predecessor.—1. The county clerk of any county of this state upon order duly made by the supreme court at a special term thereof shall hereafter have power to complete and sign and certify in his own name, adding to his signature the date of so doing; all records of papers, orders and minutes of proceedings of any court of which he is the clerk or ex officio clerk, left uncompleted or unsigned by any of his predecessors. This subdivision shall also apply to the county of New York.

2. The county clerk of any county or register if any upon an order made by the county judge or by a justice of the supreme court in a county in which there is no county judge and filed with such clerk, may complete and sign all uncompleted or unsigned records of conveyances and mortgages of real estate and other instruments affecting real property filed for record during the term of any of his predecessors. Such records shall be signed in his own name. (*Amended by L. 1915, ch. 246.*)

Source.—L. 1886, ch. 341.

§ 167. County clerks may receive certain papers for safe keeping.—The clerk of every county in this state, and the register of deeds in the county of New York, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any deeds, conveyances, wills or other papers or documents, which any person shall offer to them for that purpose; and shall give to such person a written receipt therefor.

Such instruments, papers and documents, shall be properly indorsed, so

as to indicate their general nature and the names of the parties thereto, shall be filed by the officer receiving the same, stating the time when received, and shall be deposited and kept by him and his successors in office, with his official papers, in some place separate and distinct from such papers.

The instruments, papers and documents so received and deposited, shall not be withdrawn from such office, except on the order of some court of record, for the purpose of being read in evidence in such court, and then to be returned to such office; nor shall they be delivered without such order, to any person, unless upon the written order of the person or persons who deposited the same, or their executors or administrators.

Such instruments, papers and documents so deposited shall be open to the examination of any person desiring the same, upon payment of the fees allowed by law.

Source.—R. S., pt. 3, ch. 7, tit. 3, Art. 7, §§ 63–66.

Consolidators' note.—The words "city and" in first paragraph are omitted because the officer formerly known as the "register of deeds of the city and county of New York" is now known as the "register of deeds of the county of New York."

§ 168. County clerk shall maintain register of moneys paid or ordered paid into court; penalty for failure thereof.—The county clerk of each of the counties of this state shall maintain and keep in his office a book to be known as a court and trust fund register to be used solely as a record of moneys and securities paid or transferred, or ordered or required to be so paid or transferred into court. Immediately upon the filing in his office of any judgment, order or decree of any court directing the payment or happening of the contingency expressed in said paper or record, have been transfer of money or securities, the amount thereof being stated, or determinable upon the happening of the contingency expressed in said judgment, order or decree, to the treasurer of his or any other county of the state, or in the counties of Bronx, New York, Kings, Queens and Richmond to the chamberlain of the city of New York, or upon the filing in his office of any report of a referee or other person, or treasurer's or chamberlain's receipt, stating that a sum of money has been deposited with such treasurer or chamberlain, in accordance with any such judgment, order or decree or with any provision of law; or upon the filing or entry terminated, a statement of the contingency upon the happening of which in his office of any other paper or record from which it appears that money or securities, the amount thereof being stated, or determinable upon the or should be paid to such treasurer or chamberlain; or upon the receipt by any such clerk of moneys required by any judgment, order or decree of the court, or by any provision of law, to be brought into court, the clerk shall enter in his court and trust fund register, the title of the action or proceeding in which such judgment, order or decree was made, or in which moneys are required to be deposited, together with a statement of the amount so deposited, or ordered or required to be deposited, if said

judgment, order or decree contains the amount of the same, or, otherwise, of the amount to be deposited as shown by the report of the referee or other person, or of the amount received by such clerk, or shown by the records of his office, if the said amount has been determined, or, if not determinable, and the name of the person or persons, if any, for whom such money or securities are ordered to be deposited, and the date of filing the same, or of such report or receipt as herein mentioned. For failure to comply with any of the provisions of this section a county clerk shall be liable to a penalty of two hundred and fifty dollars, to be recovered by the comptroller of the state in an action brought in his name as such comptroller and all money recovered in any such action or actions shall be paid to the people of the state of New York. (*Amended by L. 1910, ch. 160, and L. 1917, ch. 366, in effect May 4, 1917.*)

Source.—L. 1889, ch. 330, § 1, as amended by L. 1895, ch. 544; L. 1901, ch. 486; L. 1908, ch. 185.

Fees for recording statements of deposits with the county treasurer. Rept. of Atty. Genl. (1895) 241.

Fee not paid.—The clerk must make the record required by this section even though his fee therefor be not paid. Rept. of Atty. Genl. (1895) 241.

Separate register necessary.—Rept. of Atty. Genl. (1889) 295.

§ 169. **Special deputy clerks.**—1. In every county other than the counties of Queens, Westchester, Dutchess, Orange and Rockland the county clerk may, from time to time, by an instrument in writing, filed in his office, appoint, and at pleasure remove, one or more special deputy clerks to attend upon any or all of the terms or sittings of the courts of which he is clerk, and in any county having a population of more than sixty thousand at the last enumeration, the salary of such special deputy clerks shall be fixed by the board of supervisors of such county, and when the said salary shall be so fixed the same shall be paid from the court funds of said county or from an appropriation made therefor. Each person so appointed must, before he enters upon the duties of his office, subscribe and file in the clerk's office the constitutional oath of office; and he possesses the same power and authority as the clerk at any sitting or term of the court which he attends, with respect to the business transacted thereat. The salaries of special deputy clerks and assistants appointed in Queens county under the provisions of section one hundred and fifty-nine of the judiciary law shall be fixed by the justice residing in such county and shall be a county charge. The provisions of this subdivision shall not apply to the first or second judicial departments.

All special deputy clerks appointed in the counties of Westchester, Dutchess, Orange and Rockland, constituting the ninth judicial district hereunder, shall be appointed by the justices of the supreme court residing in said district, or a majority of them, which appointment shall be filed in writing in the clerk's office of the county affected thereby, and the salaries of such deputy clerks shall be fixed by the justices making the

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appointment and paid as hereinbefore provided. The provisions of this subdivision shall not apply to the first or second judicial departments, except to the ninth judicial district. (*Amended by L. 1910, ch. 694, L. 1913, chs. 109, 367 and 637, and L. 1915, ch. 345.*)

2. The minutes of the part or term of the supreme court to which any of the special deputy clerks to the clerk of the county of New York appointed pursuant to the judiciary law is assigned, kept by him, and the records kept by the supreme court jury clerk in the first judicial district shall be kept by the county clerk of New York county in his office and said county clerk shall give extracts from such minutes and records as now prescribed by law.

3. The minutes and records kept by the special deputy clerks appointed in the county of Queens pursuant to the judiciary law shall be kept by the county clerk in his office and he shall give extracts from such minutes and records as now prescribed by law. (*Section amended by L. 1910, ch. 694, and L. 1913, chs. 109, 367 and 637.*)

Source.—Code. Civ. Pro. § 89, amended by L. 1877, ch. 416; L. 1879, ch. 542; L. 1895, ch. 946; L. 1889, ch. 604; L. 1903, ch. 629; L. 1906, ch. 629; L. 1895, ch. 553, § 4, as amended by L. 1896, ch. 362; L. 1897, ch. 656; L. 1899, ch. 374; L. 1900, ch. 654; L. 1906, ch. 643; L. 1907, ch. 496.

Consolidators' note.—This section is taken from the Code of Civil Procedure. The section applies to New York county and for that reason a clause is inserted continuing the application.

A delivery of papers to a special deputy clerk is equivalent to delivery to the county clerk as he is a deputy of the county clerk. *Fink v. Wallach* (1905), 109 App. Div. 718, 96 N. Y. Supp. 543.

Compensation for services rendered by special deputies appointed under this section is that prescribed therein. Such compensation is the measure of the charge that can be made against the county. *People v. Sutherland* (1912), 207 N. Y. 22, 100 N. E. 440.

Effect of amendment of 1913.—Where the county clerk of Erie county, assuming to act under this section, as amended by chapter 109 of the Laws of 1913, issues an order of removal of special deputy county clerks attending terms of court, and attempts to appoint others in their places, without the approval of the justices of the Supreme Court of the Eighth Judicial District, such act on the part of the county clerk is wholly inoperative, and the State Civil Service Commission should certify the pay roll of the officers attempted to be removed by him. *Opinion of Atty. Genl.* (1913) 328.

Not in exempt class.—Deputy county clerks under this section, as amended by L. 1915, ch. 349, when assigned to act as court clerks in the various parts of the Supreme Court do not act as county clerks generally and are not included within the exempt class under section 13 (1) of the Civil Service Law, as amended by L. 1913, ch. 352. *Matter of Meahl v. Ordway* (1917), 98 Misc. 394, 162 N. Y. Supp. 576.

Applicability of civil service rules to promotion.—*Rept. of Atty. Genl.* (1910) 690.

ARTICLE X.

SHERIFFS AND CORONERS.

Section 180. Election, appointment and terms of office of sheriffs and coroners, and the undertakings of sheriffs.

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§ 180. Election, appointment and terms of office of sheriffs and coroners, and the undertakings of sheriffs.—There shall continue,

1. To be elected in each of the counties a sheriff, and in each of the counties containing a population of one hundred thousand and over, except Nassau county, four coroners, and in all other counties such number of coroners, not more than four, as shall be fixed by the board of supervisors, who shall respectively hold their offices for three years from and including the first day of January succeeding their election. The board of supervisors of a county containing a population of less than one hundred thousand, and having more than one coroner, may, by resolution, determine that after the first day of January of a year to be specified in such resolution, the number of coroners in such county shall be reduced to a specified number not less than one, and may by such resolution fix the term of coroners to be thereafter elected in such county so that the terms of all the coroners therein will expire on the first day of January of the year specified in the resolution. (*Subd. 1, amended by L. 1912, ch. 91, and L. 1916, ch. 87.*)

2. To be appointed by the governor, a sheriff, or a coroner, when a vacancy shall occur in either of such offices, and the person so appointed shall hold the office until and including the last day of December succeeding the first annual election thereafter, at which such vacancy can be lawfully filled.

Every person elected or appointed to the office of sheriff shall, before he enters upon the duties of his office, and if appointed, within fifteen days after notice thereof, execute and deliver to the county clerk of his county, a joint and several undertaking to the county, approved by such clerk, to the effect that such sheriff will, in all things, perform and execute the office

Of sheriff of his county during his continuance therein, without fraud or deceit. Such undertaking shall be filed in the office of the county clerk; and the clerk shall, at the time of his approval thereof, examine each surety thereto under oath; and he shall not approve of such undertaking, unless it shall appear on such examination that such sureties are jointly worth at least fifteen thousand dollars over and above all debts whatever; which examination, subscribed by the sureties, shall be indorsed on or attached to the undertaking; but the clerk shall determine the sufficiency of each surety. In the same manner the security shall be renewed within the twenty days after the first Monday of January in each year subsequent to that in which he shall have entered upon the duties of his office.

Source.—Former County L. (L. 1892, ch. 686) § 180, as amended by L. 1898, ch. 334; R. S., pt. 1, ch. 12, tit. 2, §§ 67-70.

References.—Term of office, and ineligibility for re-election, Constitution, Article 10, § 1; county not responsible for acts of sheriff, Id. § 1. Removal of sheriff, Id. § 1. Procedure for removal, Public Officers Law, §§ 33-35.

Oaths and undertakings, Constitution, Article 10, § 1; Public Officers Law, §§ 11-15; County Law, §§ 246, 247. Vacancy created by failure to take oath or give undertaking, Public Officers Law, § 30. Resignation of sheriffs and coroners to be made to governor, Id. § 31.

Suppression of mobs and riots, General Municipal Law, § 71. Command sheriff's posse to overcome resistance to service or execution of mandate, Judiciary Law, § 400. Governor may call out militia to aid, Military Law, § 115. Power to direct rioters to disperse, Code Criminal Procedure, § 106; to overcome resistance to process, Id. § 102. Willful disobedience of process, etc., a criminal contempt, Penal Law, § 600.

Duties of sheriffs and deputies as to courts, Judiciary Law, §§ 401-409. Misconduct of officer having charge of jurors, Penal Law, § 1792. Injury to records and misappropriation, Id. § 1838. Permitting escape of prisoners, Id. § 1839.

Undertaking.—Sheriff does not forfeit office by failing to execute bond within time specified; the statute is directory merely and does not impose an absolute limitation upon him. *People ex rel. Westcott v. Holley* (1834), 12 Wend. 481. A sheriff's bond is broken if he be guilty of any default or misconduct in his office. *People v. Brush* (1831), 6 Wend. 454.

The condition of a sheriff's bond does not extend beyond nonfeasance or misfeasance in respect to his official acts; and the plaintiff must show same affirmatively. *Ex parte Reed*, 4 Hill 572 (1843).

Conflict with Public Officers Law.—A conflict between subdivision 2 of this section and section 38 of the Public Officers Law must be resolved in favor of this section. *People ex rel. Conklin v. Boyle* (1917), 98 Misc. 364, 163 N. Y. Supp. 72.

Term of person appointed to fill vacancy.—Subdivision 2 of this section is contrary to the constitutional provision (State Const. art. X, § 5) that no person appointed to fill a vacancy in an elective office shall hold his office "longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy," and the governor cannot appoint a sheriff to fill a vacancy caused by death after October fifteenth preceding a general election to hold for a term beyond the first of the next January. *People ex rel. Conklin v. Boyle* (1917), 98 Misc. 364, 163 N. Y. Supp. 72.

See also Rept. of Atty. Genl. (1894) 271; Rept. of Atty. Genl. (1911), Vol. 2, p. 594. A person elected to fill a vacancy in the office of coroner is entitled to serve for the full term. Repts. of Atty. Genl. (1893) 345; (1902) 268; (1903) 376; (1909) 587; (1911), Vol. 2, p. 578.

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Special election.—Where a vacancy occurs in the office of sheriff between the fifteenth of October and the general election day in November following, it cannot be filled at that election, but a special election should be called for that purpose, of which not less than thirty or more than forty days' notice must be given. *Matter of Mitchell v. Boyle* (1916), 219 N. Y. 242, 114 N. E. 382, revg. (1916), 175 App. Div. 905, 161 N. Y. Supp. 1135.

Fees.—A sheriff's right to charge keeper's fees does not result from a levy, but from necessary or proper services duly proven to have been rendered. *Waite v. Kaldenberg Co.* (1897), 19 App. Div. 379, 46 N. Y. Supp. 516.

Duties of coroner and supervisor are incompatible and such offices should not be held by one person. *Rept. of Atty. Genl.* (1903) 460.

Coroner in New York city is a borough officer. *People ex rel. Hillman v. Scholer* (1904), 94 App. Div. 282, 87 N. Y. Supp. 1122, *affd.* 179 N. Y. 602, 72 N. E. 1148.

§ 181. **Under-sheriffs.**—Each sheriff shall, within ten days after he enters on the duties of his office, appoint some proper person under-sheriff of his county, to hold during his pleasure. When a vacancy shall occur in the office of sheriff, the under-sheriff shall, in all things, execute the duties of the office as sheriff, until a sheriff shall be elected or appointed and duly qualified; and any default or misfeasance in the office of such under-sheriff in the meantime, as well as before, shall be deemed to be a breach of the undertaking given by the sheriff who appointed him and also a breach of the undertaking executed by such under-sheriff, to a sheriff by whom he was appointed.

Source.—Former County L. (L. 1892, ch. 686) § 181; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 71, 72.

Under-sheriffs.—An action will not lie against an under-sheriff for breach of duty. *Paddock v. Cameron* (1828), 8 Cow. 212. See also *Tuttle v. Love* (1811), 7 Johns. 470. Though at common law the powers of the under-sheriff cease upon the death of the sheriff, yet by statute his power is continued for the benefit of all the parties interested. *Ward v. Storey* (1820), 18 Johns. 120.

The under-sheriff has no right to keep the money for which sheriff is liable until he is assured that the sheriff will pay it over to party entitled thereto. *Stegman v. Hollingsworth* (1891), 39 N. Y. St. Rep. 18, 14 N. Y. Supp. 465.

Compensation of undersheriff and deputies.—The amount reasonably paid by a sheriff as compensation of an undersheriff and deputies is a proper disbursement under a statute making the office of sheriff a salaried office and allowing the sheriff his necessary and actual disbursements. *Matter of Beck* (1898), 157 N. Y. 151, 52 N. E. 5, *reargument denied* 158 N. Y. 664, 52 N. E. 1123.

Death or resignation of sheriff.—A person while acting as sheriff is responsible for the acts of one acting as his late under-sheriff; but on the death of the principal the under-sheriff becomes substituted in his place and assumes all his duties and liabilities in respect to process not fully executed and is personally responsible for his acts, the sureties of the deceased late sheriff being sureties for the acts of the late under-sheriff. *Newman v. Beckwith* (1874), 61 N. Y. 205, revg. 5. *Lans.* 80.

Section cited.—*Buttling v. Hatton* (1900), 48 App. Div. 577, 62 N. Y. Supp. 899.

§ 182. **Deputies.**—Such sheriff may appoint such and so many deputies as he may deem proper, not exceeding one for every three thousand inhabitants of the county; any person may also be deputed by any sheriff or under-sheriff by written instrument, to do particular acts. Every appoint-

ment of an under-sheriff or of a deputy sheriff shall be in writing under the hand and seal of the sheriff and filed and recorded in the office of the clerk of the county; and every such under-sheriff or deputy sheriff shall, before he enters upon the execution of the duties of his office, take the constitutional oath of office; but this last provision shall not extend to any person who may be deputed by any sheriff or under-sheriff to do a particular act only.

Source.—Former County L. (L. 1892, ch. 686) § 182; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 73, 74.

References.—Oaths and undertakings, County Law, §§ 246, 247; Public Officers Law, §§ 11–15; effect of failure to file, *Id.* § 30.

Appointment of deputies; number to be determined by sheriff, not exceeding statutory limit. *People ex rel. Andrus v. Town Auditors* (1898), 33 App. Div. 277, 53 N. Y. Supp. 739.

A promise by a sheriff to appoint a certain person a deputy sheriff, even though for a valuable consideration, is void as against public policy. *Hager v. Catlin* (1879), 18 Hun 448. The only way the appointment of a deputy sheriff can be proved is by production of the original appointment in writing under the hand and seal of the sheriff, and due proof of its execution. *Von Beil v. Reilly* (1882), 14 Wk. Dig. 443. See also *Crowley v. Conner* (1877), 1 Robt. C. C. 162.

Bond of deputy is to the sheriff personally, and a revocation thereof can have no operation by leaving it at the office or with the under-sheriff until it comes to the knowledge of the sheriff himself. *Reilly v. Dodge* (1892), 131 N. Y. 153, 29 N. E. 1011, *affd.* 59 Super. (27 J. & S.) 199, 14 N. Y. Supp. 129. It is a breach of the deputy's bond if he failed to pay money collected, even if the sheriff should never be sued therefor. *Willet v. Stewart* (1864), 43 Barb. 98.

To give the sheriff a cause of action on the bond of his deputy there must not only be a technical breach of duty, but pecuniary damage resulting therefrom to the sheriff. *Rowe v. Richardson*, 5 Barb. 385 (1849). The sureties on the bond of a deputy sheriff are only responsible for his official acts as a general deputy; and the deputy is not accountable to his principal in that character when acting under his special direction and authority in a given case. *Tuttle v. Cook* (1836), 15 Wend. 274.

A bond conditioned to indemnify the sheriff from all costs, damages, expenses and trouble touching the return and execution of process, and concerning the not executing or wrongful execution of process, should not be construed so as to render the obligors liable for the costs and expenses of suits wrongfully instituted against the sheriff but to constitute a breach some improper act or omission of the deputy must be shown for which the sheriff could be lawfully made answerable. *Franklin v. Hunt* (1842), 2 Hill 671.

Term.—The authority of the deputy continues as long as that of his principal, provided he have a continuance of authority derived from the principal. *Ferguson v. Lee* (1832), 9 Wend. 258.

The office of deputy sheriff is vacated by the resignation of the sheriff, and to enable him to continue the duties of the office a new appointment must be made. *Boardman v. Halliday* (1843), 10 Paige 223, 230.

Performance of duties by deputy.—The authority of the deputy to perform all necessary ministerial acts required in the service and execution of legal process addressed to the sheriff is unquestionable; so he may adopt his own signature signed by his clerk. *Gibson v. National Park Bank of N. Y.* (1885), 98 N. Y. 87. See also *Livingston v. Cheetham* (1807), 2 Johns. 479; *Jackson ex dem. Randall v. Davis* (1820), 18 Johns. 7.

An execution in a sheriff's hands when he goes out of office may be executed by him thereafter personally or by deputy. *Jackson ex dem. Scofield v. Collins* (1824), 3 Cow. 89.

A sheriff may lawfully arrest without showing the warrant, but a deputy must show authority if required; this is on the presumption that within his county the sheriff is a known public officer. *Sheldon v. Van Buskirk* (1849), 2 N. Y. 473.

A deputy sheriff selling land on execution, may authorize another person to compute amount necessary to be paid to redeem and may direct that redemption money be deposited with such person as his agent. *Hall v. Fisher* (1849), 9 Barb. 17.

Actions will not lie against deputy sheriff to recover money received by him. *Colvin v. Holbrook* (1848), 2 N. Y. 126. Sheriff may recover on the bond of his deputy if he be rendered liable for a loss sustained through such deputy's omission or breach of duty. *Flack v. Brassel* (1897), 153 N. Y. 621, 47 N. E. 807.

Deputy is entitled to protection of short statute of limitations prescribed by § 383, subd. 1, of the Code of Civ. Pro. *Cumming v. Brown* (1871), 43 N. Y. 514.

Responsibility of sheriff for acts of deputy.—The duty of the deputy sheriff is to execute process according to command of the writ in pursuance of the established rules of law; and if he deviates therefrom by direction of the plaintiff in the suit, he ceases to be the sheriff's agent and becomes that of such plaintiff. *Acker v. Ledyard* (1850), 8 Barb. 514, *revd. on other grounds* (1853), 8 N. Y. 62. Authority of the deputy may be revoked by parol, and after such revocation the sheriff ceases to be responsible for his acts. *Edmunds v. Barton* (1865), 31 N. Y. 495.

The sheriff's liability for the acts of his deputy in the execution of process, rests upon the doctrine of principal and agent. The authority of the deputy to act as the agent of the sheriff, and to bind him by his acts, can only be proved by the production of his appointment as deputy, by the sheriff, in writing, under his hand and seal. *Curtis v. Fay* (1862), 37 Barb. 64.

Resignation of deputy sheriff leaves office *ipso facto* vacant. *Gilbert v. Luce* (1851), 11 Barb. 91.

Deputies to enforce animal quarantine.—A sheriff may appoint a special deputy sheriff to act as inspector in a quarantine on rabid dogs established by the Commissioner of Agriculture. *People ex rel. Baumann v. Lyon* (1912), 154 App. Div. 266, 138 N. Y. Supp. 973.

Prior to the amendment of section 96 of the Agricultural Law in 1909 the compensation of deputy sheriffs appointed to enforce an animal quarantine, pursuant to the provisions of the Agricultural Law, was a state and not a county charge. *People ex rel. Smith v. Supervisors of Erie* (1909), 134 App. Div. 12, 118 N. Y. Supp. 35.

§ 183. Custody of jails.—Each sheriff shall have the custody of the jails of his county and the prisoners therein and such jails shall be kept by him, or by keepers appointed by him, for whose acts he shall be responsible.

Source.—Former County L. (L. 1892, ch. 686) § 183; originally revised from R. S., pt. 1, ch. 12, tit. 2, § 75.

References.—Custody and control of prisoners, County Law, § 92. Officer permitting escape, punishment, Penal Law, §§ 1697, 1839.

Prisoner suffering from contagious disease.—Where the sheriff of a county jail situate in a village and containing many prisoners and their custodians, discovers that one of the prisoners is suffering from a contagious disease it is his right and duty to remove the prisoner from the jail to a suitable place and keep him there in custody until he has served his sentence. *Matter of Boyce* (1904), 43 Misc. 297, 88 N. Y. Supp. 841.

Insuring jail.—A board of supervisors has the right to insure the jail. In case of its failure to do so the sheriff may effect such insurance at the expense of the county. Rept. of Atty. Genl. (1913), Vol. 2, p. 43.

§ 184. **Sheriff's offices.**—Every sheriff shall keep an office in some proper place in the city or village in which the county courts of his county are held, of which he shall file a notice in the office of the county clerk. If there be more than one place of holding such courts, the notice shall specify in which place his office shall be kept, or it may be specified that an office will be kept in all such places. Every sheriff's office, except in the counties of Kings and New York as hereinafter provided, shall be kept open, except Sundays and other days and half days declared by law to be holidays or half-holidays, from nine o'clock in the morning until five o'clock in the afternoon, during the months of November, December, January, February and March of each year, and from eight o'clock in the morning until six o'clock in the afternoon during the other months in each year. Every notice or other paper required to be served on any sheriff may be served by leaving the same at the office designated by him in such notice during the days and hours for which he is required to keep such office open, but if there be any person belonging to such office therein, such notice or paper shall be delivered to such person, and every such service shall be deemed equivalent to a personal service on such sheriff. In the counties of Kings and New York said offices shall remain open during the entire year from nine o'clock in the forenoon to four o'clock in the afternoon, except Sundays and other days and half days declared by law to be holidays or half-holidays.

Source.—Former County L. (L. 1892, ch. 686) § 184, as amended by L. 1895, ch. 150; L. 1895, ch. 718; originally revised from R. S., pt. 3, ch. 3, tit. 2, §§ 55, 56.

References.—Holidays and half-holidays, General Construction Law, § 24. Business in public offices on holidays, Public Officers Law, § 62.

Service of papers on sheriff.—The papers referred to, which may be served by leaving them at his office, are those which are required to be served on him as sheriff, and which do not concern him personally. *Sherman v. Conner* (1875), 16 Abb. (N. S.) 396, 50 How. Pr. 29.

Notice by surety on bond of deputy of his withdrawal is not a paper that can be so served. *Reilly v. Dodge* (1892), 131 N. Y. 153, 29 N. E. 1011.

Where a delivery of an execution to a deputy in person is a delivery to the sheriff, yet leaving it in some undescribed place in the meat market of the deputy is not a good delivery. *Burrell v. Hollands* (1894), 78 Hun 583, 29 N. Y. Supp. 515.

Office hours.—Business with sheriffs, unlike that with county clerks, may be transacted at other places besides their offices, and outside of office hours. *France v. Hamilton* (1862), 26 How. Pr. 180. The sheriff's office not being required to be kept open Sunday, when the last day for redemption falls on that day, it may be made on Monday. *Porter v. Pierce* (1890), 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847.

Performance of official duties on holidays.—The provision of this section allowing a sheriff to close his office on half-holidays does not deprive him of his official powers or relieve him of the obligation to perform any of his official duties on such days which are capable of being exercised or discharged outside of his office. *Dailey v. Fenton* (1900), 47 App. Div. 418, 62 N. Y. Supp. 337.

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§ 185. Fees for services rendered the state.—When a sheriff shall be required by any statute to perform any service in behalf of the people of this state, and for their benefit, which shall not be made chargeable by law to his county, or to some officer, body or person, his account for such services shall be audited by the comptroller and paid out of the state treasury.

Source.—Former County L. (L. 1892, ch. 686) § 185; originally revised from R. S., pt. 1, ch. 12, tit. 2, § 76.

Reference.—Fees of sheriff, Code Civ. Pro. § 3307.

Section cited.—People ex rel. Smith v. Supervisors of Erie (1909), 134 App. Div. 12, 118 N. Y. Supp. 35.

§ 186. Removal of sheriff for non-payment of moneys.—When a sheriff shall be committed to the custody of any other sheriff, or to any coroner by virtue of an execution or attachment for the non-payment of moneys received by him by virtue of his office, and shall remain so committed for the space of thirty days successively, such facts shall be presented to the governor by the officer in whose custody such sheriff may be, to the end that such sheriff may be removed from office.

Source.—Former County L. (L. 1892, ch. 686) § 186; originally revised from R. S., pt. 1, ch. 12, tit. 2, § 77.

References.—Procedure before governor for removal of sheriff, Public Officers Law, §§ 33-35. Duties of coroner as to arrest and confinement of sheriff, Code Civil Procedure, §§ 172-181.

§ 187. When a coroner to act as sheriff.—When a vacancy shall occur in the office of sheriff, and there shall be no under-sheriff of the county then in office, or the office of such under-sheriff shall become vacant, or he become incapable of executing the duties of the same before another sheriff of the same county shall be elected or appointed and qualified, and there shall be more than one coroner of such county then in office, the county judge of such county shall forthwith designate one of such coroners to execute the duties of the office of sheriff of the county, until a sheriff thereof shall be elected or appointed and qualified. Such designation shall be by a written instrument, signed by the judge, and filed in the office of the clerk of the county, and the clerk shall immediately give notice thereof to such coroner. Within six days after receiving such notice, such coroner shall execute a joint and several undertaking, with the same number of sureties, to be approved in the same manner and be subject in all respects to the same regulations as the security required by law from the sheriff of such county. After the execution and filing of such undertaking in the clerk's office, such coroner shall execute the duties of the office of sheriff of the same county until a sheriff shall be duly elected or appointed and qualified.

Source.—Former County L. (L. 1892, ch. 686) § 187; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 78, 79.

References.—Duties of coroner in an action in which the sheriff is a party, Code Civ. Pro. §§ 172-181.

§ 188. When other designations to be made.—When the coroner so

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designated shall not, within the time specified, give the security required of him, the county judge shall, in like manner, designate another coroner of the county to assume the office of sheriff, and, if necessary, he shall make successive designation until all the coroners of the county shall have been designated to assume such office; and all the provisions contained in the last preceding section shall apply to every such designation and to the coroner named therein. If such vacancy shall occur when there shall be but one coroner of the county then in office, he shall be entitled to execute the duties of the office of sheriff therein until a sheriff shall be duly elected or appointed and qualified; but before he enters upon the duties of such office, and within ten days after the happening of the last vacancy in the office of the sheriff and under-sheriff, he shall execute with sureties a joint and several undertaking, the same as is required by law from a sheriff; and such undertaking shall be subject in all respects to the same regulations as the security required from the sheriff.

Source.—Former County L. (L. 1892, ch. 686) § 188; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 80-81.

§ 189. **When county judge to appoint.**—If such coroner so in office on the happening of such vacancies shall neglect or refuse to execute such undertaking within the time required, or if all the coroners, where there are more than one in office in such event, shall successively neglect or refuse to execute the undertaking within the time required, the county judge shall appoint some suitable person to execute the duties of the office of sheriff in his county, until a sheriff therein shall be duly elected or appointed and qualified. Such appointment shall be made and filed in the same manner as the above designations are made and filed, and the clerk shall forthwith give notice thereof to the person so appointed, who shall, within six days thereafter, and before he enters upon the duties of his office, give such security as is required by law of sheriffs, and subject to the same regulations; and thereupon such person shall execute the duties of the office of sheriff of the county until a sheriff shall be duly elected or appointed, and qualified.

Source.—Former County L. (L. 1892, ch. 686) § 189; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 82-84.

§ 190. **General provisions.**—Until some coroner designated or some person appointed by the judge shall have executed the security above required, or until a sheriff of the county shall have been duly elected or appointed, and qualified; the coroner or coroners of the county in which such vacancies shall exist shall execute the duties of the office of sheriff therein; and when any under-sheriff, coroner, coroners or other person shall execute the duties of the office of sheriff, pursuant to either of the foregoing provisions, the person so executing the same shall be subject to all the duties, liabilities and penalties imposed by law upon the sheriff duly elected and qualified, and he shall be entitled to the same compensation.

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Source.—Former County L. (L. 1892, ch. 686) § 190; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 85, 86.

Burial permits.—Coroners are not authorized to issue burial permits. Rept. of Atty. Genl. (1903) 417.

§ 191. **Coroners' salaries.**—The board of supervisors of any county shall have power to prescribe that coroners in said county shall receive a salary, instead of fees, and to fix the amount of such salary; and thereafter coroners in said county shall receive for their services only the salary so fixed and shall not be entitled to any fees whatever, except when performing the duties of a sheriff, in which last named case the coroner so acting shall have the same compensation as the sheriff, whose duties he performs, would have had.

Source.—Former County L. (L. 1892, ch. 686) § 191, as added by L. 1899, ch. 447. **Offices of coroner and supervisor** should not be held by the same persons as the duties are incompatible. Rept. of Atty. Genl. (1903) 460.

Salaries to be uniform for coroners in the same county. Rept. of Atty. Genl. (1902) 345.

Expenses.—Coroner, whose salary is fixed, is not entitled to compensation for his expenses. Rept. of Atty. Genl. (1901) 186. But it has been ruled that a coroner receiving a salary instead of fees is entitled to reimbursement for expenses actually and necessarily incurred by him in the discharge of his duties. Opinion of State Comptroller (1916), 10 State Dept. Rep. 550.

§ 192. **Fees of coroners.**—Coroners in and for the state of New York, except in the county of Kings and except in such other counties as have prescribed or shall hereafter prescribe, different compensation, shall be entitled to receive the following compensation for services performed: Mileage to the place of inquest and return, ten cents per mile. Viewing bodies, five dollars. Service of subpoena, ten cents per mill traveled. Swearing each witness, fifteen cents. Drawing decision, one dollar. Copying decision for record, per folio, twenty-five cents, but such officers shall receive pay for one copy only. For making and transmitting statements to the board of supervisors, each decision fifty cents. For warrants of commitment, one dollar. For arrest and examination of offenders, fees shall be the same as justices of the peace in like cases. When required to perform the duties of sheriff, shall be entitled to and receive the same fees as sheriffs for the performance of like duties. Shall be reimbursed for all moneys paid out actually and necessarily by him in the discharge of official duties as shall be allowed by the board of supervisors. Shall receive for each and every day and fractional parts thereof spent in taking an inquisition, three dollars. For performing the requirements of law in regard to wrecked vessels, shall receive three dollars per day and fractional parts thereof, and a reasonable compensation for all official acts performed, and mileage to and from such wrecked vessels, ten cents per mile. For taking ante-mortem statement shall be entitled to the same rates of mileage as before mentioned, and three dollars per day and fractional parts thereof, and for taking deposition of injured person in extremis, one dollar.

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Source.—L. 1873, ch. 855, § 1, as amended by L. 1874, ch. 535, § 1; L. 1900, ch. 763; L. 1904, ch. 119.

References.—Coroners' inquests and proceedings thereon, Code Criminal Procedure, §§ 773-790. Justices of the peace, when to act as coroners, *Id.* § 789-a.

A coroner is entitled to fees where an inquest is held, but is not entitled to disbursements in addition thereto. Where no inquest is held he is entitled to actual and necessary disbursements but no fee. Rept. of Atty. Genl. (1911) 179.

§ 193. Fees of coroner as witness.—Whenever, in consequence of the performance of his official duties, a coroner becomes a witness in a criminal proceeding, he shall be entitled to receive mileage to and from his place of residence, ten cents per mile, and three dollars per day for each day, or fractional parts thereof, actually detained as such witness. This section also applies to the county of New York.

Source.—L. 1873, ch. 855, § 3, as amended by L. 1874, ch. 535, § 3.

§ 194. Employment of stenographer and surgeons.—A coroner shall have power, when necessary, to employ not more than two competent surgeons to make postmortem examinations and dissections and to testify to the same and in counties where coroners are paid in fees, to employ a stenographer to take and reduce to writing the testimony of witnesses examined before the coroner, the compensation therefor to be a county charge. This section also applies to the county of New York. (*Amended by L. 1910, ch. 158.*)

The appointment of a coroner's physician is personal to each coroner and the term of office of each physician is coterminous with that of the coroner who appoints him unless he has been sooner removed. *Matter of Nanmack v. Creelman* (1911), 145 App. Div. 289, 130 N. Y. Supp. 211, *affd.* (1912), 206 N. Y. 630, 99 N. E. 1110.

Exclusion of persons from post-mortem examination.—A post-mortem examination, conducted by surgeons employed by a coroner holding an inquest, is not a part of the inquest in such a sense that every citizen has a right freely to attend it. *Crisfield v. Perine* (1878), 15 Hun 200, *affd.* (1880), 81 N. Y. 622.

Section cited.—*People v. Warner* (1907), 104 N. Y. Supp. 279.

§ 195. Proceedings on new sheriff assuming office.—

1. Where a new sheriff has been elected or appointed, and has qualified and given the security required by law, the clerk of the county must furnish to the new sheriff a certificate, under his hand and official seal, stating that the person so appointed or elected, has so qualified and given security.

2. Upon the commencement of the new sheriff's term of office, and the service of the certificate on the former sheriff, the latter's powers as sheriff cease, except as otherwise expressly prescribed by law.

3. Within ten days after the service of the certificate, upon the former sheriff, he must deliver to his successor:

(1.) The jail, or if there are two or more, the jails of the county, with all their appurtenances, and the property of the county therein.

(2.) All the prisoners then confined in the jail or jails.

(3.) All process, orders, commitments, and all other papers and docu-

ments, authorizing, or relating to the confinement or custody of a prisoner, or, if such a process, order, or commitment has been returned; a statement in writing of the contents thereof, and when and where it was returned.

(4.) All mandates, then in his hands, except such as he has fully executed, or has begun to execute, by the collection of money thereon, or by a seizure of or levy on money or other property, in pursuance thereof. At the time of the delivery, the former sheriff must execute an instrument, reciting the property, documents, and prisoners delivered, specifying particularly the process or other authority, by which each prisoner was committed and is detained, and whether the same has been returned or is delivered to the new sheriff. The instrument must be delivered to the new sheriff, who must acknowledge, in writing, upon a duplicate thereof, the receipt of the property, documents and prisoners, therein specified; and deliver such duplicate and acknowledgment to the former sheriff.

4. Notwithstanding the election or appointment of a new sheriff, the former sheriff must return, in his own name, each mandate which he has fully executed; and must proceed with and complete the execution of each mandate which he has begun to execute, in the manner specified in paragraph fourth of subdivision three of this section, except that all mandates issued against the wages, debts, earnings, salary, income from trust funds or profits of a judgment debtor, shall be delivered over to the new sheriff, who shall proceed with and complete the execution of the same. (*Subd. 4 amended by L. 1910, ch. 418.*)

5. When a person, arrested by virtue of an order of arrest, is confined, either in jail, or to the liberties thereof, at the time of assigning and delivering the jail to the new sheriff, the order, if it is not then returnable, must be delivered to the new sheriff, and be returned by him at the return day thereof, with the proceedings of the former sheriff and of the new sheriff thereon.

6. If the former sheriff neglects or refuses to deliver to his successor, the jail, or any of the property, documents or prisoners in his charge, as prescribed in this section, his successor must, notwithstanding, take possession of the jail, and of the property of the county therein, and the custody of the prisoners therein confined, and proceed to compel the delivery of the documents withheld, as prescribed by law.

7. If, at the time when the new sheriff qualifies, and gives the security required by law, the office of the former sheriff is executed by his undersheriff, or by a coroner of the county, or a person specially authorized for that purpose, he must comply with the provisions of this section, and perform the duties thereby required of the former sheriff.

8. The provisions of this section shall also apply to the county of New York.

Source.—Code Civ. Pro. §§ 182, 183, 184, 185, 186, 187, 188, 189.

Meaning of section.—Section 182 of the Code from which subd. 1 was derived,

was interpreted by the old supreme court to mean that until the certificate of the clerk was served upon the old sheriff, he had authority to execute process placed in his hands as sheriff, and that the powers of the old sheriff did not cease until the powers of the new sheriff became complete. *Curtis v. Kimball* (1835), 12 Wend. 275.

The outgoing sheriff, while retaining possession of the office awaiting advent of the new sheriff, is to be considered as his agent in receiving such process as comes into his hands, until the transfer of the office is complete. *Littlejohn v. Leffingwell* (1898), 34 App. Div. 185, 54 N. Y. Supp. 536.

Qualifying.—A sheriff does not lose his office by neglecting to give his bond within twenty days after receiving notice of his election, if he execute and file it within fifteen days after the commencement of his term. *People ex rel. Westcott v. Hooley* (1834), 12 Wend. 481. "Qualified" means taken the oath of office. *Curtis v. Kimball* (1835), 12 Wend. 275.

Delivery of prisoner.—The power of the outgoing sheriff ceases after ten days and the new one has no power unless the prisoner is assigned to him. *Matter of Irving* (1836), 3 How. Pr. (N. S.) 236; *Hinds v. Doubleday* (1839), 21 Wend. 223.

The power of the outgoing sheriff as to prisoners is unchanged until the certificate is served upon him by the incoming sheriff. *Feerick v. Conner* (1881), 12 Wk. Dig. 43.

A prisoner on his jail limits not assigned to the incoming sheriff by the outgoing sheriff cannot be deemed to be imprisoned. *Matter of Irving* (1836), 3 How. Pr. (N. S.) 236.

An outgoing sheriff neglecting to deliver a prisoner to his successor is liable to plaintiff in the execution. *French v. Willet* (1860), 17 Super. (4 Bosw.) 649, 10 Abb. Pr. 99.

If a new sheriff regularly receives a prisoner he is answerable, though there had been a previous voluntary escape; but plaintiff may elect which sheriff he will hold, but he cannot hold both. *Rawson v. Turner* (1809), 4 Johns. 469.

A new sheriff is not liable for the escape of a prisoner who is on the limits on bond and has not been assigned to him by his predecessor. *Partridge v. Westervelt* (1835), 13 Wend. 500. So where the sheriff dies and the under-sheriff neglects to assign such prisoner to the new sheriff. *Ridgway v. Barnard* (1858), 28 Barb. 613.

Where outgoing sheriff assigned to the incoming one a prisoner under *mesne* process, but himself returned the writ, and the new sheriff subsequently took bail, and after judgment the prisoner escaped, the new sheriff was held not liable therefor because of the irregularity of the assignment in that he never had the writ. *Richards v. Porter* (1810), 7 Johns. 137.

As to information necessary to be given with a prisoner delivered to sheriff's successor, see *Tallmadge v. Richmond* (1812), 9 Johns. 85, *revd.* on another point, (1819), 16 Johns. 307.

Decree.—Where sheriff appointed to sell property in foreclosure has advertised the same for sale before receiving his successor's certificate, he is not required to deliver the decree to his successor, since by the advertisement the seizure became complete and rendered the property subject to the decree. *Union Dime Savings Inst'n v. Andariese* (1880), 83 N. Y. 174.

Executions not levied should be turned over, and where the new sheriff has received such an execution an order will issue requiring him to make return thereon or that attachment will issue against him. *Holmes B. & H. v. Rogers* (1888), 50 Hun 600, 2 N. Y. Supp. 501.

Authority of former sheriff.—Where a sheriff prior to the expiration of his term of office under a judgment of foreclosure advertised the premises for sale upon a day after his term had expired, he had authority and was bound to proceed with

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and complete the sale. *Union Dime Savings Inst'n v. Andarlese* (1880), 83 N. Y. 174.

A sheriff may complete the execution of a *fiert facias* after he has gone out of office. *Wood v. Colvin* (1843), 5 Hill 228. So he may sell and convey. *Averill v. Wilson* (1848), 4 Barb. 180. As to return, see *Richards v. Porter* (1810), 7 Johns. 137.

Authority of deputy of former sheriff.—A deputy sheriff may complete an execution by sale and conveyance after the sheriff goes out of office, provided the execution was levied before. *Jackson v. Collins* (1824), 3 Cow. 89.

Property seized.—A sheriff cannot be compelled to deliver to his successor property seized by him by virtue of an attachment. *McKay v. Harrower* (1858), 27 Barb. 463.

Duties and liabilities of under-sheriff.—Where a sheriff who, at the expiration of his term of office, has in his hands process not fully executed, dies before the complete execution thereof, his late under-sheriff becomes substituted in his place and assumes all his duties and liabilities in respect to such process, and such under-sheriff is personally liable for all moneys collected by him by virtue of such process. *Newman v. Beckwith* (1874), 61 N. Y. 205.

A bond given by an under-sheriff to the sheriff covers moneys received by the former after the latter's final term has expired; he is bound to pay over to the ex-sheriff. *Stegman v. Hollingsworth* (1891), 39 N. Y. St. Rep. 18, 14 N. Y. Supp. 465.

Appointment of special person to execute a deed where sheriff died and there was no under-sheriff. *Sickles v. Hogeboom* (1833), 10 Wend. 562.

ARTICLE XI.

DISTRICT ATTORNEYS.

Section 200. Election, appointment, term of office and undertaking of district attorney.

201. General duties.

202. Assistant district attorneys.

203. In Erie, Monroe, Onondaga, Rensselaer and Westchester counties.

204. Employment of counsel by district attorney.

205. Special district attorney.

§ 200. Election, appointment, term of office and undertaking of district attorney.—There shall continue,

1. To be elected in each of the counties, a district attorney, who shall hold his office for three years from and including the first day of January succeeding his election;

2. To be appointed by the governor, a district attorney, when a vacancy shall occur in such office, and the person so appointed shall hold the office until and including the last day of December succeeding the first annual election thereafter at which such vacancy can be lawfully filled.

3. Except in the county of Kings, every person elected or appointed to the office of district attorney, shall, before he enters upon the duties of his office, and if appointed, within fifteen days after notice thereof, execute and deliver, to the county clerk of his county, a joint and several undertaking to the county, approved by the county judge, with two or more

sufficient sureties, being resident freeholders, and in such sum as the board of supervisors of the county shall direct, to the effect that he will faithfully account for and pay over according to law, or as the court may direct, all moneys that may come into his hands as such district attorney.

4. It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed; except when the place of trial of an indictment is changed from one county to another, it shall be the duty of the district attorney of the county where the indictment is trial of an indictment is changed from one county to another, it shall be the duty of the district attorney of the county to which such trial is changed to assist in such trial upon the request of the district attorney of the county where the indictment was found. (*Section amended by L. 1914, ch. 62.*)

Source.—Former County L. (L. 1892, ch. 686) § 200, as amended by L. 1908, ch. 262; originally revised from L. 1884, ch. 337; L. 1888, ch. 55, § 1.

References.—Election of, for terms of three years (except in counties of New York and Kings), Constitution, Article 10, § 1. Removal by governor, *Id.* § 1. Procedure for removal, Public Officers Law, §§ 33–35. Failure to prosecute for bribery, a ground for removal, Constitution, Article 13, § 6. Resignation of district attorney to governor, Public Officers Law, § 31.

Oaths and undertakings, manner of executing, effect of failure to file, etc. County Law, §§ 246, 247; Public Officers Law, §§ 11–15, 30. Vacancies, how created, *Id.* § 30. Legislature may provide for filling, Constitution, Article 10, § 5.

District attorney may be temporarily displaced by attorney-general, when ordered by the governor, Executive Law, § 62, subd. 2. Governor may designate deputy attorney general as special district attorney, *Id.* §§ 62, 67. Salary fixed by board of supervisors, County Law, § 12, subd. 5.

Term of office of district attorney of Kings county, power of legislature to change it. *People ex rel. Eldred v. Palmer* (1897), 21 App. Div. 101, 47 N. Y. Supp. 403, *affd.* (1897), 154 N. Y. 133, 47 N. E. 1084.

Special district attorneys, powers of courts to appoint, under L. 1883, ch. 123, amending R. S., pt. 1, ch. 12, tit. 2, § 90, which was not repealed by the County Law. *People v. Lytle* (1896), 7 App. Div. 553, 560, 40 N. Y. Supp. 153. The act here referred to is consolidated in County Law, § 205.

Employee's right to fees as notary.—The office of notary is not incompatible with the position of messenger or librarian in the office of the district attorney, and a notary holding such a position may recover his fees as notary for services rendered at the request of the district attorney. *Merzbach v. Mayor, etc., of New York* (1900), 163 N. Y. 16, 57 N. E. 96.

Duties as to prosecutions.—The duty of the district attorney to conduct prosecutions embraces whatever is essential to bring a criminal to trial as well as the proceedings of the trial; so he may cause the arrest of a fugitive in a foreign jurisdiction, and the expense thereof is a proper county charge. *People ex rel. Gardenier v. Supervisors of Columbia* (1892), 134 N. Y. 1, 31 N. E. 322.

Institution of proceedings to compel rescinding of parole.—It is a part of the prosecution for crime, within the statutory duty of the district attorney, to institute and enforce in the courts any proceeding or means authorized by law for the restoration and enforcement of a judgment of conviction obtained by him. Where the board of parole paroled a prisoner contrary to the provisions of the statute the law imposes upon the district attorney the duty to preserve and defend the

integrity and effectiveness of the judgment. He is the proper party to institute a writ of habeas corpus to compel the board to rescind the parole. *Matter of Lewis v. Carter* (1917), 220 N. Y. 8, 115 N. E. 19, revg. 175 App. Div. 501, 160 N. Y. Supp. 1136.

§ 201. General duties.—1. Every district attorney shall, on or before the first Tuesday in October, annually file in the office of the county treasurer a written account verified by his oath to be true, of all moneys received by him by virtue of his office during the preceding year; and shall, at the same time, pay over any balances thereof to the county treasurer. If he shall refuse or neglect to account for and pay over such moneys as so required of him, the county treasurer shall prosecute him and his sureties for the same, in the name of and for the benefit of his county.

2. Within thirty days after a district attorney receives or collects money upon a recognizance or for a penalty or forfeiture, belonging to the county, he must pay it to the county treasurer of his county, deducting only his necessary disbursements; except that, where he does not receive, as his compensation, a salary fixed pursuant to law, the county court may, by an order entered in its minutes, allow him to retain also a sum, specified in the order, for his reasonable costs and expenses, and a reasonable counsel fee.

3. Each district attorney must render to the first term of the county court of his county, held in each calendar year, a written account, verified by his affidavit, of all actions brought by him upon recognizances, or for penalties or forfeitures belonging to the county, or to the state; of all his proceedings therein; of all judgments recovered by him therein; and of all money, collected by him from any person, belonging to the county or to the state. This subdivision applies to a district attorney who has gone out of office, during the preceding calendar year.

4. Where a recognizance to the people is forfeited, the district attorney of the county in which it was taken, must, unless the court otherwise directs, forthwith bring an action to recover the penalty thereof.

5. Subdivisions two, three, and four of this section shall also apply to the county of New York.

Source.—Former County L. (L. 1892, ch. 686) § 201; Code Civ. Pro. §§ 1966, 1967, 1968.

References.—District attorney as temporary surrogate, Code Civ. Pro. § 2484.

Actions for penalties and forfeitures, Code Civ. Pro. § 1962; against county treasurer for failure to file report, County Law, § 148; against delinquent town officers, Town Law, § 14; against officers receiving county moneys, County Law, § 244; against trespassers on state lands, Public Lands Law, §§ 8, 9, 18.

Duties as to abatement of nuisances, Public Health Law, § 6; as to collection of taxes, Town Law, § 235; as to disbarment proceedings against attorneys, Judiciary Law, §§ 88, 476; as to excise cases, Liquor Tax Law, § 40; as to false weights and measures, Penal Law, §§ 2414, 2415; as to election frauds, Election Law, §§ 551, 559; as to criminal statistics, Code Crim. Pro. § 941; as to gambling implements, Penal Law, § 978; as to obscene books, Penal Law, § 1144; as to mobs and riots, Code Crim. Pro. § 115.

Duties as to prosecution of offenses, Code Criminal Procedure, §§ 188-454.

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To advise grand jury as to indictments, *Id.* §§ 262, 263. Disclosing findings or actions of grand jury, misdemeanor, Penal Law, § 1782.

District attorney to act as surrogate in certain cases, Code Civil Procedure (Surrogates' Code) § 2478. Legal assistance to state board of charities, State Charities Law, § 16; Poor Law, § 119. Duties regarding investigations of prisons, Prison Law, § 52.

Action for breach of an undertaking given upon conviction of a husband for abandonment of his wife may be prosecuted in the name of the overseer of the poor. *Lutes v. Shelley* (1886), 40 Hun 197, 24 Wk. Dig. 117.

Forfeited bail.—Payment to county treasurer of money collected upon forfeiture of bail. *People v. Abrams* (1916), 172 App. Div. 577.

Forfeited recognizance.—Whenever a recognizance is forfeited the district attorney of the county in which it was taken is the proper officer to prosecute for the alleged breach. *People v. Meyers* (1874), 1 Sheld. 429.

After forfeiture the recognizance will not be discharged on giving new bail until there has been a trial, but proceedings on the forfeiture will be stayed. *People v. Coman* (1875), 5 Daly 527, 49 How. Pr. 91, appeal dis. 63 N. Y. 611 (1875); *People v. Abrahams* (1875), 6 Daly 120.

Where the recognizance is for appearance on a day named "and from time to time as directed by the justice," and the proceedings are adjourned when the defendant is not present, there cannot be a forfeiture at a subsequent adjourned day. *People v. Scott* (1876), 67 N. Y. 585.

In New York City the court may, under Laws of 1839, ch. 343, order a suit on the recognizance, or a judgment may be entered under Laws of 1844, ch. 315. *People v. Sands* (1876), 7 Hun 235.

Judgment may be entered by filing the recognizance with the county clerk with a copy of an order declaring it forfeited. *People v. Quigg* (1874), 59 N. Y. 83.

§ 202. Assistant district attorneys.—In any county having, according to the last preceding federal or state enumeration, more than sixty-five thousand inhabitants, the district attorney may, when authorized by the board of supervisors, appoint a suitable person, who must be a counselor-at-law, in this state, and a citizen and resident of the county, to be his assistant. Every appointment of an assistant district attorney shall be in writing, under the hand and seal of the district attorney, and filed in the office of the county clerk; and the person so appointed, shall take and file with the clerk the constitutional oath of office, before entering upon his duties as such assistant district attorney. Every such appointment may be revoked by the district attorney making the same, which revocation shall be in writing and filed in the clerk's office. Such assistant district attorney may attend all criminal courts, and discharge any duties imposed by law upon, or required of the district attorney by whom he was appointed. And in any such county the district attorney may in like manner appoint any additional assistant district attorneys or detectives or stenographers or interpreters for his office whenever he is authorized so to do by the board of supervisors of any such county. The qualifications, regulations and powers of any such additional assistant district attorneys shall be the same as prescribed in this section in relation to an assistant district attorney. The salaries of any such officers so authorized to be appointed by the district attorney shall be fixed by such board of supervisors.

Source.—Former County L. (L. 1892, ch. 686) § 202, as amended by L. 1904, ch. 78; L. 1908, ch. 165; originally revised from L. 1872, ch. 587, §§ 1-3; L. 1888, ch. 55, § 81.

Employment of private detectives.—Although there is no express statutory provision allowing a district attorney to employ private detectives without authorization by the board of supervisors or making the compensation of such detectives a county charge, a district attorney may, nevertheless, employ private detectives where their services are necessary to the proper discharge of his official duties and the reasonable recompense and disbursements of said detectives are a county charge which should be audited by the board of supervisors. But the supervisors are not required to audit the bill as presented and may scrutinize the items before allowing the same. *People ex rel. Watts v. Supervisors of Niagara* (1915), 170 App. Div. 334, 156 N. Y. Supp. 148.

§ 203. In Erie, Monroe, Onondaga, Rensselaer, Niagara * and Westchester counties.—The district attorney of Erie county may appoint in and for the county of Erie, in the manner provided in the last section, and with like powers, such number of assistants as shall be fixed and determined by resolution of the board of supervisors of Erie county. All of the persons so appointed shall be called assistant district attorneys. Each of said assistant district attorneys shall receive such salary as shall be fixed and determined by said board of supervisors. The district attorney shall designate in the order appointing such assistants the salary which each of such assistants shall receive, subject, however, to the limitations prescribed by such resolution of the board of supervisors. The three assistant district attorneys and the two deputy assistant district attorneys now in office shall continue to receive the same salaries that are now paid them until the board of supervisors shall by resolution fix and determine the salaries which such assistants and deputies shall receive pursuant to the provisions of this section. Said assistants shall severally take the constitutional oath of office before entering upon the duties thereof; and the district attorney shall be responsible for their acts. Said district attorney may designate, in writing, to be filed in the office of the clerk of said county, one of his said assistants to be the acting district attorney in the absence from said county or other inability of said district attorney; and the assistant so designated shall, during such absence or inability of said district attorney, perform the duties of the office. Such designation may be revoked by said district attorney in writing, to be filed in said county clerk's office. The district attorney of Monroe county may appoint, in and for the county of Monroe, in the manner provided in the last section, and with like powers, three assistants, to be called respectively, the first, second and third assistant district attorneys, and two deputy assistants, to be called respectively, the first and second deputy assistant district attorneys, who shall severally take the constitutional oath of office before entering upon the duties thereof, and the district attorney shall be responsible for their acts. In Monroe county the salaries of the assistant

* So in original.

district attorneys and the deputy assistant district attorneys shall be fixed by the board of supervisors as follows: The salary of the first assistant district attorney shall be not less than two thousand dollars per year, payable monthly; the salary of the second assistant district attorney shall not be less than eighteen hundred dollars per year, payable monthly; the salary of the third assistant district attorney shall not be less than sixteen hundred dollars per year, payable monthly; the salary of the first deputy assistant district attorney shall not be less than twelve hundred dollars per year, payable monthly; the salary of the second deputy assistant district attorney shall not be less than seven hundred and twenty dollars per year, payable monthly; and until the salaries of said officials are so fixed by the board of supervisors, they shall be as above stated. The district attorney of Monroe county and his assistants and such deputy assistants shall conduct, on the part of the people, all preliminary examinations in the police court of the city of Rochester, and, subject to the right of a complainant to appear personally or by attorney, all other prosecutions for crime therein; and may conduct prosecutions therein for violations of the penal ordinances of the said city, and appeals therefrom, and in such event one-half of the salary of such first deputy shall be a charge upon the city of Rochester and assessed back upon said city by the board of supervisors of Monroe county; but the corporation counsel of the said city shall have the power to prosecute any person for the violation of an ordinance and to conduct proceedings therefor, or an appeal therefrom. The district attorney of Onondaga county may appoint in and for said county, in the manner provided in the last section, and with like powers, two assistants, to be called respectively the first and second assistant district attorneys, each of whom shall take the constitutional oath of office before entering upon the duties thereof; and the district attorney of said county shall be responsible for their acts. The district attorney of Westchester county may appoint in and for the county of Westchester, in the manner provided in the last section, and with like powers, two assistants, to be called respectively the first and second assistant district attorney, who shall severally take the constitutional oath of office before entering upon the duties thereof; and the district attorney shall be responsible for their acts; and the salary of each shall be fixed by the board of supervisors. The district attorneys of the counties of Erie, Onondaga and Monroe may also appoint a person to act as interpreter at all sessions of the grand juries of such counties and of the city of Buffalo, whose compensation shall be fixed by the court in and for which such grand jury may be empaneled. The district attorneys of the counties of Erie and Monroe shall each be entitled to receive, in addition to their salary, all costs collected by them in actions and proceedings prosecuted and defended by them. The county judge, or the special county judge, of the county of Monroe, or any supreme court judge, shall have power, on the application of the district attorney of Monroe county, to order and

direct the county treasurer of Monroe county to pay to the district attorney any sum of money expended or incurred by him in the performance of his duties in his office, and the county judge of the county of Rensselaer, or any supreme court judge, shall have power, on the application of the district attorney of Rensselaer county, to order and direct the county treasurer of Rensselaer county to pay to the district attorney any sum of money expended or incurred by him in the performance of his duties in his office, and the county judge of the county of Albany, or any supreme court judge, shall have power, on the application of the district attorney of Albany county, to order and direct the county treasurer of Albany county to pay to the district attorney of such county any sum of money expended or incurred by him in the performance of his duties in his office, and the county judge of Columbia county, or any judge of the supreme court, shall have power, on the application of the district attorney of Columbia county, to order and direct the county treasurer of Columbia county to pay to the district attorney of such county any sum of money expended or incurred by him in the performance of his duties in office. The district attorney of Niagara county shall have charge of and conduct on the part of the people all preliminary examinations in the police courts of the cities of Lockport, North Tonawanda and Niagara Falls, either in person or by his assistant. In lieu of the necessary traveling expenses and other disbursements incurred in the performance of these additional duties, either by himself or his assistant or stenographer, the district attorney of Niagara county shall receive an amount to be fixed by the board of supervisors of Niagara county at not less than one thousand two hundred dollars per annum, payable monthly by the county treasurer of Niagara county, and the assistant district attorney shall receive an amount to be fixed by the board of supervisors of Niagara county, at not less than five hundred dollars per annum, payable monthly by the county treasurer of Niagara county, and the district attorney's stenographer shall receive an amount to be fixed by the board of supervisors of Niagara county at not less than four hundred dollars per annum, payable monthly by the county treasurer of Niagara county. Until such amount is so fixed by the board of supervisors it shall be as above stated. (*Amended by L. 1911, ch. 95, L. 1912, ch. 544, and L. 1915, ch. 140.*)

Source.—Former County L. (L. 1892, ch. 686) § 203, as amended by L. 1893, ch. 70; L. 1897, ch. 409; L. 1900, ch. 330; L. 1901, ch. 51; L. 1902, ch. 143; L. 1903, ch. 512; L. 1904, ch. 61; L. 1904, ch. 380; L. 1906, ch. 319; L. 1906, ch. 433; L. 1907, ch. 454; originally revised from L. 1888, ch. 55, §§ 4, 6, 9.

§ 204. **Employment of counsel by district attorney.**—The district attorney of any county in which an indictment has been found for a capital or other important crime, with the approval in writing of the county judge of such county, which shall be filed in the office of the county clerk, may employ counsel to assist him on the trial of such indictment; and the costs and

expenses thereof, to be certified by the judge presiding at the trial, shall be a charge upon the county.

Source.—Former County L. (L. 1892, ch. 686) § 204, as amended by L. 1908, ch. 262, § 2; originally revised from L. 1874, ch. 323; L. 1882, ch. 196, § 2.

Must be employed by district attorney of county where case tried.—This section is the only source of authority for any district attorney to employ counsel, and a compliance with its terms is necessary in order to confer jurisdiction upon the court to make an order fixing the compensation of such counsel; and where such special counsel was employed by the district attorney in the county where the indictment was found, and the prosecution was subsequently removed to another county, such counsel is not entitled to have an application for compensation granted unless he be likewise employed by the district attorney of the county where the action was tried. *Matter of Knight* (1908), 191 N. Y. 286, 84 N. E. 63, affg. *People v. Neff* (1907), 121 App. Div. 44, 106 N. Y. Supp. 559.

Employment of county judge.—When the county judge authorized the district attorney to employ counsel in a capital case, and the district attorney afterwards retained the same county judge as counsel, the transaction, while not affecting any legal right of the defendant, is disapproved by the court as a matter which concerns the public. *People v. Sanducci* (1909), 195 N. Y. 361, 88 N. E. 385.

Certificate of justice.—Where the district attorney, pending an appeal in a capital case, retains, with the approval of the county judge, counsel to assist him on such appeal, the certificate of the justice who presided at the second trial does not authorize payment for services rendered by such counsel previous to that trial. *People ex rel. Peck v. Supervisors of Genesee* (1901), 61 App. Div. 545, 70 N. Y. Supp. 578, affd. 168 N. Y. 640, 61 N. E. 1133.

Application to New York county.—The provisions of this section do not apply to the county of New York. Therefore when the district attorney of the county employs an attorney to assist him in the trial of an important criminal case, there is no provision which authorizes the judge presiding at the trial to make a certificate fixing the amount of the special counsel's compensation. *People ex rel. Hennessy v. Coler* (1901), 65 App. Div. 217, 72 N. Y. Supp. 564. The general statutory provisions contained in L. 1874, ch. 323, were not repealed by implication by the County Law so far as such act relates to New York county. *People ex rel. McIntyre v. Coler* (1901), 35 Misc. 454, 71 N. Y. Supp. 127, revd. on other grounds (1901), 67 App. Div. 619, 73 N. Y. Supp. 1144 (1902).

§ 205. **Special district attorney.**—Whenever there is a vacancy or the district attorney of any county and his assistant, if he has one, shall not be in attendance at a term of any court of record, which he is by law required to attend, or shall be unable by sickness, or by being disqualified from acting in a particular case, to discharge his duties at any such term, the court may, by an order entered in its minutes, appoint some attorney at law residing in the county, to act as special district attorney during the absence, inability or disqualification of the district attorney and his assistant; but such appointment shall not be made for a period beyond the adjournment of the term at which made. The special district attorney so appointed shall possess the powers and discharge the duties of the district attorney during the period for which he shall be appointed. The board of supervisors of the county shall pay the necessary disbursements of, and a

reasonable compensation for the services of the person so appointed and acting.

Source.—R. S., pt. 1, ch. 12, tit. 2, § 90, as amended by L. 1883, ch. 123, § 1.

Consolidators' note.—This section was not intended by the legislature to apply to the county of New York, as the last sentence provides that "the board of supervisors of the county," etc. At the time of the passage of the act in 1883 there was no board of supervisors in the county of New York. It has an application, however, to the counties of Kings, Queens and Richmond, where boards of supervisors existed and whose powers and duties have now been transferred so far as the latter counties are concerned to the board of aldermen of the city of New York.

This section was not repealed by the former County Law (Laws of 1892, ch. 686). History of this enactment and prior similar enactments given, and revisers' purposes set forth. *People v. Lytle* (1896), 7 App. Div. 553, 40 N. Y. Supp. 153.

ARTICLE XII.

COUNTY ATTORNEYS.

Section 210. Appointment, term of office and duties of county attorneys.

§ 210. Appointment, term of office and duties of county attorneys.—The board of supervisors in any county may appoint a county attorney who shall be removable at its pleasure. The term of office of a county attorney so appointed shall be two years, unless sooner removed, and his salary shall be fixed by the board of supervisors and be a county charge. The board of supervisors may, by local law, prescribe the duties of the county attorney, which duties may include the services to town boards and town officials when not in conflict with the interests of the county.

Source.—L. 1907, ch. 280, § 1.

Consolidators' note.—The question as to whether or not this article has an application to the counties of Kings, Queens and Richmond where no boards of supervisors exist must be determined by the courts. There is no board of supervisors for the county of New York, but the powers and duties of boards of supervisors of the counties of Kings, Queens and Richmond have been devolved upon the board of aldermen of the city of New York. Whether the provision in the charter of the city of New York vesting these powers in the board of aldermen included powers which might subsequently be created in the board of supervisors is doubtful.

Employment of special counsel.—Where the supervisors of certain towns or cities within a county have appealed to the State Tax Commission from the decision of the board of supervisors equalizing assessments, the board is authorized to employ an attorney to represent and defend its action. *Rept. of Atty. Genl.* (1913), Vol. 2, p. 101.

A bill for services of counsel employed by a county superintendent of highways in a proceeding to remove a town superintendent is not a proper charge against the state. Such bill, if no county attorney has been appointed, would be a proper charge against the county. *Rept. of Atty. Genl.* (1911), Vol. 2, p. 429.

ARTICLE XII-A.

[Article added by L. 1910, ch. 152, in effect Apr. 22, 1910.]

COUNTY AUDITORS.

Section 215. Appointment of county auditors.

216. Duties.

§ 215. **Appointment of county auditors.**—The board of supervisors in any county may, by resolution duly adopted, appoint a county auditor or auditors in and for such county and fix the term of office and salary. The county auditor or auditors may also act as county purchasing agent or committee where so directed by the board of supervisors which shall prescribe the place where and the time when the office shall be open. (*Added by L. 1910, ch. 152.*)

§ 216. **Duties.**—The county auditor or auditors shall audit all the bills for the expenses of the several county officials for repairs and maintenance of the several county offices and buildings under their respective jurisdictions and the expenses of county officials and all other bills that are properly chargeable to the county, unless their powers shall be limited by the board of supervisors, and when so audited they shall have the same force and effect as if audited by the board of supervisors and shall be paid by the county treasurer upon the certificate of such auditor or auditors in the same manner. But any board of supervisors which has appointed or which may hereafter appoint a county auditor or county auditors, may by resolution limit his or their power of audit to certain accounts or classes of accounts against the county, in which case such auditor or auditors shall have power to audit such accounts or classes of accounts only. The board of supervisors also by resolution or resolutions, duly adopted, shall prescribe the form and manner of presentation of such bills, and the form and manner in which such auditor or auditors shall keep a record of the presentation thereof, and the action of such auditor or auditors thereon. In case of refusal or neglect of such auditor or auditors to audit any bill presented for audit for the full amount claimed the claimant shall be unprejudiced by such refusal or neglect and shall have the right to present the same to the board of supervisors for audit. (*Added by L. 1910, ch. 152, and amended by L. 1913, ch. 384.*)

§ 217. **Appointment of county comptroller as auditor.**—The board of supervisors may, in any county where a county comptroller has been elected as provided by article fourteen-a of this chapter, by resolution duly adopted appoint such county comptroller as county auditor with the powers and duties specified in this article and fix his term of office not to exceed however the term for which such comptroller has been elected or appointed, but without any further compensation than that which is provided for such official as county comptroller. Such official when so ap-

pointed shall still be designated and known as the county comptroller, and shall perform all the duties and have all the powers of a county auditor in addition to the powers and duties of a county comptroller, and in addition shall have the power to appoint a deputy whose compensation shall be fixed by the board of supervisors and paid as the salaries of other county officers are paid, and who shall perform such duties as the comptroller may assign to him and shall also perform all the duties of the comptroller when he shall be absent or incapable of performing the duties thereof, or when the office shall be vacant, until it shall be filled. Where the county comptroller of any county has been appointed auditor as herein provided it shall not be necessary for the claims examined by him to be presented to the board of supervisors for audit except as provided by section two hundred and sixteen of this act, and all orders or warrants for the payment of any claims or accounts examined and audited by the county comptroller appointed auditor as aforesaid shall be paid by warrants issued by the county comptroller upon the county treasurer. (*Added by L. 1915, ch. 38.*)

ARTICLE XIII.

SUPERINTENDENTS OF THE POOR.

Section 220. Election, appointment and term of office of superintendents of the poor.

221. Undertaking.

§ 220. Election, appointment and term of office of superintendents of the poor.—There shall continue to be elected or appointed in each of the counties, except Kings, Queens and Richmond, one or more superintendents of the poor as heretofore; but no supervisor of a town, or county treasurer, shall be elected or appointed to such office. The board of supervisors of any county having, or entitled to have three or more superintendents of the poor, may, at an annual meeting thereof, determine by resolution that thereafter only one county superintendent of the poor shall be elected; but no superintendent of the poor shall be elected or appointed in such county until the general election next preceding the expiration of the terms of the superintendents in office, or the office shall be vacant. The term of any superintendent in office, or of any person duly elected thereto on the passage of such resolution, shall not be affected thereby. Such board may also, in counties having and entitled to have but one superintendent of the poor, in like manner determine that thereafter three superintendents of the poor be elected for such county. After the passage of a resolution, as herein provided, the powers herein conferred shall not be again exercised within a period of five years. Such resolution shall not take effect until the next calendar year succeeding its adoption.

There shall continue,

1. To be elected annually in each of the counties so having and being entitled to three county superintendents, one county superintendent of the poor, who shall hold his office for three years from and including the first day of January succeeding his election, and until his successor is duly elected and qualifies;

2. To be appointed by the board of supervisors, if in session, otherwise by the county judge, a county superintendent of the poor, when a vacancy shall occur in such office, and the person so appointed shall hold the office until and including the last day of December succeeding his appointment, and until his successor shall be elected and qualifies;

3. To be elected a county superintendent of the poor in a county when a vacancy shall occur in such office, and the term of which shall not expire on the last day of the next succeeding December, and the person so elected shall hold the office for such unexpired term, which shall be designated upon the ballots of the electors, or until his successor shall be elected and qualifies;

4. To be elected in each of the counties so having, and entitled to have but one superintendent, a superintendent of the poor, who shall hold his office for three years from and including the first day of January succeeding his election, and until his successor is duly elected and qualifies;

5. To be appointed by the board of supervisors, if in session, otherwise by the county judge, a superintendent of the poor, in a county having and being entitled to but one superintendent, when a vacancy shall occur in such office; and the person so appointed shall hold the office until and including the last day of December succeeding his appointment, and until his successor shall be elected and qualifies;

6. To be elected in the succeeding year after the board of supervisors of a county having but one superintendent of the poor, shall have adopted a resolution to have three superintendents, if the term of the superintendent in office expires with such year, three superintendents of the poor for such county, for the terms of one, two and three years respectively, which terms shall be respectively designated upon the ballots of the electors voting for such officers. If the term of the superintendent in office will not expire with such succeeding year, there shall be elected two superintendents of the poor for such county, for such terms, to be so designated upon the ballots of the electors voting for such officers, as will make the terms of one of the three superintendents expire with each succeeding year, and one superintendent of the poor shall thereafter be annually elected. Such persons so elected shall hold the office from and including the first day of January succeeding his election, and until and including the last day of December of the year in which his term shall so expire, and until his successor is duly elected and qualifies. When ballots are voted without designating the term, the first name on the ballot shall be deemed as intended for the full or longer term of the officer voted for; the second name for the next longer term, and the third name for the shorter term.

§ 221.

Superintendents of the poor.

L. 1909, ch. 16.

Source.—Former County L. (L. 1892, ch. 686) § 210; originally revised from L. 1829, ch. 352, as amended by L. 1853, ch. 80; L. 1847, ch. 498, §§ 1-6, as amended by L. 1862, ch. 298; L. 1849, ch. 116, § 4; L. 1854, ch. 188, §§ 1, 2.

Consolidators' note.—The office of superintendent of the poor does not exist in the city of New York, and therefore an exception is necessary in this section so far as the counties of Kings, Queens and Richmond are concerned. The county of New York has been generally excepted from the entire chapter, and therefore no special exception is necessary in this section.

References.—Removal of superintendents by the governor, Public Officers Law, §§ 33-35. Powers of a majority of a board of superintendents, General Construction Law, § 41. Oaths, effect of failure to file, etc., County Law, § 246; Public Officers Law, §§ 10, 13, 30.

Powers and duties of superintendents of the poor, Poor Law, § 3. Duties relative to the indigent insane, Insanity Law, §§ 82, 94.

Powers generally.—A majority of the superintendents of the poor of a county may act without a meeting or consulting the minority. *Johnson v. Dodd*, 56 N. Y. 76 (1874). Superintendents of the poor have capacity to contract a liability for supplies furnished for poorhouse, which may be enforced by suit. *Hayes v. Symonds* (1850), 9 Barb. 260.

Defense of action against county clerk to recover mortgage tax.—See *People ex rel. Frost v. Woodbury* (1914), 213 N. Y. 51, 106 N. E. 932, revg. (1914), 161 App. Div. 25, 146 N. Y. Supp. 389; *Rept. of Atty. Genl.* (1911), Vol. 2, p. 314.

Term of vacancy appointee.—The term of a superintendent of the poor appointed to fill a vacancy extends to the thirty-first of December following the appointment, or until his successor is elected and qualifies. *Rept. of Atty. Genl.* (1892) 265.

Election for unexpired term.—A superintendent of the poor may be elected to fill an unexpired current term at an intervening general election. *Rept. of Atty. Genl.* (1907) 595.

Ineligible person elected; term of present incumbent.—A person in office as superintendent of the poor at the time of the election at which an ineligible person was elected as his successor, holds over until his successor is duly elected at the next general election thereafter. *Rept. of Atty. Genl.* (1898) 78.

Public Officers Law not applicable.—The office of superintendent of the poor is a statutory office, and must be filled in the manner provided by this section; section 38 of the Public Officers Law, relating to the filling of vacancies by appointment, has no application. *Close v. Burden* (1914), 163 App. Div. 83, 148 N. Y. Supp. 773.

The keeper of an almshouse, appointed by the superintendents of the poor, is removable at their pleasure; and such superintendents have no power to fix by contract the duration of his term. *Abrams v. Horton* (1897), 18 App. Div. 208, 45 N. Y. Supp. 887.

Putnam county.—L. 1856, chap. 118, abolishing the office of Superintendent of the Poor in the county of Putnam, was not repealed by this section. *Atty. Genl. Opin.* (1915), 6 State Dep. Rep. 439.

§ 221. Undertaking.—Every person elected or appointed to the office of superintendent of the poor shall, before he enters upon the duties of his office, and if appointed, within fifteen days after notice thereof, execute and deliver to the clerk of the county, to be filed in his office, his undertaking to the county, with two or more sufficient sureties, with the approval of the board of supervisors, if in session, indorsed thereon by the clerk; otherwise by the county judge of his county, or a justice of the supreme court of his judicial district, and in such sum as such board, judge or justice

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approving the same shall direct, to the effect that he will faithfully discharge the duties of his office as such superintendent of the poor, and pay according to law all moneys that shall come into his hands as such superintendent, and render a just and true account thereof to the board of supervisors of his county. (*Amended by L. 1914, ch. 62.*)

Source.—Former County L. (L. 1892, ch. 686) § 211; originally revised from L. 1848, ch. 327, §§ 1-3; L. 1850, ch. 12, §§ 4-5.

References.—Official undertakings, provisions generally applicable, County Law, § 247; Public Officers Law, §§ 11, 13, 15, 30.

ARTICLE XIV.

COUNTY JUDGE, SURROGATE, SPECIAL COUNTY JUDGE AND SPECIAL SURROGATE.

Section 230. Election, appointment and term of office of county judge, surrogate, special county judge and special surrogate.

231. Creation and undertaking of surrogate.

232. Compensation of county judges and surrogates.

233. When and how paid.

§ 230. Election, appointment and term of office of county judge, surrogate, special county judge and special surrogate.—There shall continue to be elected in each of the counties now having such offices,

1. A county judge and a surrogate, who shall severally hold the office for six years from and including the first day of January succeeding his election.

2. A special county judge and a special surrogate, pursuant to the *several* acts of the legislature creating and respectively defining the terms and duties thereof.

3. There shall continue to be appointed by the governor, by and with the consent of the senate, if in session, a county judge, surrogate, special county judge or special surrogate, when a vacancy shall occur in either of such offices, and the person so appointed shall hold the office until and including the last day of December succeeding the first annual election thereafter at which such vacancy can be lawfully filled.

Source.—Former County L. (L. 1892, ch. 686) § 220; originally revised from L. 1871, ch. 859, §§ 1, 2, 5, 9; L. 1883, ch. 111, §§ 1, 2; L. 1881, ch. 613; L. 1886, ch. 164.

Consolidators' note.—Subdivision 4 of former § 220 stricken out as court was abolished by Constitution.

References.—Constitutional provisions as to county judge and surrogate, Constitution, Article 6, §§ 14-16. Age limit of county judge and surrogate, Id. § 12. Officers to discharge duties of county judge and surrogate, Id. § 16. Surrogate's clerk, Code Civ. Pro. §§ 2508-2510. Temporary surrogate, Id. §§ 2484, 2485, 2492, 2493, 2501. Resignations to governor, Public Officers Law, § 31.

Jurisdiction of county court, Code Civil Procedure, § 340. Special provisions as to organization and practice, Id. §§ 341-361. Terms of court, calendar, seal, clerks and attendants, stenographers, etc., Judiciary Law, §§ 190-201.

As to term of county judge elected before taking effect of judiciary article of

§§ 230-a, 231, 232.

County judge and surrogate.

L. 1909, ch. 16.

Constitution, Jan. 1, 1870, see *People ex rel. Davis v. Gardner*, 45 N. Y. 812 (1871), affg. 59 Barb. 198, 5 Lans. 1.

Section cited.—*People ex rel. Smith v. Supervisors of Erie*, 134 App. Div. 12 (1909), 118 N. Y. Supp. 35.

§ 230-a. **Additional county judge in Kings county.**—From and after the passage of this act there shall be an additional county judge, in the county of Kings, making the number of county judges in said county, five instead of four as heretofore provided. This additional county judge shall receive the same compensation as the other county judges in Kings county. The powers, duties and jurisdiction of such additional county judge shall be co-ordinate and co-equal with the county judges of such county now in office. (*Added by L. 1915, ch. 83.*)

§ 231. **Creation and undertaking of surrogate.**—The board of supervisors of any county, except Kings, having a population exceeding forty thousand, may, by resolution at a meeting thereof, determine that the office of surrogate therein shall be a separate office, and provide for the election of such officer therein. The clerk of the board shall immediately deliver the resolution to the county clerk, who shall file the same in his office and, within ten days thereafter, transmit a certified copy thereof to the secretary of state; and thereafter a surrogate shall be elected for such county. Every person elected or appointed to the office of surrogate or county judge, where there is no separate office of surrogate, shall, before he enters upon the duties of his office, and if appointed, within fifteen days after notice thereof, execute and deliver to the county clerk of his county a joint and several undertaking, with two or more sureties being resident freeholders, to be approved by such clerk, to the effect that he will faithfully perform his duties as such surrogate, and apply and pay over all moneys and effects that may come into his hands as such surrogate in the execution of his office; which undertaking shall be immediately filed in the office of such county clerk.

Source.—Former County L. (L. 1892, ch. 686) § 221; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 87, 88, as amended by L. 1871, ch. 239; L. 1871, ch. 859, §§ 3, 4.

Consolidators' note.—The exception in this section of the county of Kings has been allowed to stand, as it seems to have been the intention of the legislature that a different rule should prevail. The power vested in the board of supervisors of the county of Queens or Richmond by this section would be performed by the board of aldermen of the city of New York under section 1586 of the charter of that city.

Application of section. Rept. of Atty. Genl. (1900) 265.

§ 232. **Compensation of county judges and surrogates.**—The annual salaries of county judges and surrogates in the several counties are fixed at the sums respectively set opposite the names of each county in the following schedule, to wit:

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Subd.	Name of County.	Salary of County Judge.	Salary of Surrogate.
1	Albany	\$7,000 00	\$6,500 00
2	Allegany	2,750 00	
3	Broome	5,000 00	
4	Cattaraugus	1,500 00	1,500 00
5	Cayuga	2,000 00	2,000 00
6	Chautauqua	2,000 00	2,000 00
7	Chemung	5,000 00	
8	Chenango	3,000 00	
9	Clinton	1,200 00	1,800 00
10	Columbia	2,000 00	2,500 00
11	Cortland	3,500 00	
12	Delaware	3,000 00	
13	Dutchess	3,000 00	3,500 00
14	Erle	7,500 00	7,500 00
15	Essex	2,500 00	
16	Franklin	3,200 00	
17	Fulton	1,400 00	1,600 00
18	Genesee	2,500 00	
19	Greene	3,000 00	
20	Hamilton	800 00	
21	Herkimer	3,000 00	
22	Jefferson	2,000 00	2,000 00
23	Kings	10,000 00	15,000 00
24	Lewis	2,400 00	
25	Livingston	3,000 00	
26	Madison	3,000 00	
27	Monroe	7,000 00	7,000 00
28	Montgomery	1,400 00	1,600 00
29	Nassau	5,000 00	5,000 00
30	Niagara	5,000 00	
31	Oneida	5,000 00	5,000 00
32	Onondaga	5,000 00	5,000 00
33	Ontario	2,000 00	2,000 00
34	Orange	3,000 00	3,500 00
35	Orleans	2,000 00	
36	Oswego	2,000 00	1,500 00
37	Otsego	1,800 00	1,500 00
38	Putnam	2,000 00	
39	Queens	10,000 00	10,000 00
40	Rensselaer	5,000 00	5,000 00
41	Richmond	7,500 00	
42	Rockland	3,600 00	
43	St. Lawrence	1,750 00	1,750 00
44	Saratoga	2,000 00	\$2,500 and \$500 for clerk hire.
45	Schenectady	4,000 00	4,000 00
46	Schoharie	2,500 00	
47	Schuyler	1,500 00	
48	Seneca	1,500 00	
49	Steuben	1,500 00	2,000 00
50	Suffolk	2,000 00	3,000 00
51	Sullivan	1,200 00	

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Subd.	Name of County.	Salary of County Judge.	Salary of Surrogate.
52	Tioga	2,500 00	
53	Tompkins	3,500 00	
54	Ulster	3,000 00	3,000 00
55	Warren	5,000 00	
56	Washington	2,200 00	2,500 00
57	Wayne	3,000 00	
58	Westchester	10,000 00	10,000 00
59	Wyoming	2,500 00	
60	Yates	1,500 00	

(Subd. 1, amended by L. 1912, ch. 549; subd. 11, amended by L. 1917, ch. 34; subd. 14, amended by L. 1912, ch. 37; subd. 16, amended by L. 1913, ch. 436; subd. 22, amended by L. 1910, ch. 281; subd. 23, amended by L. 1911, ch. 413; subd. 27, amended by L. 1912, ch. 549; subd. 29, amended by L. 1910, ch. 300, and L. 1916, ch. 382; subd. 31, amended by L. 1911, ch. 203, and L. 1916, ch. 86; subd. 33, amended by L. 1916, ch. 252; subd. 41, amended by L. 1911, ch. 413; subd. 55, amended by L. 1916, ch. 132; subd. 56, amended by L. 1917, ch. 192; and subd. 58, amended by L. 1912, ch. 549.)

61. The salaries provided in the preceding subdivision of this section for the county judge and surrogate of each of the counties of Onondaga, Queens, Rensselaer and Tompkins shall take effect upon the expiration of the terms of the incumbents in office on February seventeenth, nineteen hundred and nine, respectively, and until the expiration of said terms such officers shall receive the salaries authorized by law on January first, nineteen hundred and nine. The salaries provided in subdivision twenty-nine of this section for the county judge and surrogate of the county of Nassau shall take effect upon and after January first, nineteen hundred and seventeen, and until that date the county judge and surrogate of the county of Nassau shall receive the salary authorized by law on January first, nineteen hundred and sixteen. (Subd. 61, as amended by L. 1910, ch. 300, amended by L. 1916, ch. 382.)

62. The salary provided in subdivision twenty-three of this section for the surrogate of the county of Kings shall take effect upon the expiration of the term of the present incumbent, and until the expiration of said term such surrogate shall receive the salary authorized by law of January first, nineteen hundred and eleven. (Subd. 62, added by L. 1911, ch. 413.)

63. The salary provided in subdivision 41 of this section for the county judge of the county of Richmond shall take effect upon the expiration of the term of said office, expiring December thirty-first, nineteen hundred and eleven. (Subd. 63, added by L. 1911, ch. 413.)

64. The salaries provided in subdivision fourteen of this section for the county judge and surrogate of the county of Erie shall take effect upon the expiration of the term of the present incumbents, respectively, and until the expiration of said terms such officers shall receive the salaries

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authorized by law on January first, nineteen hundred and nine. (*Subd. 64 added by L. 1912, ch. 37.*)

64. In addition to the salary herein provided to be paid to the surrogate of Chautauqua county, he shall be entitled to receive his necessary expenses while holding court in said county at places other than the county seat at Mayville. Such expense account shall be audited by the board of supervisors of said county and shall not exceed the sum of five hundred dollars per annum. (*Subd. 64 added by L. 1912, ch. 92.*)

65. The salaries provided in subdivisions one, twenty-seven and fifty-eight for the county judge and surrogate of the county of Albany, for the county judge and surrogate of the county of Monroe, and for the surrogate of the county of Westchester, shall take effect upon the expiration of the terms of the present incumbents respectively, and until the expiration of such terms such county judges and surrogates shall receive the salaries authorized by law on January first, nineteen hundred and twelve. (*Subd. 65 added by L. 1912, ch. 549.*)

66. The salary provided in subdivision sixteen of this section for the county judge of the county of Franklin shall take effect upon the expiration of the term of the present incumbent and until the expiration of said term such officer shall receive the salary authorized by law on January first, nineteen hundred and thirteen. (*Subd. 66 added by L. 1913, ch. 436.*)

67. The salary provided in subdivision fifty-five of this section for the county judge and surrogate of the county of Warren shall take effect upon the expiration of the term of the present incumbent, and until the expiration of such term such officer shall receive the salary authorized by law on January first, nineteen hundred and eleven. (*Subd. 67, added by L. 1916, ch. 132.*)

68. The salary provided in subdivision eleven of this section for the county judge and surrogate of the county of Cortland shall take effect upon the expiration of the term of the present incumbent, and until the expiration of such term such officer shall receive the salary authorized by law on January first, nineteen hundred and fourteen. (*Subd. 68 added by L. 1917, ch. 34.*)

68. The salaries provided for in subdivision fifty-six of this section for the county judge and the surrogate of the county of Washington shall take effect upon the expiration of the terms of the present incumbents, respectively, and until the expiration of such terms such officers shall receive the salaries authorized by law on January first, nineteen hundred and seventeen. (*Subd. 68 added by L. 1917, ch. 192.*)

Source.—Former County L. (L. 1892, ch. 686) § 222, as amended by L. 1893, ch. 50; L. 1894, chs. 227, 646, 340; L. 1895, ch. 649; L. 1898, chs. 658, 158; L. 1900, ch. 306; L. 1901, chs. 161, 337, 505, 584; L. 1902, chs. 255, 234; L. 1903, ch. 434; L. 1904, ch. 337; L. 1905, chs. 666, 160, 410; L. 1906, chs. 439, 463, 377; L. 1907, chs. 97, 256; L. 1908, chs. 3, 77, 588, 374; originally revised from L. 1872, ch.

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767, as amended by L. 1877, ch. 401; L. 1877, ch. 21; L. 1878, ch. 259, as amended by L. 1883, ch. 212; L. 1885, ch. 122; L. 1879, ch. 285, as amended by L. 1893, ch. 492; L. 1879, ch. 330, as amended by L. 1891, ch. 355; L. 1879, ch. 362; L. 1879, ch. 357; L. 1880, ch. 270; L. 1881, ch. 12; L. 1881, ch. 354, § 2; L. 1883, ch. 309, § 4; L. 1883, ch. 374; L. 1885, ch. 107; L. 1885, ch. 123; L. 1888, ch. 22; L. 1889, chs. 10, 14, 294, 312, 376; L. 1890, chs. 10, 136, 382.

Surrogate; allowance of expenses.—A board of supervisors has no authority to increase the compensation of a surrogate by the allowance of a lump sum for expenses. Rept. of Atty. Genl. (1912), Vol. 2, p. 194.

§ 233. **When and how paid.**—Such salaries, except in the counties of Kings, Broome and Westchester, shall be paid quarterly, by the county treasurer of the respective counties. In the counties of Broome and Westchester such salaries shall be paid monthly by the county treasurer. When a county judge of one county shall hold a county court, or preside at a court of sessions, in any other county, he shall be paid the sum of ten dollars per day, except in the county of Kings where the compensation shall be twenty dollars per day, for his expenses in going to, and from, and holding or presiding at such court, which shall be paid by the county treasurer of such other county, on the presentation of the certificate of the clerk of such court of the number of days. (*Amended by L. 1909, chs. 122, 228, and L. 1914, ch. 70.*)

Source.—Former County L. (L. 1892, ch. 686) § 223, as amended by L. 1897, ch. 407; L. 1908, ch. 500; originally revised from L. 1872, ch. 767, §§ 4, 5, as amended by L. 1874, ch. 64.

Consolidators' note.—No exception of the counties of Queens and Richmond has been made in this section, although there exists no county treasurer in those counties. The section is workable as it stands, as under section 1587 of the charter of the city of New York the city comptroller performs the duties theretofore vested in the county treasurer. It was evidently the intention of the legislature by excepting the county of Kings to provide for the payment of such salary by that county by some special act.

Judge of adjoining county.—In the absence of the county judge an inventory may be delivered to the judge of an adjoining county. *Pratt v. Stevens*, 94 N. Y. 387 (1884).

A county treasurer in deciding upon the validity of claims against the county is charged with judicial rather than ministerial functions, and should not countersign a warrant for the payment of an illegal claim. *People ex rel. Baumann v. Lyon* (1912), 77 Misc. 377, 136 N. Y. Supp. 534, *affd.* 154 App. Div. 266, 138 N. Y. Supp. 973.

ARTICLE XIV-a.

[Article inserted by L. 1909, ch. 466, in effect May 24, 1909.]

COUNTY COMPTROLLER.

- Section 234. County comptroller; term of office.
 235. Duties of county comptroller; issue and sale of bonds.
 236. County employees; how paid.
 237. Filing and verification of accounts.
 238. Purchase of supplies by county officers; sheriff to be custodian of buildings.

239. Estimate of county officers.

239-a. Accounts with treasurer.

§ 234. County comptroller; term of office.—Upon the filing with the county clerk of any county, prior to the first day of October, of a petition, duly signed by a number of voters equal to at least one per centum of the total vote cast in such county for the office of governor at the last general election, asking that the office of county comptroller be created in and for such county, such county clerk shall prepare a question to be submitted, in the same manner as other questions are submitted, to the voters of such county at the next general election, in substantially the following form: “Shall the office of county comptroller be created in and for the county of?” At the next general election after the affirmative determination of such proposition, there shall be elected, in the same manner as are other county officers, a county comptroller, whose term of office shall commence on the first day of January following and shall be for three years and whose successor shall be elected in like manner for a term of three years. A member of the board of supervisors, during the term for which he has been so elected or appointed, shall not be eligible for election or appointment to the office of county comptroller, nor shall any person elected or appointed to the office of county comptroller, while holding such office, be eligible to election or appointment as supervisor. Before entering upon the duties of his office he shall take the constitutional oath and execute to the county a bond with good and sufficient sureties to be approved by the county judge in a sum to be fixed by the board of supervisors, conditioned upon the faithful performance of his duties. The board of supervisors shall prescribe the annual salary of such county comptroller and the compensation of assistants appointed by him and shall provide and maintain suitable rooms to be used by such county comptroller as his office. The office of the county comptroller shall be open daily, with the exception of Sundays and holidays, from nine ante meridian until five post meridian. The county comptroller may be removed by the governor within the term for which he shall have been chosen, after a copy of the charges against him and an opportunity to be heard in his defense shall have been given to such comptroller. If a vacancy shall occur, otherwise than by expiration of term, the governor shall appoint a person to execute the duties of county comptroller until the vacancy shall be filled by an election.

If the county comptroller shall be unable to perform the duties of his office in consequence of sickness or temporary absence from the county he may designate one of the assistants, deputies, inspectors or clerks in his office to act in his place. If the county comptroller shall be so incapacitated for more than ten days without making such designation, the board of supervisors may do so. Such designation shall be in writing and shall be signed by the county comptroller in case he makes such designation and by the chairman and clerk of the board of supervisors in case such designation

is made by the board of supervisors. Such designation shall be filed with the county clerk and the clerk so designated shall be known as the acting county comptroller. The assistant, deputy, inspector or clerk so designated shall perform the duties of the county comptroller until the county comptroller shall resume them. An assistant, deputy, inspector or clerk so designated shall not receive any additional compensation while acting as county comptroller to that which he is receiving at the time of the designation. (*Amended by L. 1917, ch. 76, in effect Mch. 20, 1917.*)

§ 235. Duties of county comptroller; issue and sale of bonds.—The comptroller shall superintend the fiscal affairs of the county pursuant to law and the resolutions of the board of supervisors. He shall keep a separate account with every officer and department and with each improvement for which funds are appropriated or raised by tax or assessment. No warrant shall be drawn for the payment of any claim or obligation of the county unless it state particularly against which of such funds it is drawn. No fund shall be overdrawn nor shall any warrant be drawn against one fund to pay a claim chargeable to another. The county comptroller shall perform such other and further duties as may from time to time be prescribed by law or by resolution of the board of supervisors, not inconsistent with this act or other laws of the state. All accounts or claims against the county for work, labor, services, merchandise or materials, for the county or any county officer, and all accounts or claims against the county for fees by any officer or officers authorized to charge and collect fees from the county shall be filed in the office of the county comptroller before being presented to the board of supervisors. The county comptroller shall cause each claim upon presentation to him to be numbered consecutively, and the number, date of presentation, the name of the claimant and a brief statement of the character of each claim, shall be entered in a book kept for such purpose, which shall at all times during office hours be so placed as to be convenient for public inspection and examination. The county comptroller shall examine and report upon all accounts or claims against the county for work, labor, services, merchandise or materials furnished the county or any officer or department thereof and all accounts or claims against the county for fees by any officer or officers authorized to charge and collect fees from the county, before the same shall be audited and ordered paid by the board of supervisors; he shall ascertain, before reporting to the board of supervisors, whether such accounts or claims and the prices therein are just and true, and whether the prices charged and the quality of the merchandise furnished and in accordance with the contract or agreement therefor, if any such contract or agreement has been made, and whether the work, labor and services have been performed and the merchandise or materials delivered and whether the services for which any officer or officers are entitled to collect fees from the county have been per-

formed and whether the fees charged therefor are in accordance with law, and shall attach a certificate to each claim or account, stating the result of such examination, and, if it is advised by him that any such account or claim be rejected or modified, stating the reasons for such rejection or modification. Such account or claim with the certificate attached thereto shall be filed in his office, and shall during office hours be open to public inspection. The board of supervisors shall not audit any account of claim which the county comptroller advises should be rejected or modified, except where such account or claim is modified in accordance with the recommendations of the county comptroller, unless two-thirds of all the members elected to the board of supervisors shall vote in favor of the payment of said account or claim notwithstanding the recommendations of the county comptroller. The comptroller shall cause to be kept in his office such books as are necessary to contain all claims and accounts against the county presented to him for examination, and the action taken by him on each, and a record of the money appropriated by the board of supervisors for the benefit of the county buildings and officers and the amount drawn thereon, and a record of all contracts or agreements made for supplies to be furnished any county building or county office. The county comptroller shall report to the board of supervisors at each regular meeting thereof the balance of the appropriation to each department remaining unexpended. A county comptroller first elected in any county as above provided is authorized after he enters upon the discharge of his duties to employ such expert accountants as may be necessary in opening the proper books in his office and in establishing the financial system herein provided for such time as he shall deem necessary, not exceeding ninety days, and the expense thereof shall be a county charge. All bonds of the county for whatever purpose issued shall be advertised and sold by the county comptroller. He shall cause to be published, for such time as the board of supervisors shall prescribe, a notice containing a description of the bonds to be sold, the manner and place of sale, and the time when the same shall be sold. Award shall be made to the highest bidder. At any sale of bonds the county comptroller may reject all bids and readvertise, if in his opinion the price offered is inadequate. All bonds shall be signed in the name of the county, by the chairman of the board of supervisors and county treasurer and countersigned by the county comptroller. A list of all bonds issued by the county shall be kept in the county comptroller's office and when any bonds are paid by the county treasurer they shall be presented by him to the county comptroller for cancellation. (*Added by L. 1909, ch. 466, and amended by L. 1910, ch. 8.*)

Audit of claims rejected or modified by county comptroller.—Under the County Law the board of supervisors cannot audit any claim which the county comptroller advises should be rejected or modified, except in accordance with his decision, unless two-thirds of all members of the board shall vote in favor of the audit

contrary to such decision. *Becker v. County of Oneida* (1913), 157 App. Div. 457, 142 N. Y. Supp. 221.

Review of action of boards of audit.—*It seems*, that the proper method of reviewing the action of the boards of audit having judicial or quasi-judicial powers respecting the audit of claims, is not by action, but by certiorari or mandamus, depending upon the circumstances of the particular case. *Becker v. County of Oneida* (1913), 157 App. Div. 457, 147 N. Y. Supp. 221.

§ 236. **County employees; how paid.**—Before presentation to the county comptroller of the claims or payrolls for services rendered to the county, or for services of subordinate officials, such claims shall be certified by the county officer appointing or employing such persons to the effect that such persons were regularly appointed to or employed in the positions held by them; that the services represented were actually performed and that the compensation demanded in said claims and the amounts contained in such payrolls were correct. Upon the presentation of such claims or payrolls to the county comptroller by the several county officers he shall examine the same, report thereon to the board of supervisors and a certified transcript of such claims or payrolls as allowed shall be made by the county comptroller and delivered to the county treasurer. All original payrolls and claims for services shall be filed in the office of the county comptroller and transcripts thereof in the office of the county treasurer. All county employees and county officers shall be paid by warrants issued by the county comptroller upon the county treasurer.

§ 237. **Filing and verification of accounts.**—Each account or claim presented to the county comptroller for examination shall be approved by the officer or head of department incurring the same; such claim or account shall be verified by the person presenting it to the effect that it is just, true and correct; that no part thereof has been paid or otherwise settled; that the prices charged in such accounts or claims are correct and just, and, if there is any contract or agreement therefor, that the prices are in accordance with such contract or agreement, a copy of which must be attached to said account or claim. All orders or warrants for the payment of any claims or accounts examined by the county comptroller and ordered paid by the board of supervisors shall be drawn by the clerk of the said board and countersigned by the chairman thereof and by the county comptroller before the same are paid by the county treasurer.

§ 238. **Purchase of supplies by county officers; sheriff to be custodian of buildings.**—County officers may purchase for the use of the buildings or offices of which they have charge or custody all supplies necessary for their support and maintenance, all accounts for which shall be presented to the county comptroller to be examined by him, and in case any purchase or contract shall involve an expense exceeding two hundred dollars it shall be let to the lowest responsible bidder, after public notice such as the board of supervisors shall prescribe. The superintendent or custodian of

L. 1909, ch. 16.

County comptroller.

§§ 239, 239-a.

a county building, a county officer, county comptroller or supervisor shall not be directly or indirectly interested in a contract or purchase of supplies by any such superintendent or custodian or county officer. All written contracts or agreements for supplies for any county building or office shall be made in duplicate, one copy of which shall be filed in the office of the county comptroller and one copy in the office of the superintendent or custodian of the county building or county office for which such contracts were made. The sheriff of the county shall be the superintendent and custodian of the county jail and such other of the county buildings as the board of supervisors shall designate and shall make all contracts for heating, lighting and the care and maintenance of the buildings of which he is custodian.

§ 239. **Estimate of county officers.**—The superintendent or custodian of county buildings and all county officers shall annually submit to the board of supervisors on or before the fifteenth of the last month of the fiscal year upon forms prescribed by the county comptroller an estimate of the amount necessary to be expended for supplies, for the support, the conduct and maintenance of such buildings or offices during the next fiscal year. They shall include in their annual report to the board of supervisors at its first regular meeting after the beginning of the fiscal year upon forms prescribed by the county comptroller the quantity of supplies used by them, the amount paid for them during the preceding year; and also a statement of all contracts made by them for supplies and all facts as shall be required to show whether such contracts were reasonable and just and shall state the action of the board of supervisors thereon. The board of supervisors may call upon any such superintendent or custodian or officer for a further or more detailed report or for further information on any subject embraced in the report. The board of supervisors by a committee appointed for the purpose may investigate any such report or any agreement or contract for supplies at any time. Upon such examination said board or committee shall have the power to subpoena witnesses and to compel their attendance with or without books or papers.

§ 239-a. **Accounts with treasurer.**—The comptroller shall keep an account between the county and treasurer of all moneys received and disbursed by the treasurer, and for all purchases made shall procure daily statements from the treasurer as to the moneys received and disbursed by such treasurer. He shall procure from the banks in which the amounts have been deposited by the treasurer monthly statements of the moneys which have been received and paid out on account of the county. He shall examine the treasurer's books, accounts and bank books and ascertain as to their correctness and shall render to the board of supervisors, as often as such board shall prescribe, a detailed report of the funds and of the financial condition of the county. All moneys deposited by the treasurer shall be placed to the credit of the county. The treasurer shall

keep bank books in which shall be entered his deposits in and moneys drawn from the banks or trust companies in which such deposits shall be made. He shall exhibit such books to the county comptroller for his inspection at least once each month, and oftener if required. The banks or trust companies in which such deposits are made shall make to the comptroller monthly statements of moneys which shall have been received and paid out by them on account of the county. Deposits in banks and trust companies shall be made by the treasurer in conformity with the provisions of this chapter.

ARTICLE XV.

MISCELLANEOUS.

Section 240. County charges.

- 241. Compensation of public officers in Ulster county.
- 242. County charges, how raised.
- 243. Annual report of county officers.
- 244. Recovery and disposition of moneys.
- 245. Official seals.
- 246. General provisions relating to county officers.
- 247. General provisions relating to official bonds and undertakings.
- 248. Reimbursing counties for expenses of certain criminal trials.
- 249. County responsible for funds or moneys paid into court.

§ 240. County charges.—The following are county charges:

1. Charges incurred against the county by the provisions of this chapter;
2. All expenses necessarily incurred by the district attorney in criminal actions or proceedings arising in his county;
3. The compensation of the county officers, their subordinates and assistants, which are payable by the county;
4. The compensation of the criers of the courts of record within the county for attendance thereat, and also traveling fees, at the rate of five cents per mile, for going to and returning from the place of attendance. (*Subdivision 4 amended by L. 1910, ch. 34.*)
5. The compensation of the sheriff for the commitment and discharge of his prisoners on criminal process within the county, and for summoning constables to attend court;
6. Compensation allowed by law to constables for attending courts of record, and the compensation allowed by law to constables and other officers, for executing process on persons charged with a felony; for services and expenses in conveying such persons to jail; and for the service of subpoenas issued by the district attorney and for other services in relation to criminal proceedings and support of prisoners in transit, for which no specific compensation is prescribed by law, and which are not a town charge, as prescribed by article eight of the town law; but no charge for issuing or

serving any subpoena in any criminal action or proceeding issued or served on behalf of a defendant shall be allowed, unless otherwise ordered by the court in which the action or proceeding was pending;

7. The expenses necessarily incurred in the support of persons charged with, or convicted of crimes, and committed to the jails of the county;

8. The sums required by law to be paid to witnesses in criminal actions and proceedings;

9. The moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law, including the expense of printing the copies of the calendar for a term of the supreme court held within the county, or of the county court, and including in any county where the duties of county judge and surrogate are performed by the same officer, except in the county of Herkimer, the actual and necessary expenses of such officer and his clerk, incurred in holding court, by authority of the board of supervisors, at a place or places other than the county seat or place of residence of such officer or clerk.

10. All items of coroner's compensation and the accounts of the coroners of the county for such services as are not chargeable to the person employing them;

11. The accounts of the county clerks, for the services and expenses incurred under the law respecting elections, other than for militia and town officers;

12. The sums required to pay the bounties authorized by resolution of the board of supervisors for the destruction of wild animals and noxious weeds, unless the supervisors by resolution direct that any such bounties shall be town charges;

13. The compensation of the members of the board of supervisors;

14. The charges and accounts for services rendered by justices of the peace in the examination of felons, and in other criminal proceedings as mentioned in section one hundred and seventy-one of the town law, when not otherwise provided for;

15. The expenses necessarily incurred, and sums authorized by law, or by the board of supervisors, pursuant to law, to be raised for any county purpose;

16. The reasonable costs and expenses in proceedings before the governor for the removal of any county officer upon charges preferred against him, including the taking and printing of the testimony therein;

17. All judgments duly recorded against a county;

18. All damages recovered against, or costs and expenses lawfully incurred by a county officer in prosecuting or defending an action or proceeding brought by or against the county or such officer, for an official act done, when such act was done, or such action or proceeding was prosecuted or defended pursuant to law, or by authority of the board of supervisors; and any such damages so recovered, or costs and expenses incurred

by any such officers, for any act done in good faith in his official capacity, without any such authority, may be made a county charge by a majority vote of all the members elected thereto.

19. In any county, if a prisoner, actually confined in jail, makes oath before the sheriff, jailer, or deputy-jailer, that he is unable to support himself during his imprisonment, his support is a county charge. This subdivision shall also apply to the county of New York.

20. The expense of the publication of notices of appointment of terms of the county court is a county charge.

21. The fees of a county clerk or of the clerk of any court of record for making and certifying a copy or copies of any record, document or paper, when ordered so to do by the state comptroller, pursuant to section four of the state finance law, shall be a charge upon the county where such records, documents or papers are recorded or filed. This subdivision shall also apply to the county of New York.

Source.—Former County L. (L. 1892, ch. 686) § 230, as amended by L. 1896, ch. 439; L. 1902, ch. 507; L. 1906, ch. 74; L. 1893, ch. 116; Code Civ. Pro. § 20, as amended by L. 1899, ch. 523; Id. § 112, as amended by L. 1883, ch. 405; Id. § 356; Id. § 744, as amended by L. 1892, ch. 651; L. 1896, ch. 269; L. 1903, ch. 622; former section of County Law originally revised from R. S., pt. 1, ch. 8, tit. 4, §§ 104-106; L. 1852 ch. 304, § 2; L. 1874, ch. 323.

Consolidators' note.—The new matter inserted in subds. 19, 20 and 21, are general provisions now applicable to the county of New York, and as the county of New York is generally excepted from the provisions of this chapter, the words, "this subdivision shall also apply to the county of New York" have been inserted to save the subdivisions referred to from the exception. Subdivision 20 relates to publication of notices of appointment of terms of the county court. There is no county court in New York county.

References.—Fees of coroners county charges, County Law, § 240. Election expenses chargeable against county, Election Law, §§ 318-319. Board of prisoners in county Jail, County Law, § 12, subd. 15. Fees of witnesses in criminal actions, Code Criminal Procedure, §§ 616-618. Fees of justices of the peace in criminal proceedings, Town Law, § 171. Costs in proceedings for removal of county officers, Public Officers Law, §§ 33-35. Costs in proceeding to inquire as to insanity of criminal, county charge, Code Criminal Procedure, § 262-a. Compensation of constables or deputy sheriffs attending courts, Code Civil Procedure, § 3312. Fees of constables for services in criminal proceedings, Code Criminal Procedure, § 740-b; Town Law, § 171. Maintenance of and supplies for court rooms, etc., County Law, § 42.

Audit of accounts against county, County Law, § 12, subd. 2.

Power of district attorney to obligate county.—Expenses necessarily incurred by district attorney in performance of his duties should be audited. *People ex rel. Gardenier v. Supervisors of Columbia*, 134 N. Y. 1 (1892), 31 N. E. 322.

Expense of prosecution for illicit traffic in intoxicating liquors by the district attorney, under the metropolitan police act, is a county charge. *People ex rel. Hall v. Supervisors of New York* (1865), 32 N. Y. 473. But see *People ex rel. Kelly v. Haws* (1861), 21 How. Pr. 117, 12 Abb. Pr. 192. Expense of prosecutions under the Liquor Tax Law. Rept. of Atty. Genl. (1902) 342. Statement of expenses of district attorney must be itemized. *Matter of White* (1900), 51 App. Div. 175, 64 N. Y. Supp. 726. See also *Matter of Pinney* (1896), 17 Misc. 24, 40 N. Y. Supp. 716.

As subd. 2 of this section makes expenses necessarily incurred by a district attorney in original actions or proceedings arising in his own county, a county charge, he has, when acting in good faith, authority to employ a civil engineer to make an expert investigation upon receiving complaints that a contractor building state and county roads was not properly performing his contract. The board of supervisors of the county will be directed on certiorari to audit the claim of said engineer where there is nothing to impeach the good faith of the district attorney in employing him, or to show that the charges were unreasonable. It is immaterial that the charge against the contractor was not presented to the grand jury or that after being held by a magistrate he was discharged on habeas corpus by the county judge. *People ex rel. Koetteritz v. Supervisors of Herkimer* (1911), 148 App. Div. 392, 132 N. Y. Supp. 808.

Expert witnesses.—The power of the district attorney is discretionary, and he may obligate his county to pay for the services of an expert witness, though not to an exorbitant amount. *People ex rel. Hamilton v. Supervisors of Jefferson* (1898), 35 App. Div. 239, 54 N. Y. Supp. 782. See also *People ex rel. Tripp v. Supervisors of Cayuga* (1898), 22 Misc. 616, 50 N. Y. Supp. 16; *People ex rel. Bliss v. Supervisors of Cortland* (1891), 39 N. Y. St. Rep. 313, 15 N. Y. Supp. 748. The district attorney may and if necessary should employ expert testimony in behalf of the people before a commissioner appointed by the governor to conduct a hearing on an application for executive clemency; and the expense of same is a county charge. *Tompkins v. Mayor* (1897), 14 App. Div. 536, 43 N. Y. Supp. 878. It is the duty of the district attorney to procure the services of expert witnesses where necessary, and the amount paid them will not affect the regularity of the trial. *People v. Montgomery* (1872), 13 Abb. Pr. (N. S.) 207.

A district attorney has power under this section to obligate his county to pay a reasonable sum for the services of an expert witness in a criminal trial. Although the witness' bill is subject to review and audit by the board of supervisors and although the board is not bound by any specific sum which the district attorney had agreed to pay, it must audit a reasonable sum. Where the only evidence before the board is that ten dollars per day is the minimum charge for such services in the county, it is not justified in reducing the bill to five dollars a day and, on certiorari, such determination will be annulled, and the matter remitted for further audit. *People ex rel. Manley v. Supervisors of Chenango* (1911), 148 App. Div. 584, 132 N. Y. Supp. 868.

Compensation of county officers.—Board of supervisors cannot provide compensation for a clerk in a county office. *People ex rel. Masterson v. Gallup* (1884), 30 Hun 501, affd. in 96 N. Y. 628. Salary of stenographer in surrogate's office in New York a county charge. *Munson v. Mayor, etc., of New York* (1878), 57 How. Pr. 497.

Supervisors may employ person to take charge of county offices, and the expense incurred thereby is a legal county charge. *Conway v. Mayor, etc., of New York* (1876), 6 Daly 515. Salaries of police justices of city of New York are county charges and payable by county as contingencies. *People ex rel. Stuart v. Edmonds* (1854), 19 Barb. 468.

Where no provision has been made for payment of a person entitled to monthly payments for services rendered the county, discounts by a bank on his bills issued to raise the money cannot be made a county charge. *People ex rel. Johnston v. Supervisors of Ulster* (1887), 43 Hun 385.

Mileage fees of court crier.—While a board of supervisors has power to fix the compensation of a court crier, it can neither reduce nor cancel the amount fixed by law to be paid such official as traveling fees, or make a binding contract with the appointee to perform the duties of the position and to eliminate the fees expressly

provided for by the statute. *Matter of Becker v. Phipps* (1915), 89 Misc. 176, 153 N. Y. Supp. 486.

Sheriff is entitled to traveling expenses necessarily incurred in execution of process. *People ex rel. Wood v. Denton* (1899), 41 App. Div. 386, 58 N. Y. Supp. 722.

Transportation of convicts.—Expenses of sheriffs in obeying orders of Court in transporting convicts to State Prison, should be audited by the Board of Supervisors. *Rept. of Atty. Genl.* (1910) 539.

Fees of a constable conveying prisoners convicted in court of special sessions are a town, not a county charge. *People ex rel. McGrath v. Supervisors of Westchester* (1890), 119 N. Y. 126, 23 N. E. 489, *affg.* 53 Hun 157, 6 N. Y. Supp. 153, which criticises *People ex rel. Bancroft v. Supervisors of Orange* (1879), 18 Hun 19. Fees of constable for killing dogs a county charge. *Matter of Town of Hempstead* (1899), 36 App. Div. 321, 335, 55 N. Y. Supp. 345, *affd.* (1899), 160 N. Y. 685, 55 N. E. 1101.

Sheriff's fees for receiving, boarding and discharging prisoners committed for violation of city ordinances, a county charge. *People ex rel. Van Tassel v. Supervisors of Columbia* (1876), 67 N. Y. 330. See also *Ross v. Supervisors of Cayuga* (1885), 38 Hun 20.

Sheriff's charges for support of prisoners.—Where prisoners are confined in a county jail, under authority of a village charter providing that persons arrested in the village by the local police may be detained therein until a police justice be found, not exceeding twenty-four hours, the expense of their support in the jail is a county charge which should be allowed the sheriff at a reasonable rate. *People ex rel. Gray v. Supervisors of Livingston* (1903), 89 App. Div. 152, 86 N. Y. Supp. 284.

A sheriff is not entitled to compensation for boarding prisoners, but only to reimbursement for the moneys actually expended by him in performing such duties, and the board of supervisors has no power to make a contract to pay him a fixed weekly rate for the board of each prisoner, determined without regard to the expenses incurred. *People ex rel. Caldwell v. Supervisors* (1899), 45 App. Div. 42, 60 N. Y. Supp. 1122.

The support of prisoners convicted of a felony is a state charge, and has never been a county charge. *Commissioner of Charities, etc. v. Supervisors of Queens County* (1892), 64 Hun 195, 18 N. Y. Supp. 883.

Support of juvenile female delinquents committed under sections 485 and 486 of the Penal Law is a county charge. *St. Agnes Training School v. County of Erie* (1910), 68 Misc. 648, 124 N. Y. Supp. 984.

Costs in equalization proceedings.—The board of supervisors may employ counsel to defend its equalization, and the expense thereof is a contingent charge against the county. *People ex rel. Ulster County v. City of Kingston* (1886), 101 N. Y. 82, 96, 4 N. E. 348.

Costs in bastardy proceedings.—The services of an attorney retained by the superintendents of the poor in a bastardy proceeding are a county charge; but the claim is not to be audited by them, but by the supervisors. *Neary v. Robinson* (1885), 98 N. Y. 81. See also *People ex rel. Johnson v. Supervisors of Delaware* (1871), 45 N. Y. 196.

Counsel assigned by court to defend a prisoner have no claim against the county for their services; to charge a county with a claim for services rendered or expenses incurred there must be some statutory authority therefor. *People ex rel. Hadley v. Supervisors of Albany* (1864), 28 How. Pr. 22. Cited with approval, *People ex rel. Ransom v. Supervisors of Niagara* (1879), 78 N. Y. 622.

Expenditures of county clerk in arranging papers scattered by fall of cases,

without fault on his part, are a proper county charge. *Worth v. City of Brooklyn* (1898), 34 App. Div. 223, 54 N. Y. Supp. 484.

Necessary expenditures of a special or exceptional character in executing the duties of the office of county clerk for services not required of him under the general laws may properly become a county charge under subdivision 9 of this section. *People v. Sutherland* (1912), 207 N. Y. 22, 100 N. E. 440. Various charges for services disallowed. *Rept. of Atty. Genl.* (1910) 470.

"Services" refers to services for which county clerk was authorized to charge for when County Law was enacted, and does not include moneys paid by him in sorting jury slips. *Matter of Walsh v. Supervisors of Albany* (1897), 20 App. Div. 489, 47 N. Y. Supp. 35.

Surrogate's expenses.—A surrogate is not entitled to be paid, in addition to his salary, his expenses incurred in holding court at one of the county seats of his county which is not the place of his residence, without specific authority of the board of supervisors. *Townsend v. Supervisors of Seneca County* (1911), 73 Misc. 563, 133 N. Y. Supp. 555.

If the supervisors provide suitable accommodations for the surrogate at the county seat he cannot make the county liable for the rent of an office in another place in the county. *People ex rel. Westbrook v. Supervisors of Montgomery County* (1885), 34 Hun 599.

Subdivision 9 of this section does not provide for the allowance of traveling or other expenses of a surrogate as a county charge. *Rept. of Atty. Genl.* (1912) Vol. 2, p. 194.

Enforcement of quarantine regulations.—Compensation or expenditures of a sheriff incurred in the enforcement of quarantine regulations under section 96 of the Agricultural Law are a charge against the county. *Rept. of Atty. Genl.* (1907) 453.

County treasurers, dealings of with county funds. *Rept. of Atty. Genl.* (1897) 127.

Superintendent of the poor; personal expenses.—The County Law does not make the personal expenses of a superintendent of the poor a county charge and they are not a proper charge unless the board of supervisors has expressly so provided in fixing the compensation of the superintendent. *Strong v. Williams* (1915), 167 App. Div. 714, 153 N. Y. Supp. 175.

Expense of town litigation not county charge.—The expenses of a litigation, arising out of the action of a town in assessing a railroad at a rate fixed and directed by the Board of Supervisors, are not a county charge; an agreement by the Board of Supervisors to pay them is *ultra vires* and cannot be enforced by the town. *People ex rel. Sweet v. Supervisors of St. Lawrence* (1905), 101 App. Div. 327, 91 N. Y. Supp. 948.

Necessary expenses of officers.—Any resolution or ordinance, passed by any board of supervisors, to make anything a prerequisite to their performing their duty of auditing accounts for necessary expenses of county officers under subdivision 9, is without authority and nugatory. *People ex rel. Hasbrouck v. Supervisors of New York County* (1861), 21 How. Pr. 322.

Rewards for conviction of Motor Vehicle Law violators.—A district attorney is not authorized to offer rewards for the apprehension of offenders of the Motor Vehicle Law. *McNeill v. Supervisors of Suffolk County* (1906), 114 App. Div. 761, 100 N. Y. Supp. 239.

Coroner's expenses.—A coroner who receives a specified annual salary is not entitled to an allowance for expenses. *Rept. of Atty. Genl.* (1901) 186. But see to the contrary, *Opinion of State Comptroller* (1916), 10 State Dept. Rep. 550.

Cost of printing election ballots.—A contract for the printing of election ballots made by the county clerk is subject to audit by the board of supervisors, but said board cannot be compelled by certiorari to audit such a bill at the same

amount as they allowed on a prior audit. *People ex rel. Newburgh News P. & P. Co. v. Supervisors of Orange* (1910), 140 App. Div. 227, 125 N. Y. Supp. 105, *affd.* (1911) 203 N. Y. 564, 96 N. E. 1127.

Authorized by law.—The legislature has power to fix a maximum amount to be paid for a county improvement as it has to fix an exact amount. *People ex rel. McSpedon v. Haws* (1861), 21 How. Pr. 178, 12 Abb. Pr. 204. No court can audit a claim against a county, or order it paid, unless authorized by statute. *Matter of Tinsley* (1882), 90 N. Y. 231.

Boards of supervisors cannot bind their counties by an act not within the limits of the express powers conferred upon them by statute; they cannot allow a claim on any notions of their own as to its equity. *Chemung Canal Bank v. Supervisors of Chemung* (1848), 5 Den. 517.

Audit by board of supervisors of a claim does not have the legal effect of making it a county charge; what are county charges are fixed by law, and when the board determines the amount thereof, their fiat is conclusive inasmuch as they act judicially. *People ex rel. Tracy v. Green* (1874), 47 How. Pr. 382.

Expenditures for a survey of railroads and corporate property are not a county charge. *Rept. of Atty. Genl.* (1902) 278.

Highway expenses.—The common-law rule that the care and repairs of roads is in the county does not obtain in this state. Unless authorized by statute highway expenses are not chargeable against the county. *People ex rel. Slosson v. Supervisors of Westchester* (1907), 116 App. Div. 844, 102 N. Y. Supp. 402.

Repair of county property.—The necessary expense incurred in keeping the property of a county in repair, and to preserve it from decay, and keep it in a condition for use, is a proper county charge. *People v. Stout* (1856), 23 Barb. 349.

Furnishing jail.—A board of supervisors has authority to direct the purchase of such articles of furniture as are necessary to properly equip and furnish the county jail, and an account for articles so purchased is a proper county charge. *Schenck v. Mayor* (1876), 67 N. Y. 44.

Proceedings of supervisors.—Where a person printed a book containing the proceedings of the board of supervisors, under a contract with such board, and they took a claim for the printing into consideration and rejected it, it was held that the claim, being one which by law must be presented to and passed upon by the board of supervisors, and it having been presented and passed upon and rejected, no action at law could be maintained for its recovery. *Adams v. Supervisors of Oswego County* (1873), 66 Barb. 368.

Re-indexing deeds and mortgages.—Unless authorized by special statute, boards of supervisors have no power to make a contract to pay a county clerk for re-indexing deeds and mortgages recorded in the office of such clerk. *Wadsworth v. Supervisors of Livingston County* (1916), 217 N. Y. 484, 112 N. E. 161.

Bronx river valley sewer.—The construction of a sanitary sewer to drain a large and thickly populated part of Westchester county, consisting of several municipalities, is a legitimate county purpose. *Horton v. Andrus* (1908), 191 N. Y. 231, 83 N. E. 1120.

Liability for support of children committed to a juvenile asylum under sections 486 and 1298 of the Penal Law is a county charge. *People ex rel. New York Juvenile Asylum v. Supervisors of Nassau* (1915), 168 App. Div. 863, 153 N. Y. Supp. 1076.

Costs in proceedings before governor for removal of officer.—The reasonable costs and expenses incurred by the president of a taxpayer's association in proceedings before the governor for the removal of a sheriff are county charges, notwithstanding the fact that the president appeared as an individual complainant. *People ex rel. Smart v. Supervisors of Washington* (1901), 66 App. Div. 66, 72 N. Y. Supp.

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568. But board of supervisors may examine and determine reasonableness of same. *People ex rel. Benedict v. Supervisors of Oneida* (1881), 24 Hun 413.

A district attorney who has successfully met the charges against him in a proceeding before the Governor for his removal from office is entitled to charge to the county his expenses for counsel fees and various disbursements incurred in the defense and the supervisors will be required to audit the claims. Said statute, being purely prospective and not retroactive, is constitutional and does not involve a grant of the public moneys of a municipality in the aid of a private individual *People ex rel. Gagan v. Purdy* (1916), 173 App. Div. 350, 159 N. Y. Supp. 246.

The reasonable expense of residents of a county in employing counsel to prosecute before the Governor a proceeding voluntarily brought by them, resulting in the removal of a sheriff from office upon the ground that he was unfit to discharge his duties, is an expense for a county or public purpose within the meaning of this section and the board of supervisors of the county will be required by mandamus to audit such claim as a county charge. *It seems*, that if the accusation against such officer were frivolous or not presented in good faith, the expense of the prosecution would not be a county charge, and that the audit thereof would be a gift and within the prohibition of section 10 of article 8 of the State Constitution. *People ex rel. Nash v. Supervisors of Onondaga* (1914), 164 App. Div. 89, 149 N. Y. Supp. 572.

The reasonable costs and expenses incurred by a sheriff in the successful defense of charges made to the governor against him in a proceeding for his removal from office are legal county charges, and when his claim therefor has been duly allowed and audited by the board of supervisors a taxpayer's action will not lie to recover the money paid pursuant to such audit. *Gavin v. Supervisors of Rensselaer* (1916), 93 Misc. 264, 157 N. Y. Supp. 973, *affd.* 157 App. Div. 973, 159 N. Y. Supp. 1114.

Liability for injuries.—Though a county have the duty of maintaining a bridge, it is not liable to a person sustaining an injury by reason of neglect of this duty; the right of action must have been given by statute. *Ensign v. Supervisors of Livingston* (1881), 25 Hun 20.

Expenses of defense by public officer.—The payment from the funds of a county of the expenses incurred by a police officer in successfully defending charges preferred against him for official misconduct violates the constitutional provision prohibiting a county from incurring any indebtedness except for county purposes. *Matter of Chapman v. City of New York*, 168 N. Y. 80, 61 N. E. 108, 56 L. R. A. 846, 85 Am. St. Rep. 661; See also *Matter of Straus* (1889), 44 App. Div. 425, 61 N. Y. Supp. 37; *Matter of Jensen* (1899), 44 App. Div. 509, 60 N. Y. Supp. 933.

Quo warranto proceeding expenses of an ousted officer are not a proper charge as for acts done in an "official capacity" under subdivision 18. *Rattigan v. Supervisors of Cayuga County* (1915), 152 N. Y. Supp. 402.

A county is not liable under subdivision 18 of this section for the costs and expenses incurred by the sheriff in defending an action brought against him by an individual for wrongfully returning an execution unsatisfied. *Wey v. O'Hara* (1905), 48 Misc. 82, 95 N. Y. Supp. 81.

Judgment against county treasurer.—The amount of judgment for costs obtained against a county treasurer in a proceeding to review the action of such officer in refusing to issue a liquor tax certificate is a proper charge against a county. *Rept. of Atty. Genl.* (1913), Vol. 2, p. 532.

Contracts for the support of civil prisoners. *People v. Bowe* (1885), 34 Hun 528.

Advertising of terms of courts to be held in judicial district of which county forms a part a county charge. *People ex rel. Cole v. Supervisors of Greene* (1884), 15 Abb. N. C. 447, 2 How. Pr. N. S. 483, *affd.* 39 Hun 299.

Section cited.—*People ex rel. Hawley v. Howard* (1912), 152 App. Div. 621, 137

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N. Y. Supp. 496; *People ex rel. Smith v. Supervisors of Erie County* (1909), 134 App. Div. 12, 118 N. Y. Supp. 35; *People ex rel. Hewitt v. Hoyland* (1911), 145 App. Div. 11, 129 N. Y. Supp. 500; *People v. King* (1897), 19 Misc. 98, 43 N. Y. Supp. 975, *affd.* 15 App. Div. 84, 44 N. Y. Supp. 287; *People ex rel. Long v. Supervisors of Westchester* (1909), 65 Misc. 227, 119 N. Y. Supp. 695.

Former section cited.—*Doremus v. Mayor, etc., of New York*, 6 Daly 121; *Erhard v. Kings County* (1895), 36 N. Y. Supp. 656.

See also cases cited under section 12, *ante*.

§ 241. Compensation of public officers in Ulster county.—There shall be allowed to the several public officers in the county of Ulster the following annual salaries to be paid quarterly:

1. To the superintendent of the poor, fifteen hundred dollars;
2. To the county treasurer, twenty-five hundred dollars.

The board of supervisors shall not audit or allow to the sheriff of the county more than six thousand dollars in any year for his services and expenses; nor to the clerk of the county more than twelve hundred dollars for his services and expenses in any one year.

Source.—Former County L. (L. 1892, ch. 686) § 231, as amended by L. 1893, ch. 467; originally revised from L. 1879, ch. 355.

§ 241-a. Compensation of supervisors and assessors in attending tax meetings.—Supervisors, in addition to the compensation provided by section twenty-three of this chapter, and town assessors, shall be entitled to receive compensation at the rate of four dollars per day for each calendar day actually and necessarily spent in attending a meeting within the county held for the purpose of conference with the state board of tax commissioners or a member of such board, and mileage at the rate of eight cents per mile by the most direct route from his residence, in going to and returning from the place within the county where such meeting is held. Such compensation and mileage shall be a county charge. (*Added by L. 1911, ch. 51.*)

Reference.—Similar provision in Tax Law, § 173.

§ 242. County charges, how raised.—The moneys necessary to defray the county charges of each county shall be levied on the taxable property in the several towns therein, in the manner prescribed in the general laws relating to taxes; and in order to enable the county treasurer to pay such expenses as may become payable from time to time, the board of supervisors shall annually cause such sum to be raised in advance in their county, as they may deem necessary for such purpose.

Source.—Former County L. (L. 1892, ch. 686) § 232; originally revised from R. S., pt. 1, ch. 12, tit. 4, § 5.

Levy for county charges, board of supervisors is bound to make. *Chemung Canal Bank v. Supervisors of Chemung* (1848), 5 Den. 517; *People ex rel. Downing v. Stout* (1856), 23 Barb. 338, 4 Abb. Pr. 25.

§ 243. Annual report of county officers.—Each county officer who shall receive, or is authorized by law to receive, any money on account of fines

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or penalties or other matter in which his county, or any town or city therein, shall have an interest, shall annually make a written report to the board of supervisors of his county, verified to be true, bearing date the first day of November, stating the time when, and the name of every person from whom, such money has been received, the amount thereof, on what account received, and the sums remaining due and unpaid; and if no such money has been received, his report shall so state. Such report shall be filed with the clerk of the board, on or before the fifth day of November; and no officer shall be entitled to receive payment for his services, unless he shall file with the supervisors, or other officers performing their duties, his affidavit that he has made such report, and paid over all moneys which he is required to pay over, within ninety days after receiving any such money. Such officers shall pay the same without any deduction to the treasurer of his county, who shall execute duplicate receipts therefor, one of which he shall deliver to the person paying the money, and attach the other to his annual report herein required; but nothing herein shall be construed to apply to moneys received by any town or city officer in his official capacity, as such, specially appropriated for any town or city purpose.

Source.—Former County L. (L. 1892, ch. 686) § 233; originally revised from L. 1863, ch. 404, §§ 1, 2, as amended by L. 1864, ch. 341.

Reference.—Failure to make a report a misdemeanor, Penal Law, § 1842.

The purpose of the section is to render this class of officers subject to the supervision of the board of supervisors. *City of Buffalo v. Neal* (1895), 86 Hun 76, 33 N. Y. Supp. 346.

§ 244. Recovery and disposition of moneys.—The district attorney shall sue for and recover, in behalf of, and in the name of, his county, the money received by any officer for, or on account of, his county, or any town or city therein, and not paid to the county treasurer, as herein required. All moneys belonging to any town or city in such county, which shall be received by the county treasurer, shall be distributed to the several towns or cities entitled to the same, by resolution of the board of supervisors, which shall be entered in the minutes of its proceedings.

Source.—Former County L. (L. 1892, ch. 686) § 234; originally revised from L. 1863, ch. 404, § 3.

§ 245. Official seals.—The official seals of boards of supervisors of the several counties, county seal, county treasurer's seal, surrogate's seal, and the seal of the register of deeds, shall continue to be the official seals, respectively, of such boards, county treasurer, surrogate, and register of deeds, and used as such, respectively, when authorized by law. When any such seal shall be lost, destroyed, or become unfit for use, the board of supervisors of the county interested therein or not having such seal, shall cause a new seal or seals to be made at the expense of the county. A description of each of such seals, together with impressions therefrom, shall be filed in the office of the county clerk and in the office of the secretary of state, unless it has already been done. In counties having two county seats,

a duplicate of the county seal shall be procured and kept at the county seat where the county clerk's office is not situated, at some place to be designated by the county clerk, and may be used by him the same as at his office. In counties having but one court house and which is located more than five miles from the county clerk's office, a duplicate of the county seal shall be procured and kept at such court house and the county clerk may use the same at such court house. The seal kept by the county clerk in each county, including New York county, as prescribed in the judiciary law, shall continue to be the seal of the county, and must be used by him where he is required to use an official seal. (*Amended by L. 1914, ch. 29.*

Source.—Former County L. (L. 1892, ch. 686) § 235 and Code Civ. Pro. § 28; originally revised from L. 1855, ch. 249, § 1; L. 1865, ch. 148; L. 1881, ch. 302; L. 1885, ch. 140.

Reference.—Official seals, how impressed on instruments, General Construction Law, §§ 43–45.

Official seal of Surrogate's Court, replacing of. Rept. of Atty. Genl. (1902) 150.

§ 246. General provisions relating to county officers.—Elective officers shall be chosen at general elections. A person in office, when this chapter takes effect, shall continue to hold the same until the expiration of the term for which he was elected or appointed; and a person thereafter elected to any such office on or before entering upon the duties thereof, and a person thereafter appointed to any such office within ten days after notice thereof, and before entering upon the duties of his office, shall take and subscribe before the county clerk, or county judge of the county, the constitutional oath of office; and the same, with his certificate of election or appointment, shall be immediately filed in the office of the county clerk.

Source.—Former County L. (L. 1892, ch. 686) § 236.

Reference.—Holding over after expiration of term, Public Officers Law, § 5. Constitutional oath of office prescribed, Constitution, Article 13, § 1. Official oaths generally, Public Officers Law, § 10. Effect of failure to file, *Id.* §§ 13, 15, 30.

§ 247. General provisions relating to official bonds and undertakings.—Every undertaking required by this chapter must be executed by the officer or person in whose behalf it is given, and his sureties, and duly acknowledged or proven and certified, and the approval indorsed thereon. The parties executing the same shall be jointly and severally liable, regardless of its form in that respect, for damages sustained by reason of a breach thereof. Every officer or board required to approve an undertaking may examine each surety thereto under oath, and shall not approve the same unless the sureties are freeholders of the state and jointly worth over and above their debts and liabilities at least double a sum which such officer or board may fix upon and insert in the undertaking as reasonably sufficient to indemnify the county, and every person who may be or become interested therein, or in any breach thereof. Official bonds and undertakings, including the bonds of executors, administrators, guardians and trustees, required by law to be filed in the office of the county clerk or sur-

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rogate, shall also be recorded in such offices respectively, in a book to be provided and kept in each of such offices, to be designated "book of official bonds and undertakings." The county clerk and surrogate's clerk shall respectively be entitled to the same fees for such recording, as are allowed to county clerks for recording conveyances, except that in counties where the surrogate's clerk receives a salary as full compensation for his services he shall not be entitled to any fee for such services.

Source.—Former County L. (L. 1892, ch. 686) § 237, as amended by L. 1904, ch. 461; originally revised from R. S., pt. 1, ch. 12, tit. 2, §§ 18, 19, as amended by L. 1874, ch. 502; L. 1850, ch. 12; L. 1887, ch. 372, §§ 1, 2, as amended by L. 1890, ch. 367.

References.—Undertaking and bond defined. General Construction Law, § 14. Undertakings generally, Public Officers Law, § 11; force and effect, Id. § 12; neglect to file undertaking, Id. § 13; creation of vacancy for failure to execute, Id. § 30. County clerk to give notice of failure to file, County Law, § 161, subd. 4. Sureties must justify in a sum equal to twice the amount of the bond. Rept. of Atty.-Genl. (1896) 275.

The filing and entry of the bond is not simply notice to a subsequent purchaser of land charged with the lien thereof, but he is put upon inquiry to ascertain as to the equities between co-sureties. *Crisfield v. Murdock* (1891), 127 N. Y. 315, 27 N. E. 1046.

§ 248. Reimbursing counties for expenses of certain criminal trials.—

1. Whenever the trial of an indictment has been transferred from the county in which such indictment was found to some other county the cost and expense of such trial shall be a charge upon the county in which such indictment is found.

2. Whenever, under the order of any court of competent jurisdiction, the pleadings and issue in any prosecution for any crime or misdemeanor, other than indictment, shall have been sent down to any county in this state for trial therein, in consequence of any inability to obtain an unprejudiced or impartial jury in the county in which the venue was originally laid, the expenses of the trial of said prosecution shall be a charge upon the county from which the same was transferred.

3. In case the expenses of the trial of said indictment or prosecution shall have been assessed on any county in which any such issue shall have been determined, the same, with interest thereon, shall be reimbursed to the treasury of such county by the county treasurer in the county from which such proceedings have been sent down, and the board of supervisors of the county liable to pay such expenses as aforesaid are hereby authorized to include the same in their annual levy of taxes.

4. This section also applies to the county of New York.

Source.—Former County L. (L. 1892, ch. 686) § 205, as added by L. 1908, ch. 262; L. 1853, ch. 195, § 1.

§ 249. County responsible for funds or moneys paid into court.—Each county of the state shall be responsible for all funds or moneys deposited with the treasurer thereof by virtue of a judgment, decree or order of any

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court of record in this state, and an action to recover any loss to or of such fund may be brought against the county by any party aggrieved or by the comptroller of the state of New York in a court of competent jurisdiction.

Source.—L. 1908, ch. 186, § 1.

The expenditures necessary to protect funds deposited in county treasury by virtue of a judgment, decree or order should be made primarily from the fund to be protected if in such fund there is money available for the purpose. If there is no money in such fund immediately available, payment should be made out of any other funds in the treasury not specifically appropriated. Rept. of Atty. Genl. (1912) Vol. 2, p. 366.

§ 250. **Expenses of peace officer for injuries.**—If heretofore or hereafter a peace officer of a county be injured while executing or attempting to execute a warrant or process of a criminal court, the board of supervisors of such county may, by resolution, determine that the reasonable medical and hospital expenses of such peace officer incurred on account of such injuries, not exceeding an amount specified in the resolution, shall be paid by the county, and such expenses shall thereupon become a county charge. (*Added by L. 1912, ch. 95.*)

ARTICLE XVI.

LAWS REPEALED; WHEN TO TAKE EFFECT

Section 260. Laws repealed.

261. When to take effect.

§ 260. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Source.—Former County L. (L. 1892, ch. 686) § 238.

Consolidators' note.—Section 2 of the County Law, as it appears in this report, excepts the county of New York from "this chapter." The question occurs whether this exception applies to the schedule of repeals. On the face of the chapter it would seem that the acts repealed in the schedule were left standing as to New York county because of this exception. However, there are acts in the schedule which apply only to the city and county of New York. See L. 1875, ch. 480. If the schedule was not intended to apply to New York county what object was sought by the insertion of such an act?

The framers of the former County Law evidently drew a distinction between the text of the law and the schedule of repeals and by the first section intended to except New York county from the provisions of the text of the law only. This conclusion has been arrived at after a study of the acts contained in the schedule.

All the repeals inserted in the County Law schedule by this board are intended to be absolute repeals, unless otherwise stated in the schedule. The repeals in the former County Law schedule are also treated as absolute repeals.

§ 261. **When to take effect.**—This chapter shall take effect immediately.

Source.—Former County L. (L. 1892, ch. 686) § 239.

SCHEDULE OF LAWS REPEALED.

			LAWS OF	CHAPTER	SECTION
Revised Statutes....Part 1, chapter 2,			1808	240	16
title 6	All		1810	193	22
Revised Statutes....Part 1, chapter 9,			1812	43	All
title 7, section 5			1812	239	44
Revised Statutes....Part 1, chapter 12			R. L. 1813	49	All
..... All			R. L. 1813	67	All
Revised Statutes....Part 1, chapter 20,			R. L. 1813	69	All
title 17	All		R. L. 1813	87	All
Revised Statutes....Part 1, chapter 20,			R. L. 1813	89	All
title 18	All		1814	169	1
Revised Statutes....Part 3, chapter 3,			1815	36	All
title 2, sections 54-61			1815	129	All
Revised Statutes....Part 3, chapter 7,			1815	204	All
title 3, sections 63-66			1815	266	28
Revised Statutes....Part 3, chapter 8,			1817	177	5
title 4, sections 102-106			1817	252	1
Revised Statutes....Part 3, chapter 8,			1818	129	All
title 17, section 35			1818	283	3-7, 9
Revised Statutes....Part 4, chapter 2,			1819	88	All
title 8, sections 7, 8, 10-13, 15			1820	13	All
Revised Statutes....Part 4, chapter 3,			1820	76	All
title 1	All		1820	124	2
LAWS OF	CHAPTER	SECTION	pt. relating to judge of probate.		
1783	19	All	1820	206	All
1787	32	1-3, 7	1820	230	All
1787	39	6	1821	88	All
1787	65	8	1821	308	All
1788	37	20-23	1821	234	All
1788	42	10	1822	26	All
1788	65	4-6, 8, 9	1822	99	All
1789	22	1-12	1822	124	4, 5
1790	45	All	1822	126	All
1792	31	All	1822	184	3-5
1793	64	12	1822	250	27
1794	1	2	1823	70	7
1794	30	All	1823	141	All
1794	37	All	1824	254	1, 2
1795	27	All	1825	95	1
1796	8	1-4	1825	273	All
1796	56	3	1826	62	1
1797	55	All	1826	161	All
1797	100	All	1826	178	All
1798	1	All	1826	295	All
(21 Sess.)			1827	217	All
1798	22	1-3	1828	21	1
1799	17	All	1829	352	All
1799	18	5	1830	297	2
1799	44	1	1830	320	4, 39
1800	9	All	1831	237	All
1800	53	All	1832	292	4
1800	73	All	1834	90	All
1800	107	3	1835	287	All
1801	28	All	1835	296	All
1801	34	11	1835	299	All
1801	60	14-17	1836	22	All
1801	62	All	1836	106	All
1801	77	3	1836	111	All
1801	78	21	1836	117	All
1801	90	19	1836	141	2
1801	113	12, 13			
1801	146	1, 3			
1801	180	All			
1807	43	All			
1807	87	All			
1808	47	All			

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1836	459	All	1854	57	All
1836	506	3	1854	183	All
1837	125	All	1855	249	All
1837	178	All	1856	108	All
1838	120	4	1857	461	All
1838	205	All	1857	564	All
1838	314	All	1858	190	All
1839	369	1	1858	213	All
1839	375	All	1859	165	All
1839	388	All	1859	254	All
1840	28	1, 3	1859	386	All
1840	73	All	1859	496	All
1840	99	All	1860	4	All
1840	130	All	1860	57	2
1840	210	All	1860	276	All
1840	281	All	1861	83	All
1840	340	All	1861	96	2
1842	290	8	1861	97	4, 5
1843	192	All	1862	244	All
1844	88	4, 5	1862	245	All
1844	125	All	1862	298	All
1844	161	All	1863	393	All
1845	92	All	1863	404	All
1845	172	All	1864	53	1
1845	180	22, 28, 35-37	1864	197	All
1845	329	All	1864	287	All
1846	31	1, 3, 4	1864	341	All
1846	99	All	1865	143	All
1846	109	All	1865	404	All
1846	129	All	1866	441	All
1846	189	All	1866	696	All
1847	39	All	1866	736	All
1847	276	8-14	1868	268	All
1847	277	3	1868	345	All
last sentence; 4, 5, 8-10			1868	872	All
1847	280	65	1869	459	All
1847	307	All	1869	855	All
1847	308	All	1870	69	All
1847	427	All	1870	361	All
1847	455	14	1870	432	All
1847	460	1-28	1870	467	3
1847	470	33, 37	1870	506	1
1847	498	All	1870	507	All
1848	41	2	1870	597	All
1848	136	All	1870	752	All
1848	164	All	1871	18	All
1848	327	All	1871	184	All
1849	95	All	1871	239	All
1849	116	All	1871	274	All
1849	185	All	1871	695	All
1849	194	All	1871	710	All
1849	207	All	1871	859	All
1849	331	2, 3	1872	17	All
1849	360	All	1872	285	All
1850	12	All	1872	319	All
1850	346	All	1872	587	All
1851	81	All	1872	733	2,
1851	175	All	pt. relating to employment of coun-		
1851	211	All	sel to assistant district attorneys.		
1851	397	All	1872	767	All
1852	44	2	1872	883	All
1852	187	All	1873	119	All
1852	304	All	1873	323	All
1853	80	All	1873	515	All
1853	195	All	1873	760	2,
1853	481	All	clause fixing the time for counties to		

COUNTY LAW.

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Laws repealed.

§ 260.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
pay their quota of state taxes.			1881	411	All
1873	833	All	1881	439	All
1874	64	All	1881	464	All
1874	260	All	1881	543	All
1874	323	2,	1881	554	All
pt. relating to employment of coun-			1881	570	All
sel to assist district attorneys and			1881	613	All
costs in proceedings to remove county			1882	58	All
officers.			1882	60	All
1874	410	All	1882	118	All
1874	502	All	1882	196	All
1874	535	All	1882	250	All
1875	251	All	1882	289	All
1875	446	All	1882	304	All
1875	464	All	1882	317	All
1875	480	All	1883	111	All
1875	482	All	1883	123	All,
1876	257	All	except as to county of New York.		
1876	258	All	1883	212	All
1876	373	All	1883	309	All
1877	21	All	1883	370	All
1877	35	All	1883	374	All
1877	102	All	1883	492	All
1877	401	All	1884	141	All
1877	436	All	1884	231	All
1878	8	All	1884	327	All
1878	77	All	1884	337	All
1878	94	All	1884	350	All
1878	122	All	1885	107	All
1878	132	All	1885	122	All
1878	228	All	1885	123	All
1878	239	All	1885	140	All
1878	259	All	1885	160	All
1878	285	All	1885	326	All
1879	23	All	1885	439	All
1879	159	All	1885	451	All
1879	275	All	1886	63	All
1879	285	All	1886	126	All
1879	307	All	1886	164	All
1879	330	All	1886	173	All
1879	348	All	1886	306	All
1879	355	All	1886	341	All
1879	357	All	1886	355	All
1879	362	All	1886	659	4
1879	364	All	1886	678	All
1879	447	All	1887	297	All
1880	175	All	1887	372	All
1880	233	All	1888	22	All
1880	270	All	1888	55	All
1880	320	All	1888	152	All
1880	336	6	1889	10	All
1880	365	All	1889	14	All
1880	504	All	1889	264	All
1880	512	All	1889	294	All
1880	580	All	1889	312	All
1881	12	All	1889	330	1
1881	97	All	1889	331	All
1881	118	All	1889	376	All
1881	129	All	1889	466	All
1881	145	All	1890	10	All
1881	264	All	1890	136	All
1881	302	All	1890	180	All
1881	328	All	1890	203	All
1881	350	All	1890	245	All
1881	354	All	1890	287	All
1881	392	All	1890	367	All

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1890	382	1	1899	447	All
1890	568	131	1899	658	1,
1891	5	All	pt. relating to salary of county judge.		
1891	277	All	1900	12	All
1891	289	All	1900	130	1
1891	292	All	1900	163	All
1891	347	All	1900	296	All
1891	355	All	1900	306	All
1892	256	All	1900	330	All
1892	289	All	1900	400	All
1892	664	All	1900	529	All
1892	686	All	1900	560	All
1892	715	6	1900	763	All
1893	50	All	1901	51	All
1893	70	All	1901	112	All
1893	116	All	1901	161	All
1893	222	All	1901	255	All
1893	251	All	1901	337	1,
1893	467	All	pt. relating to salary of county judge.		
1893	724	All	1901	455	All
1894	79	All	1901	486	All
1894	109	1, 2,	1901	505	All
first sentence, 3			1901	584	All
1894	163	All	1902	38	All
1894	227	All	1902	142	All
1894	340	All	1902	143	All
1894	644	All	1902	158	All
1894	646	All	1902	234	All
1894	685	All	1902	255	All
1895	144	All	1902	401	All
1895	150	All	1902	507	All
1895	310	All	1903	196	All
1895	332	All	1903	434	All
1895	480	All	1903	465	All
1895	544	1	1903	469	All
1895	649	All	1903	612	All
1895	718	All	1903	534	All
1895	742	All	1904	20	All
1895	756	All	1904	61	All
1895	937	All	1904	78	All
1895	961	All	1904	83	All
1896	48	All	1904	119	All
1896	178	All	1904	174	All
1896	281	All	1904	277	All
1896	439	All	1904	337	All
1896	593	All	1904	380	All
1896	680	All	1904	461	All
1896	826	All	1905	20	All
1896	902	All	1905	160	All
1896	937	All	1905	244	All
1896	995	All	1905	261	All
1897	171	All	1905	276	All
1897	232	All	1905	410	1,
1897	329	All	pt. amending L. 1894, ch. 109, § 2,		
1897	406	All	first sentence.		
1897	407	All	1905	496	All
1897	409	All	1905	666	All
1898	158	All	1906	74	All
1898	225	All	1906	212	All
1898	334	All	1906	249	All
1898	349	All	1906	318	All
1898	588	3,	1906	319	All
pt. relating to salary of county judge.			1906	362	All
1899	133	All	1906	377	All
1899	155	All	1906	426	All
1899	203	All	1906	433	All

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Consolidators' notes.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1906	439	All	1908	373	All
1906	463	All	1908	374	All
1907	81	All	1908	410	All
1907	97	All	1908	438	All
1907	256	All	1908	478	All
1907	275	All	1908	500	All
1907	280	All	Code Civil Procedure		20,
1907	294	All	to and including words "county		
1907	454	All	charges"; 28; 31, pt. relating to		
1907	482	All	boards of supervisors; 88; 89, words		
1908	8	All	"shall be kept" to "prescribed by law,"		
1908	42	All	and last three sentences; 112, 121,		
1908	77	All	182-189; 203, first sentence and pt.		
1908	165	All	making county charge; 356, last sen-		
1908	185	1	tence; 358, to and including words		
1908	186	All,	"county court thereof"; 744, pt. re-		
except pt. relating to city of New			lating to fees of county clerk; 961, pt.		
York.			relating to county clerk and register;		
1908	255	All	1966, first sentence; 1967, 1968; 2414,		
1908	262	All	last sentence; 3285.		

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Statutes repealed which are temporary or obsolete or have been consolidated in the "Consolidated Laws" are given with an explanatory note as follows:—

R. S., pt. 3, ch. 7, tit. 3, art. 7, §§ 63-66.—Consolidated in County Law, § 167.

R. S., pt. 3, ch. 8, tit. 4, §§ 102, 103.—Relating to judgments against the board of supervisors of a county. Superseded by L. 1892, ch. 686, §§ 12, 230.

R. S., pt. 3, ch. 8, tit. 17, § 35.—Consolidated in County Law, § 5. The section consolidated relates to the collection of a judgment against a county after its division. There is no board of supervisors in New York county and this act has no application thereto.

R. S., pt. 4, ch. 2, tit. 8, §§ 7, 8, 10-12.—Sections 7, 8, relating to fees of district attorneys, except in New York county, superseded by L. 1838, ch. 120, § 4; L. 1838, chs. 308, 309, 310, 313. L. 1839, ch. 375, § 10, relating to coroners' fees, was superseded by the following statutes: L. 1868, ch. 565; L. 1873, ch. 833; L. 1875, ch. 248; L. 1876, ch. 398; L. 1878, ch. 37; L. 1878, ch. 156; L. 1884, ch. 233; L. 1885, ch. 418; L. 1885, ch. 311, and L. 1897, ch. 378, §§ 1570, 1571. Section 11, relating to sheriffs' fees, finally superseded and covered by Code Civ. Pro. § 3307. Section 12 is covered by former County Law, L. 1892, ch. 686, § 230, which is consolidated in County Law, § 240.

L. 1787, ch. 32, §§ 1-3, 7.—Relating to sheriffs. Superseded by L. 1801, ch. 28, and repealed by L. 1801, ch. 193.

L. 1787, ch. 39, § 6.—Relating to sheriffs and the custody of prisoners. Superseded by L. 1801, ch. 65, and repealed by L. 1801, ch. 193.

L. 1787, ch. 65, § 8.—Last section of an act regulating criminal procedure and relating to costs. Obsolete.

L. 1788, ch. 37, §§ 20-23.—Relating to the payment of expenses in criminal prosecutions. Superseded by L. 1801, ch. 60, and repealed by L. 1801, ch. 193.

L. 1788, ch. 42, § 10.—Relating to costs of conviction of criminal charge. Superseded by L. 1801, ch. 34, and repealed by L. 1801, ch. 193.

L. 1788, ch. 65, §§ 4-6, 8, 9.—Relating to clerk of board of supervisors and county treasurer. Superseded by L. 1801, ch. 180, and repealed by L. 1801, ch. 193.

L. 1789, ch. 22, §§ 2-12.—Relating to dogs. Superseded by L. 1801, ch. 62, and repealed by L. 1801, ch. 193.

L. 1789, ch. 25, § 1 pt.—Relating to fees of coroners and constables. Superseded by L. 1801, ch. 190, and repealed by L. 1801, ch. 193.

L. 1793, ch. 64, § 12.—This section 12, relating to division of towns, is a general provision at the end of a local act. Re-enacted by L. 1801, ch. 78, § 21, and repealed by L. 1801, ch. 193.

L. 1794, ch. 30.—Relates to auditing the accounts of town officers. Superseded by L. 1801, ch. 180, § 2, and repealed by L. 1801, ch. 193.

Where the statutes covered by express repealing acts have been repealed by the

Consolidated Laws, the repealing statutes themselves have been recommended for repeal.

L. 1795, ch. 27.—Relating to sheriffs. Superseded by L. 1801, ch. 28, and repealed by L. 1801, ch. 193.

L. 1796, ch. 8, §§ 1-4.—Providing for a public prosecutor in oyer and terminer and gaol delivery and general sessions. Sections 1, 2 and 4 superseded by L. 1801, ch. 146. Section 3 superseded by L. 1801, ch. 190, and repealed by L. 1801, ch. 193.

L. 1796, ch. 56, § 3.—Relating to report to be made by county clerk. Superseded by L. 1801, ch. 113, and repealed by L. 1801, ch. 193.

L. 1797, ch. 55.—Relating to payment of expenses in bringing back into state fugitives from justice. Re-enacted by L. 1801, ch. 135, last section, and repealed by L. 1801, ch. 193.

L. 1798, ch. 1, § 1.—Puts court of general sessions of county of New York in a district with certain other counties. Obsolete.

L. 1798, ch. 22.—Relating to bond of sheriffs. Sections 1-3 superseded by L. 1801, ch. 28. Section 4 superseded by L. 1801, ch. 43, § 3. All repealed by L. 1801, ch. 193.

L. 1799, ch. 18, § 5.—Relates to conveyances to counties. Substance contained in L. 1892, ch. 686, § 3. Obsolete.

L. 1799, ch. 44, § 1.—Provides for deputy county clerk. Section 1 superseded by L. 1801, ch. 90, § 19. Repealed by L. 1801, ch. 193.

L. 1800, ch. 9.—Authorizing supervisors to levy taxes for repairs to court houses and jails. Superseded by L. 1801, ch. 180, § 11, and repealed by L. 1801, ch. 193.

L. 1800, ch. 53.—Relating to compensation of supervisors. Superseded by L. 1801, ch. 180, § 9, and repealed by L. 1801, ch. 193.

L. 1800, ch. 73.—Relating to the bond to be given by the sheriffs of certain counties. Superseded by L. 1801, ch. 28, and repealed by L. 1801, ch. 193.

L. 1800, ch. 107 § 3.—Temporary act regarding collection of taxes before May 1, 1800.

L. 1801, ch. 28.—Relating generally to sheriffs. Superseded by 1 R. L., ch. 67, p. 418, and repealed by L. 1813, ch. 202.

L. 1801, ch. 34, § 11.—Relating to fees of justices of the peace in criminal cases. Superseded by 2 R. L., ch. 24, p. 193, and repealed by L. 1813, ch. 202.

L. 1801, ch. 60, §§ 14-17.—Relating to costs and expenses in criminal charges. Superseded by 1 R. L., ch. 8, p. 494, and repealed by L. 1813, ch. 202.

L. 1801, ch. 77, § 3.—Relating to the appointment of surrogates. Superseded by 1 R. L., ch. 79, p. 444, and repealed by L. 1813, ch. 202.

L. 1801, ch. 78, § 21.—Relating to the division of townships. Superseded by 2 R. L., ch. 35, p. 125, and repealed by L. 1813, ch. 202.

L. 1801, ch. 90, § 19.—Relating to deputy county clerks. Superseded by 1 R. L., ch. 56, p. 515, and repealed by L. 1813, ch. 202.

L. 1801, ch. 113, §§ 12, 13.—Relating to notice of filing of oaths and the return lists of persons who have taken oaths. Superseded by 1 R. L., ch. 13, p. 382, and repealed by L. 1813, ch. 202.

L. 1801, ch. 146, §§ 1, 3.—Relating to the appointment and compensation of district attorneys. Superseded by 1 R. L., ch. 89, p. 413, and repealed by L. 1813, ch. 202.

L. 1801, ch. 180.—Relating generally to boards of supervisors. Superseded by 2 R. L., ch. 49, p. 137, and repealed by L. 1813, ch. 202.

L. 1801, ch. 184, § 27.—Relating to poor and poor-houses. Superseded by 1 R. L., ch. 78, § 29, p. 290, and repealed by L. 1813, ch. 202.

L. 1807, ch. 43.—Provides a penalty for supervisors neglecting to raise money as directed by law. Superseded by 2 R. L., ch. 49, § 10, p. 137, and repealed by L. 1813, ch. 202.

L. 1808, ch. 47.—Relating to district attorneys. Superseded by 1 R. L., ch. 89, p. 413, and repealed by L. 1813, ch. 202.

L. 1808, ch. 240, § 16.—Prohibits supervisors and clerks of boards of supervisors from holding office of either county treasurer or loan commissioner. Superseded by 1 R. L. 1813, ch. 49, § 4, p. 138, and repealed by L. 1813, ch. 202.

L. 1810, ch. 193, § 22.—Authorizes boards of supervisors to increase bounty for the destruction of wolves and panthers. Superseded by 2 R. L., ch. 49, § 12, p. 141, and repealed by L. 1813, ch. 202.

L. 1812, ch. 43.—Clerk of supreme court in New York may procure boxes for papers at expense of state. Temporary and obsolete.

L. 1812, ch. 239, § 44.—Provides that sheriff shall not keep male and female

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Consolidators' notes.

prisoners in the same room. Superseded by 1 R. L., ch. 67, § 18, p. 425, and repealed by L. 1813, ch. 202.

1 R. L. 1813, ch. 69, p. 427.—“An act relative to gaols.” All, except §§ 14, 15, 28, 29, repealed, as shown by schedule. Excepted sections are obsolete.

L. 1815, ch. 204.—Relates to new general commissions of the pleas and to new general commissions of the peace, and supplements 1 R. L. (1813), ch. 14, §§ 4, 5, p. 459, which was repealed by L. 1828, ch. 21, § 1, ¶ 114. Obsolete.

L. 1817, ch. 252, § 1.—Erects Seneca, Tompkins, Cortland and Broome counties as a separate district, and provides for appointment of a district attorney therein. Superseded by L. 1818, ch. 283, § 1, which provides for the appointment of a district attorney in each county in the state.

L. 1820, ch. 124, § 2.—Abolishes salaries of judges of probate. Superseded by L. 1830, ch. 249, § 14, which fixes the salary.

L. 1822, ch. 124, §§ 4, 5.—Relates to the collection of accounts against attorneys for clerk's fees and remitting before March, 1823. Temporary and obsolete.

L. 1823, ch. 141.—Relates to the payment of certain bounties for destruction of wolves in Franklin county. Temporary and obsolete.

L. 1829, ch. 8.—Relates to meeting of supervisors of Dutchess county. Superseded by L. 1849, ch. 194, § 4, ¶ 11.

L. 1830, ch. 297, § 2.—Suspends for one year as to the city and county of Albany certain sections of the Revised Statutes. Temporary.

L. 1834, ch. 90.—Relates to meetings of county judges and supervisors of Jefferson county to appoint commissioners of deeds in towns. Town commissioners of deeds abolished by L. 1840, ch. 238.

L. 1836, ch. 141, § 2.—Relates to qualifications of judge of courts of common pleas in county of Saratoga. Obsolete.

L. 1836, ch. 506, § 3.—Gives power to chairman of committee of board of supervisors to administer oath. Consolidated in County Law, § 28.

L. 1838, ch. 120, § 4.—Relates to compensation of district attorney in Erie county. Superseded by L. 1852, ch. 304.

L. 1838, ch. 205.—Relates to the bounty on wolves in Lewis county. Superseded by L. 1849, ch. 194, § 4, ¶ 13, and repealed by L. 1849, ch. 194, § 11.

L. 1838, ch. 333, § 18.—Fixing date of annual meeting of supervisors of Fulton county. Superseded by L. 1849, ch. 194, § 4, ¶ 11, and then repealed by L. 1849, ch. 194, § 11.

L. 1839, ch. 388.—Relates to compensation of clerks of supreme courts and register and clerks in chancery. So much of this act as relates to “fees of supreme court clerks” is repealed by L. 1840, ch. 386, § 40. Parts relating to fees of registers, assistant registers and clerks in chancery abrogated by abolition of court of chancery. Constitution of 1847, Article 14. Section 7 was amended so as to read as follows by L. 1840, ch. 340, § 1.

L. 1840, ch. 28, §§ 1, 3.—Compensation of district attorney in Albany county. Superseded by L. 1849, ch. 185.

L. 1840, ch. 73.—Compensation of district attorney, Tompkins county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1840, ch. 99.—Compensation of district attorney, Monroe county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1840, ch. 210.—Compensation of district attorney, Oswego county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1840, ch. 281.—Compensation of district attorney, Dutchess county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1840, ch. 340.—Relates to the accounts and reports of clerks and registers. Amends L. 1839, ch. 388, § 7. Obsolete. See note to L. 1839, ch. 388.

L. 1843, ch. 192.—Compensation of district attorney, Cayuga county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1844, ch. 283, §§ 4, 5.—Compensation of district attorney, Chenango county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1844, ch. 161.—Compensation of district attorney, Yates county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1845, ch. 92.—Compensation of district attorney, Greene county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1845, ch. 179.—Compensation of district attorney, Oneida county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1845, ch. 180, §§ 35, 36.—Section 35 excepts Kings, Queens, Suffolk and New York counties from the provisions of certain preceding sections of the same chap-

ter, all of which have been repealed. Obsolete. Section 36 is a repeal.

L. 1845, ch. 329.—Compensation of district attorney, Ulster county. Section 1 amended to read as follows by L. 1851, ch. 81, § 1. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1846, ch. 31, §§ 1, 3, 4.—Compensation of district attorney, Kings county. Superseded by L. 1892, ch. 686, § 12, subd. 5. Section 4 provides for compensation of treasurer of Kings county. Obsolete. Section 2 is special.

L. 1846, ch. 99.—Compensation of district attorney, Schoharie county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1846, ch. 109.—Compensation of district attorney, Orange county. Section 1 amended to read as follows by L. 1852, ch. 187, § 1. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1846, ch. 129.—Compensation of district attorney, Allegany county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1846, ch. 189.—Provides that, except in city and county of New York and Kings county, county treasurers shall receive for their services, instead of fees, a compensation to be fixed by supervisors not exceeding one-half of one per centum for receiving, the same for disbursing, and in no case exceeding \$500 per annum. Statute superseded as follows: L. 1847, ch. 427 [Albany Co.]; L. 1864, ch. 143 [Clinton Co.]; L. 1864, ch. 261 [Montgomery Co.]; L. 1865, ch. 182 [Herkimer and Franklin Cos.]; L. 1865, ch. 693 [Ontario Co.]; L. 1867, ch. 108 [Otsego Co.]; L. 1867, ch. 143 [Livingston Co.]; L. 1868, ch. 462 [Chautauqua Co.]; L. 1870, ch. 570 [Rensselaer Co.]. Section 1 amended to read as follows by L. 1873, ch. 110, § 1. As to counties not named, by L. 1892, ch. 686, § 12, ¶ 5.

L. 1847, ch. 39.—Relates to time for the annual meeting of the board of supervisors of Oswego county. Amends R. S., pt. 1, ch. 12, tit. 2, art. 1, § 3, which was repealed by L. 1892, ch. 686, § 238. Superseded by L. 1892, ch. 686, § 10.

L. 1847, ch. 277, § 3, pt., relating to salary of county judges, 4, 5, 8. Regulates compensation of county judicial officers. Section 9 amended so as to read as follows by L. 1849, ch. 95, § 1. Section 10 repealed by same. Superseded by L. 1892, ch. 686, § 222.

L. 1847, ch. 280, § 65.—Clerks of counties shall be clerks of various courts. Part relating to clerks of supreme court abrogated by Constitution (1895). Art. 6, § 19. Part relating to clerks of county courts consolidated in County Law, § 161, subd. 11.

L. 1847, ch. 307.—Clerk of general sessions in county of New York shall be clerk of oyer and terminer. Superseded by L. 1882, ch. 410, § 1529.

L. 1847, ch. 308.—Amends act relating to annual meeting of supervisors of Oswego county. L. 1847, ch. 39, which was superseded by L. 1892, ch. 686, § 10.

L. 1847, ch. 427.—Relates to fees county treasurer Albany county. Superseded by L. 1892, ch. 686, § 12, ¶ 5.

L. 1848, ch. 41, § 2.—Compensation of district attorneys, Broome county. Superseded by L. 1892, ch. 686, § 12, subd. 5. Section 1 is special.

L. 1849, ch. 95.—Amends L. 1847, ch. 277, § 9, relating to duties of county officers. Superseded by L. 1892, ch. 686, § 222.

L. 1849, ch. 185.—Relates to district attorney of county of Albany. Superseded by L. 1892, ch. 686, § 12, ¶ 5.

L. 1849, ch. 331, § 2.—Amends L. 1847, ch. 460, § 23, relating to alterations in county jails. Original act all repealed and this amendment is obsolete.

L. 1851, ch. 81.—Compensation of district attorney, Ulster county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1851, ch. 175.—Amends L. 1847, ch. 276, § 13, an act relating to separate officer for surrogate in certain counties. Sections 2, 3 repealed by L. 1892, ch. 686, § 238. The remainder of act is contained in County Law, § 231.

L. 1851, ch. 397.—Provides that county treasurers must collect old charges for official services before April, 1849. Temporary and obsolete.

L. 1853, ch. 195.—Provides for reimbursing counties for expenses of criminal trials sent to them from other counties. Consolidated in County Law, § 248.

L. 1854, ch. 57.—Additional compensation for justices of sessions in Erie county. Court abolished by Constitution, art. 6, § 14. Obsolete.

L. 1854, ch. 183.—Deputy clerk for court of general sessions in Kings county. Court abolished by Constitution, art. 6, § 14. Section 2 amended so as to read as follows by L. 1866, ch. 441, § 1. Obsolete.

L. 1859, ch. 254.—Directs supervisors to fix fees for conveyance of juvenile delinquents to houses of refuge and of lunatics to insane asylums. Consolidated in

L. 1909, ch. 16.

Consolidators' notes.

County Law, § 12, subd. 20, with changes made necessary by conflict with provisions of Insanity Law, § 85.

L. 1860, ch. 276.—Relating to business hours in county clerks' offices. Statute cited is covered by L. 1892, ch. 686, § 165.

L. 1861, ch. 83.—Relates to presentation of accounts against counties of Onondaga, Tioga, Oneida, Fulton, Monroe, Broome, Delaware, Cayuga, Orange, Jefferson, Richmond, Livingston, Chenango, Suffolk, Ulster, Dutchess, Steuben and Niagara. Obsolete and provisions superseded by County Law, § 12, subd. 2, §§ 24, 25. Section 1 amended so as to read as follows by L. 1862, ch. 245, § 1.

L. 1862, ch. 245.—Amends L. 1861, ch. 83, § 1. See note to L. 1861, ch. 83.

L. 1866, ch. 441.—Supervisors may pay salary to deputy clerk of court of general sessions in Kings county. Court abolished by Constitution, art. 6, § 14. Obsolete.

L. 1866, ch. 736.—Salaries of surrogate and clerk in Erie county. Superseded, as to surrogate, L. 1892, ch. 686, § 222, ¶ 14; as to clerk, Code Civ. Proc., § 2508.

L. 1868, ch. 268.—Compensation of district attorneys, Orange county. Superseded by L. 1892, ch. 686, § 12, subd. 5.

L. 1872, ch. 733.—A provision in the general appropriation act of that year permitting district attorneys to employ counsel. It is superseded by L. 1874, ch. 332, § 2. See L. 1874, page 387, and also 65 App. Div. 217; 72 N. Y. Supp. 564.

L. 1873, ch. 515.—Amends L. 1872, ch. 767, regarding salaries of county judges and surrogates. Original act all repealed by repealing clause of L. 1892, ch. 686. Superseded by L. 1892, ch. 686, § 222. Sections 1, 3-7 amended so as to read as follows by L. 1877, ch. 401, §§ 1, 2. Section 2 amended so as to read as follows by L. 1877, ch. 35, § 1.

L. 1873, ch. 833.—Sections 4-6 changed to 5-7 by L. 1873, ch. 286, § 2. Consolidated in County Law, as part of § 240, subd. 10. Section 1 amended so as to read as follows by L. 1874, ch. 535, § 1, and L. 1900, ch. 763, § 1. Sections 2, 3 amended so as to read as follows by L. 1874, ch. 535, §§ 2, 3.

L. 1874, ch. 535.—Section 1 amended so as to read as follows by L. 1900, ch. 763, § 1. Remainder of act consolidated in County Law, §§ 193 and 194.

L. 1875, ch. 251.—Empowers boards of supervisors to contract with sheriff or jailer for support of civil prisoners. Consolidated in County Law, § 12, subd. 22.

L. 1875, ch. 446.—Relates to support of prisoners discharged between January 1 and May 11, 1875. Temporary and obsolete.

L. 1879, ch. 447.—Section 1 amends R. S., pt. 1, ch. 12, tit. 2, art. 2, § 25, relating to books and moneys of county in hands of former county treasurer or of representatives of deceased county treasurer. Original section of Revised Statutes repealed and substance thereof in County Law, § 148. Section 2 consolidated in County Law, § 153.

L. 1880, ch. 320.—Amends L. 1879, ch. 364, giving power to supervisors over bridges between two towns. Covered by County Law, §§ 62, 65.

L. 1880, ch. 365.—Amends L. 1875, ch. 482, § 1, subd. 9, so as to read as follows, and consists of three sections. Section 2 excepts town of Flatbush and city and county of New York from operation of act. The exception as to New York is surplusage as the substance of § 1 in fact makes the exception, the city and county of New York being coterminous. Section 3 is when act shall take effect. L. 1881, ch. 554, amends L. 1880, ch. 365, § 1, so as to read as follows, and in the amendment excepts the towns of Flatbush and New Lots, and thus supersedes L. 1880, ch. 365.

L. 1881, ch. 129.—Amends L. 1875, ch. 482, § 1, ¶ 15, so as to read as follows, and was superseded by L. 1894, ch. 685, § 1.

L. 1881, ch. 145.—This law provides that county clerks and treasurers shall make and certify copies of papers filed in their offices pursuant to L. 1848, ch. 277; such copies shall be recorded and be evidence. Original law referred to funds in hands of clerk of court of appeals and directed that he shall turn them over to county treasurers with files of the late court of chancery. Original law was repealed by L. 1877, ch. 417, § 1, ¶ 22. Object of this law was to preserve evidence of these matters so as to clear titles, etc. Its special provisions are now superseded by general provisions in Code Civ. Pro. §§ 933 and 961, and L. 1896, ch. 547, § 247. This law is superfluous and obsolete.

L. 1881, ch. 328.—Office hours of clerk of county of Columbia. Superseded by L. 1892, ch. 686, § 165.

L. 1881, ch. 392.—Office hours of clerk of county of Oneida. Superseded by L. 1892, ch. 686, § 165.

L. 1883, ch. 123.—Amends R. S., pt. 1, ch. 12, tit. 2, art. 7, § 90, relating to

appointment of special district attorneys in cases of vacancy or sickness. This section of Revised Statutes was repealed by the repealing clause of L. 1892, ch. 686, § 238. The amendment was not repealed. The act would appear to apply to New York county, but inasmuch as there may be doubt on the question, the repeal excepts New York county and leaves the matter open to judicial construction. It seems to be in force and hence is consolidated in County Law, except as to New York county, as § 205.

L. 1885, ch. 123.—Consists of four sections. Section 1 fixes salary of surrogate of Monroe county. Specifically repealed, as shown in schedule of laws repealed. Section 2 prohibits said surrogate from acting as referee or practicing as attorney. Superseded by Code Civ. Pro. § 2495. Section 3 is a repeal. Section 4 provides when act shall take effect.

L. 1886, ch. 341.—Provides that county clerk may complete records of predecessor. Consolidated in County Law, § 166.

L. 1887, ch. 443.—Amends L. 1874, ch. 416, § 1, relating to fees for publishing session laws in newspapers. Covered by L. 1892, ch. 686, § 21, and L. 1892, ch. 715, §§ 2, 8.

L. 1889, ch. 466.—Amends R. S., pt. 1, ch. 20, tit. 17 "of dogs." Section 1 amended so as to read as follows by L. 1890, ch. 245, § 1. Sections 2, 4 expressly repealed. The first sentence of § 3 was superseded by L. 1892, ch. 686, § 120. The remainder of § 3 is ineffective and requires an action to be taken by a county officer who, under the present statute, has no power to take the action.

L. 1890, ch. 180.—Authorizes supervisors to establish fire districts in unincorporated villages. Superseded by L. 1892, ch. 686, § 37.

L. 1890, ch. 203.—Amends R. S., pt. 1, ch. 20, tit. 17 "of dogs." It is still in force and is consolidated in County Law, § 125.

L. 1890, ch. 287.—Amends L. 1886, ch. 126, § 1, which was amendatory of L. 1881, ch. 439, § 1, relating to apportionment of expense of building and maintenance of certain bridges. L. 1890, ch. 287, provides that "the provisions of L. 1881, ch. 439, shall apply and continue in force so far as relates to or affects any bridges heretofore constructed thereunder." The repeal of L. 1881, ch. 439, and L. 1886, ch. 126, by L. 1892, ch. 686, § 238 [former County Law], did not affect the provision of L. 1890, ch. 287, above quoted, and it remains alive and is consolidated in County Law, § 65.

L. 1891, ch. 5.—Statute amends L. 1885, ch. 160, § 6, providing for petition for change of site after destruction of poor-house. Sections 1, 2 consolidated in County Law, § 34. Remainder, consisting of §§ 3, 4, which do not change substance of amending statute, are covered by the repeal by L. 1892, ch. 686, § 238.

L. 1891, ch. 292.—Act amends L. 1875, ch. 482, § 1, subd. 14, concerning "dogs." Superseded by L. 1892, ch. 686, §§ 110, 111, 114.

L. 1892, ch. 289.—Statute relating to streets outside of city limits amends L. 1875, ch. 482, § 1, subd. 9, as amended by L. 1880, ch. 365, and by L. 1881, ch. 554. Original act repealed by repealing clause of L. 1892, ch. 686. By General Construction Law, § 100, this statute remains in force and is therefore consolidated in County Law, § 72.

L. 1892, ch. 664.—Statute relates to the repayment to drafted men of money expended for substitutes. Declared unconstitutional by the court of appeals in 159 N. Y. 212, and should be repealed.

L. 1892, ch. 686.—This statute, which is the former County Law, is recommended for repeal because its live provisions have been incorporated in County Law.

L. 1892, ch. 715, § 6.—Consolidated in § 18 of County Law. For remainder of this statute, see Legislative Law, § 48.

L. 1893, ch. 116.—Consolidated in County Law, § 240, subd. 12.

L. 1893, ch. 222.—Consolidated in County Law, § 140.

L. 1893, ch. 251.—Consolidated in County Law, § 13.

L. 1893, ch. 467.—Consolidated in County Law, § 241, subd. 2.

L. 1894, ch. 227.—Consolidated in County Law, § 232, subd. 12.

L. 1894, ch. 340.—Section 1 consolidated in County Law, § 232, subd. 31. Section 2 is a repeal, and § 3 when act shall take effect.

L. 1894, ch. 646.—Consolidated in County Law, § 232, subd. 28.

L. 1894, ch. 685.—Consolidated in County Law, § 12, subd. 21.

L. 1895, ch. 310.—Consolidated in County Law, § 52.

L. 1895, ch. 649.—Section 1 consolidated in County Law, § 232, subd. 1. Section 2 is an express repeal, and § 3 is when act is to take effect.

L. 1895, ch. 718.—Consolidated in County Law, § 184.

L. 1909, ch. 16.

Consolidators' notes.

- L. 1896, ch. 756.—Consolidated in County Law, § 79.
 L. 1896, ch. 48.—Consolidated in County Law, §§ 162, 163.
 L. 1896, ch. 281.—Consolidated in County Law, as subd. 3 of § 142.
 L. 1896, ch. 593.—Consolidated in County Law, § 164.
 L. 1896, ch. 826.—Consolidated in County Law, § 93.
 L. 1896, ch. 937.—Sections 1-4 consolidated in County Law, § 151. Sections 5, 6 declare it shall not abridge or affect any action then pending. Expired.
 L. 1896, ch. 995.—Consolidated in County Law, § 68.
 L. 1897, ch. 406.—Consolidated in County Law, § 54.
 L. 1897, ch. 407.—Consolidated in County Law, § 233.
 L. 1898, ch. 158.—Consolidated in County Law, § 232, subd. 36.
 L. 1898, ch. 225.—Consolidated in County Law, § 62.
 L. 1898, ch. 334.—Consolidated in County Law, § 180, subd. 1.
 L. 1898, ch. 133.—Consolidated in County Law, § 31.
 L. 1899, ch. 155.—Consolidated in County Law, § 78.
 L. 1899, ch. 303.—Consolidated in County Law, § 19.
 L. 1899, ch. 447.—Consolidated in County Law, § 191.
 L. 1900, ch. 130, § 1.—Consolidated in County Law, § 12, subd. 15.
 L. 1900, ch. 163.—Consolidated in County Law, § 80.
 L. 1900, ch. 296.—Consolidated in County Law, § 12, subd. 16.
 L. 1900, ch. 306.—Consolidated in County Law, § 232, subd. 6.
 L. 1901, ch. 112.—Consolidated in County Law, § 148.
 L. 1901, ch. 161.—Consolidated in County Law, § 232, subd. 17.
 L. 1901, ch. 255.—Consolidated in County Law, § 12, subd. 17.
 L. 1901, ch. 337, § 1, pt.—So much as relates to salary of county judges consolidated in County Law, § 232, subd. 29.
 L. 1901, ch. 455.—So much of § 1 as adds §§ 134, 136 to L. 1892, ch. 686, consolidated in County Law, §§ 134, 136. Remainder of statute amended so as to read as follows by L. 1902, ch. 158, §§ 1-3; L. 1906, ch. 212, § 2, and L. 1907, ch. 294, §§ 3, 5, 7. Section 2 states when act shall take effect.
 L. 1901, ch. 486.—Consolidated in County Law, § 168.
 L. 1901, ch. 505.—Consolidated in County Law, § 232, subd. 34.
 L. 1901, ch. 584.—Section 1 amended so as to read as follows by L. 1907, ch. 256, § 1. Section 2 is a repealing section. Section 3 states when act shall take effect.
 L. 1902, ch. 28.—Relates to taxes on dogs. Consists of ten sections. Section 1 amended so as to read as follows by L. 1907, ch. 294, § 1. Sections 2-9 consolidated in County Law, §§ 117, 118, 121-124, 126, 127. Section 10 states when act shall take effect.
 L. 1902, ch. 158.—Sections 1-3 were amended to read as follows. Section 4 unnecessary legislation.
 L. 1902, ch. 234.—Consolidated in County Law, § 232, subd. 50.
 L. 1902, ch. 255.—Consolidated in County Law, § 232, subd. 45.
 L. 1902, ch. 507.—Consolidated in County Law, § 240, subd. 4.
 L. 1902, ch. 434.—Consolidated in County Law, § 232, subd. 57.
 L. 1902, ch. 465.—Consolidated in County Law, § 12, subd. 18.
 L. 1902, ch. 469.—Section 1 amended so as to read as follows by L. 1907, ch. 81, § 1. Section 2 consolidated in County Law, § 69. Section 3 states when act shall take effect.
 L. 1903, ch. 534.—Consolidated in County Law, § 165.
 L. 1904, ch. 20.—Consolidated in County Law, § 41.
 L. 1904, ch. 78.—Consolidated in County Law, § 202.
 L. 1904, ch. 83.—Consolidated in County Law, § 95.
 L. 1904, ch. 119.—Consolidated in County Law, § 192.
 L. 1904, ch. 174.—Consolidated in County Law, § 144.
 L. 1904, ch. 277.—Consolidated in County Law, § 39.
 L. 1904, ch. 337.—Consolidated in County Law, § 232, subd. 22.
 L. 1904, ch. 461.—Consolidated in County Law, § 247.
 L. 1905, ch. 160.—Consolidated in County Law, § 232, subd. 15.
 L. 1905, ch. 244.—Consolidated in County Law, § 12, subd. 19.
 L. 1905, ch. 261.—Consolidated in County Law, § 110.
 L. 1905, ch. 276.—Consolidated in County Law, § 141.
 L. 1905, ch. 410, § 1.—So much as amends L. 1894, ch. 109, § 2, first sentence, consolidated in County Law, § 232, subd. 30. Second sentence classified to Code Civil Procedure. Section 2 made special. Section 3 provision when act is to take effect.
 L. 1905, ch. 496.—Consolidated in County Law, § 20.

Consolidators' notes.

L. 1909, ch. 16.

- L. 1905, ch. 686.—Consolidated in County Law, § 232, subd. 3.
- L. 1908, ch. 74.—Amends L. 1892, ch. 686, § 240, subd. 9. Consolidated in County Law, § 240, subd. 9.
- L. 1908, ch. 249.—Further amends L. 1892, ch. 686, § 37. Consolidated in County Law, § 38.
- L. 1908, ch. 318.—Amends L. 1892, ch. 686, § 12, subd. 13. Consolidated in County Law, § 12, subd. 13.
- L. 1908, ch. 362.—Amends L. 1892, ch. 686, by adding a new section. Consolidated in County Laws, § 152.
- L. 1908, ch. 377.—Relates to salary of surrogate of Westchester county. Consolidated in County Law, § 232, subd. 58.
- L. 1908, ch. 439.—Amends L. 1892, ch. 686, § 232, subd. 7. Consolidated in County Law, § 232, subd. 7.
- L. 1908, ch. 463.—Amends L. 1892, ch. 686, § 232, subd. 19. Consolidated in County Law, § 232, subd. 19.
- L. 1907, ch. 81.—Consolidated in County Law, § 69.
- L. 1907, ch. 97.—Consolidated in County Law, § 232, subds. 32, 40.
- L. 1907, ch. 256.—Consolidated in County Law, § 232, subd. 58.
- L. 1907, ch. 275.—Consolidated in County Law, § 92.
- L. 1907, ch. 280.—Consolidated in County Law, § 210.
- L. 1907, ch. 294.—Consolidated in County Law, §§ 114, 128-133, 135.
- L. 1907, ch. 454.—Consolidated in County Law, § 203.
- L. 1907, ch. 482.—Consolidated in County Law, § 23.
- Code Civil Procedure, § 20, to and including words "county charges." Consolidated in County Law, § 240, subd. 9.
- Code Civil Procedure, § 28. Consolidated in County Law, § 245.
- Code Civil Procedure, § 31. Part relating to boards of supervisors. Consolidated in County Law, § 42.
- Code Civil Procedure, § 88. Consolidated in County Law, § 12, subd. 25.
- Code Civil Procedure, § 89. Words "shall be kept" to "prescribed by law," and last three sentences. Consolidated in County Law, § 170, subds. 1, 3.
- Code Civil Procedure, § 112. Consolidated in County Law, § 240, subd. 19.
- Code Civil Procedure, § 121. Consolidated in County Law, § 90. The last clause of the code section is covered by County Law, § 183.
- Code Civil Procedure, §§ 182-189. Consolidated in County Law, § 195, subds. 1-7.
- Code Civil Procedure, § 203. First sentence and part making county charge. Consolidated in County Law, § 12, subd. 23.
- Code Civil Procedure, § 356. Last sentence. Consolidated in County Law, § 240, subd. 20.
- Code Civil Procedure, § 358. To and including words "county court thereof." Consolidated in County Law, § 12, subd. 24.
- Code Civil Procedure, § 744. Part relating to fees of county clerk. Consolidated in County Law, § 240, subd. 21.
- Code Civil Procedure, § 961. Part relating to county clerk and register. Consolidated in County Law, § 161, subd. 8.
- Code Civil Procedure, § 1966.—First sentence. Consolidated in County Law, § 201, subd. 4.
- Code Civil Procedure, § 1967. Consolidated in County Law, § 201, subd. 2.
- Code Civil Procedure, § 1968. Consolidated in County Law, § 201, subd. 3.
- Code Civil Procedure, § 3285. Consolidated in County Law, § 161, subd. 7.

COUNTY SEALER.

General Business Law, § 13.

COUNTY TREASURER.

Misappropriations by; Penal Law, § 1867. See County Law, §§ 140-153

COURT OF APPEALS.

Compensation of judges; Judiciary Law, § 50. Rules; Judiciary Law, §§ 51-52. Powers as to admission of attorneys; Judiciary Law, §§ 53-56. Terms; Judiciary Law, § 54. Offices of judges; Judiciary Law, § 55. Officers and employees; Judiciary Law, §§ 57-60. Delivering opinions to reporter; Judiciary Law, § 61. Jurisdiction

L. 1883, ch. 435. Jurisdiction as to private claims. § 1.

in civil actions; Code Civ. Pro. §§ 190-191. Remittitur; Code Civ. Pro. § 194. Placing of cases on calendar; Code Civ. Pro. § 195. Fees of clerks; Code Civ. Pro. § 3300. See Courts.

L. 1911, ch. 239. An act to provide for services by retired judges of the court of appeals and fixing compensation therefor.

Section 1. Every judge of the court of appeals whose term of office shall expire by reason of his having attained the constitutional age limit, or who shall have attained the age of seventy years in the year when his term of office expires, may signify to the governor in writing his willingness to perform the duties imposed upon a retired judge of the court of appeals by this act; and upon taking the constitutional oath of office to discharge the duties hereby imposed such retired judge of the court of appeals shall act as referee, without any compensation whatsoever to be paid by the parties, in any and all actions and special proceedings of a civil nature which may be referred to him by consent, wherein the people of the state of New York may be a party or in which the attorney-general is authorized by law to appear or which the attorney-general is authorized to prosecute or defend in his official capacity; for which services, so rendered or to be rendered, each such retired judge of the court of appeals shall receive an annual salary of six thousand dollars, in equal quarterly installments, to be paid by the comptroller.

COURT OF CLAIMS.

Jurisdiction, practice, etc.; Code Civ. Pro. §§ 263ff. Jurisdiction of claims of county on account of railroad bonds; General Municipal Law, § 231.

L. 1876, ch. 444.—“An act to establish a State Board of Audit, and to define its powers and duties.”

§ 1 establishes the board. The board was abolished by L. 1883, ch. 205, and its duties transferred to the board of claims. The board of claims was continued as the court of claims, with all the power and jurisdiction of that board, by L. 1897, ch. 36, which act inserted §§ 263-280 in the Code of Civil Procedure, and repealed L. 1883, ch. 205. L. 1883, ch. 205, § 7, conferred on the board of claims jurisdiction of such claims as were formerly cognizable by the state board of audit. The above entitled act, L. 1876, ch. 444, was expressly repealed by L. 1909, ch. 65.

L. 1883, ch. 435.—“An act conferring jurisdiction upon the board of claims to hear, audit and determine certain private claims against the state of New York.”

Claims for apprehension of criminals.—§ 1. Exclusive jurisdiction is hereby conferred upon the board of claims to hear, audit and determine all private claims against the state of New York arising in any manner out of any and all acts and proceedings whatever or whereby the governor of this state has, in pursuance of any law, by proclamation or otherwise, duly offered any reward for the apprehension or conviction of any criminal and to allow thereon such sums as should be paid by the state on account thereof not to exceed the amount of the reward certified by the governor to have been offered, provided that the governor shall also certify to said board

§§ 2-4.

Jurisdiction as to private claims.

L. 1888, ch. 436.

that there are different and adverse claimants who make claim to said reward, and provided, further, that said claimants or either of them shall file their said claims with the clerk of said board of claims within two years from the date of said certificate.

Notice to claimants.—§ 2. The said board may at any time after the filing of said claim, and before or upon the hearing thereof, upon the motion of the attorney-general, make an order for the giving of reasonable notice to any other person or persons appearing to have any interest in or who in any way makes claim to said reward, in order that said person or persons may, before the final determination of said matter, file a claim therefor with said board and be heard in regard thereto.

Determination of claims.—§ 3. The said board shall thereupon have full jurisdiction to determine the said controversy as between the parties before it, and to audit and determine the amount which, within the limitations aforesaid, should be paid to said parties or either of them, and the audit and determination of said board shall be final and conclusive, and upon the production of a certified copy of said award, the comptroller shall draw his warrant for the amount thereof, upon the treasurer of the state, who shall pay the same out of any funds in his hands applicable thereto.

Application of general act.—§ 4. All the provisions of chapter two hundred and five of the laws of eighteen hundred and eighty-three, entitled "An act to abolish the office of canal appraisers and to establish a board of claims and define its powers and duties," and the several acts amendatory thereof, except the right to appeal to the court of appeals, and not inconsistent with this act, shall be applicable to the filing, hearing and determination of claims herein.

L. 1895, ch. 948.—"An act relating to the jurisdiction of the board of claims."

§ 1. The board of claims shall have jurisdiction and power to investigate, hear and determine any application or claim presented by the heirs, next of kin, or representatives of any deceased person, for the release by the state of its interest in the proceeds of property that has, at any time, been escheated to the state.

§ 2. Either party may take an appeal to the court of appeals, from any award made under authority of this act, if the amount in controversy exceeds five hundred dollars, provided such appeal be taken by service of a notice of appeal within thirty days after service of a copy of the award.

L. 1899, ch. 336.—"An act to confer jurisdiction upon the court of claims to hear, audit and determine the alleged claims of the several counties containing towns, villages or cities bonded to aid in the construction of any railroad passing through such towns, villages or cities, on account of the payment to the state of the state taxes collected from such railroads within such bonded towns, villages or cities." Act required claims to be filed within one year after passage of act.

Cross references.

L. 1904, ch. 163.—“An act to confer jurisdiction upon the court of claims to hear, audit and determine the alleged claims of the several counties containing towns, villages or cities bonded to aid in the construction of any railroad passing through such towns, villages or cities, on account of the payment to the state of the state taxes collected from such railroads within such bonded towns, villages or cities.”
 [In effect March 28, 1904.]
 Act required claims to be filed within six months after passage of act.

COURTS.

General provisions relating to courts and judges; Judiciary Law, §§ 2-30. Officers generally; Judiciary Law, §§ 230-233. Clerks; Judiciary Law, §§ 250-285. Stenographers; Judiciary Law, §§ 290-319. Attendants and messengers; Judiciary Law, §§ 340-344. Criers; Judiciary Law, §§ 360-366. Interpreters; Judiciary Law, §§ 380-386. Sheriffs and constables; Judiciary Law, §§ 400-409. Reporters; Judiciary Law, §§ 430-455. Attorneys; Judiciary Law, §§ 460-479. Jurors generally; Judiciary Law, §§ 500-565. Jurors in New York county; Judiciary Law, §§ 590-667. Jurors in Kings county; Judiciary Law, §§ 680-786. Clerks' fees in civil actions; Code Civ. Pro. §§ 3301-3302, 3306.

Of original criminal jurisdiction; Code Crim. Pro. § 11. Appointment of probation officers by; Code Crim. Pro. § 11-a.

COURTS OF SPECIAL SESSIONS.

Jurisdiction; Code Crim. Pro. §§ 56-59. By whom held; Code Crim. Pro. §§ 62-63.

COURTS FOR TRIAL OF IMPEACHMENTS.

See Code Crim. Pro. §§ 12-20, 118-131.

COWS.

Dairy products; Agricultural Law, §§ 30-59. Diseases of; condemnation; Agricultural Law, §§ 90-114. Keeping in unhealthy place; Penal Law, § 192.

CRAIG COLONY.

See State Charities Law, §§ 100-117.

CREAM.

See Milk; Agricultural Law.

CREDIT.

Making false statement as to; Penal Law, § 442.

CREDIT GUARANTY AND INDEMNITY CORPORATIONS.

Organization and powers; Insurance Law, §§ 170-184.

CREDIT UNIONS.

Banking Law, §§ 450-479. Dissemination of information concerning. See Agriculture.

Cross references.

CRIMERS OF COURTS.

See Judiciary Law, §§ 360-366, 169, 199.

CRIMES.

See Penal Law.

CRIMES AGAINST NATURE.

See Penal Law, §§ 690-691.

CRIMINAL ACTIONS.

See Code Crim. Pro.

CRIMINAL ACTIONS.

See Code Crim. Pro. §§ 490-b, 941-946.

CRIPPLES.

State hospital for; State Charities Law, §§ 130-139.

CRUELTY.

Corporations to prevent; Membership Corporations Law, §§ 120-123; Cruelty to animals, see Animals.

CUBA RESERVATION.

Jurisdiction vested in conservation commission; Conservation Law, § 50, sub. 32.

CUSTODIAL ASYLUM.

For feeble-minded women; State Charities Law, §§ 80-83. Asylum at Rome; State Charities Law, §§ 90-95.

DAIRY PRODUCTS.

See Agricultural Law, §§ 30-59; Farms and Markets Law, § 30.

DANGEROUS WEAPONS.

Carrying regulated; Penal Law, §§ 1896ff.

DANNEMORA HOSPITAL FOR INSANE CONVICTS.

See Insanity Law, §§ 150-163.

DAY.

Defined; General Construction Law, § 19. Computation; General Construction Law, § 20.

DEAF AND DUMB.

State instruction; Education Law, §§ 970-980.

L. 1884, ch. 275.—“An act in relation to the Northern New York Institution for Deaf-Mutes, at Malone, New York.”

Pupils to be received in institution.—§ 1. The Northern New York Institution for Deaf-Mutes at Malone is hereby authorized to receive deaf

L. 1894, ch. 93.

Acts relative to certain institutions.

§§ 1, 2.

and dumb persons between the ages of twelve and twenty-five years, eligible to appointment as state pupils, and who may be appointed to it by the superintendent of public instruction, and the superintendent of public instruction is authorized to make appointments to the aforesaid institution.

Supervisors, etc., may send pupils.—§ 2. Supervisors of towns and wards and overseers of the poor are hereby authorized to send to the Northern New York Institution for Deaf-Mutes, deaf and dumb persons between the ages of six and twelve years, under the provisions of chapter three hundred and twenty-five of the laws of eighteen hundred and sixty-three, as amended by chapter two hundred and thirteen of the laws of eighteen hundred and seventy-five. Provided that before any pupils are sent to said institution the board of state charities shall have made and filed with the superintendent of public instruction a certificate to the effect that said institution has been duly organized and is prepared for the reception and instruction of such pupils.

L. 1878, ch. 331.—“An act in relation to the Western New York Institution for Deaf-Mutes.”

Section 1 superseded by Education Law, §§ 974, 978.

Supervisors and overseers of poor may send.—§ 2. Supervisors of towns and wards and overseers of the poor are hereby authorized to send to the Western New York Institution for Deaf-Mutes, deaf and dumb persons between the ages of six and twelve years, in the same manner and upon the same conditions as such persons may be sent to the New York Institution for the Instruction of the Deaf and Dumb, under the provisions of chapter three hundred and twenty-five of the laws of eighteen hundred and sixty-three.

See Education Law, §§ 977-980.

L. 1894, ch. 93.—“An act relative to the New York Institution for the Instruction of the Deaf and Dumb.”

Verification of bills for support of pupils.—§ 1. Hereafter any bill for board, lodging, clothing or tuition of pupils, in the aforesaid institution, shall be signed and verified by the principal and steward of said institution, instead of its president and secretary, any existing law to the contrary notwithstanding.

Continuance of corporation.—§ 2. The said New York Institution for the Instruction of the Deaf and Dumb, incorporated by an act of the legislature of the state of New York, passed April fifteen, eighteen hundred and seventeen, is hereby recognized as such corporation and declared to have been duly continued since its said incorporation, notwithstanding any lapse that may have occurred in its legislative continuance; and henceforth no further act of the legislature of this state shall be necessary to provide for its continuance as an existing corporation.

Cross-references.

- L. 1864, ch. 386.—“An act to amend an act entitled ‘An act in relation to the New York Institution for the Instruction of the Deaf and Dumb,’ passed April eighteenth, eighteen hundred and thirty-eight.”
Superseded and obsolete.

DEATH, ACTION FOR CAUSING.

See Code Civ. Pro. §§ 1902-1905.

DEATH PENALTY.

See Code Crim Pro. §§ 491-509

DEBTOR AND CREDITOR LAW.

L. 1909, ch. 17.—“An act relating to debtors and creditors, constituting chapter twelve of the consolidated laws.”

[In effect February 17, 1909.]

CHAPTER XII OF THE CONSOLIDATED LAWS.**DEBTOR AND CREDITOR LAW.**

- Article 1. Short title (§ 1).
2. General assignments for the benefit of creditors (§§ 2-28).
 3. Insolvent's discharge from debts (§§ 50-88).
 4. Insolvent's exemption from arrest and imprisonment (§§ 100-111).
 5. Judgment debtor's discharge from imprisonment (§§ 120-139).
 6. Discharge of bankrupt from judgment (§ 150).
 7. Trustees of insolvent and imprisoned debtors (§§ 160-218).
 8. Compositions by joint debtors (§§ 230-233).
 9. Payment of debts of incompetent person (§§ 250-255).
 10. Laws repealed; when to take effect (§§ 280, 281).

ARTICLE I.**SHORT TITLE.****Section 1. Short title.**

§ 1. Short title.—This chapter shall be known as the “Debtor and Creditor Law.”

Source.—New.

Scope of the law.—The “Debtor and Creditor Law” is proposed as a new chapter of the Consolidated Laws. This law was made necessary by the fact that there existed independent statutes not contained in the General Laws or Code of Civil Procedure, as for instance, L. 1877, ch. 466; L. 1893, ch. 697, and R. S., pt. 2, ch. 5, tit. 1, Article 8, which could not be assigned to any present General Law. It was deemed expedient and convenient to place these in this new law with the relevant proceedings now in the Code some of which are little used as, for instance, “Insolvent's discharge from debts,” “Insolvent's exemption from arrest and imprisonment” and “Judgment debtor's discharge from imprisonment.” “Debtor and Creditor” is a well-recognized head in digests and was adopted because the material included in the law related to both debtors and creditors, not merely insolvent debtors.

It is made up from matter from three sources:

1. Revised Statutes.
2. Session Laws.
3. Code of Civil Procedure.

The matter from the Revised Statutes will be found in Article 7, relating to

(1) trustees of insolvent and imprisoned debtors. This article embraces unrepealed matter now found in the Revised Statutes, pt. 2, ch. 5, tit. 1, Article 8. When the Code was enacted the provisions for the appointment of trustees of insolvent debtors were included therein, but the powers and duties of such trustees

were left unrepealed in the Revised Statutes and by reference made applicable to the trustees appointed under the Code of Civil Procedure.

The matter from the Session Laws is to be found in Articles 2 and 9. Article 2 contains the act relating to

(1) general assignments for the benefit of creditors. This article consists of the so-called "General Assignment Act," being L. 1877, ch. 466, as amended.

Article 9 relates to the

(2) payment of debts of incompetent persons. L. 1893, ch. 697, which contains the matter forming this article, relates to the settlement of claims against the property of a lunatic, idiot or habitual drunkard by a committee of such incompetent person.

The matter from the Code of Civil Procedure will be found in Articles 3, 4, 5, 6 and 8. Article 3 embraces §§ 2149-2187 of the Code relating to

(1) insolvent's discharge from debts. This article is the so-called "Two-Thirds Act."

Article 4 relates to

(2) insolvent's exemption from arrest and imprisonment. This article is a proceeding whereby an insolvent by surrendering his property to all his creditors may secure exemption from arrest on discharge from imprisonment because of debts. The article consists of Code, §§ 2188-2199.

Article 5 is made up of §§ 2200-2218 of the Code and relates to

(3) a judgment debtor's discharge from imprisonment. This proceeding provides a method whereby a judgment debtor not necessarily insolvent may be discharged from imprisonment under an execution by surrendering his property to his judgment creditor.

Article 6 is § 1268 of the Code relating to the

(4) discharge of a bankrupt from judgments. This article provides a proceeding whereby a bankrupt at any time after one year has elapsed since his discharge may apply for the cancellation of judgments.

Article 8 consists of

(5) the substantive portion of Code, §§ 1942, 1944, relating to compositions by joint debtors generally. (Report of Board of Statutory Consolidation, p. 727.)

Historical note.—The legislation in this state for the relief of insolvent debtors may, for the sake of clearness and continuity, be classed under the subjects of Articles 2, 3, 4, 5 of the Debtor and Creditor Law.

Article 2. General assignments for the benefit of creditors.

This article applies to cases where an insolvent debtor without the concurrence of his creditors assigns his property for the benefit of his creditors for the purpose of being discharged from his debts.

Article 3. Insolvent's discharge from his debts. This article applies to a debtor's discharge from his debts upon his petition made with the consent of the creditors representing two-thirds, in amount, of the insolvent's indebtedness, and the assignment of his property for the benefit of his creditors.

Article 4. Insolvent's exemption from arrest and imprisonment. This relates solely to either the exemption from arrest, or the discharge from imprisonment, of an insolvent upon his making an assignment of his property for the benefit of his creditors. Under this proceeding the benefit to the debtor is entirely personal, his estate remaining liable for his debts.

Article 5. Judgment debtor's discharge from imprisonment. This applies to the discharge of a person imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding. It is purely personal, and relates only to the discharge of the person and his exemption from being impris-

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oned again by virtue of an execution upon the same judgment under which he was imprisoned, or to be arrested upon an action upon that judgment.

This article of the Debtor and Creditor Law is from L. 1880, ch. 178, §§ 2200-2218 (Code of Civil Procedure), which contains the provisions of Revised Statutes, pt. 2, ch. 5, tit. 1, Article 6, as amended and modified by the legislation of the period between the enactment of the Revised Statutes cited and of L. 1880, ch. 178. (Report of Board of Statutory Consolidation, p. 728.)

ARTICLE II.

(Schedule amended by L. 1909, ch. 240.)

GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

- Section**
2. Jurisdiction of proceedings.
 3. Requisites of general assignment.
 4. Debtor's schedule.
 5. Notice to creditors to present claims.
 6. Bond of assignee.
 7. Further security.
 8. * Discharge of assignee; accounting; correction of schedules.
 9. Failure to file bond.
 10. Action on bond; application of recovery.
 11. Proceedings in case of death of assignee.
 12. Notices to parties interested in the estate as creditors or otherwise.
 13. Debts which may be proved against the estate.
 14. Duties of assignee.
 15. Power of court.
 16. Examination of witnesses.
 17. Invalid claims.
 18. Effect of orders; power of judge and duties of clerk.
 19. Sale and compromise of claims and property.
 20. General powers of court.
 21. Trial, costs and commissions.
 22. Wages and preferred claims.
 23. Limitation of preferences.
 24. Appraisal of insolvent estate in the hands of assignee.

§ 2. Jurisdiction of proceedings.—The term “judge” when used in this article shall apply equally to a county judge of the county within which the assignment is recorded and to justices of the supreme court, and the term “court” when used in this article shall, in like manner, apply to the county court of such county and to the supreme court. All applications hereunder made in the supreme court shall be made to the court, or a justice thereof within the judicial district where the assignment is recorded, and all proceedings and hearings under this article had in the supreme court upon the return of a citation or order shall be had at a special term of said court held in the county where the debtor resided at the time of the assignment, or in case of an assignment by copartners,

* So in original. See title of section.

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in the county where the principal place of business of such copartners was at the time of such assignment, or in the case of an assignment by a corporation in the county where the principal office of such corporation was at the time of such assignment. (*Amended by L. 1914, ch. 360.*)

Source.—L. 1885, ch. 380.

Consolidators' note.—The wording of this section has been altered by reason of the incorporation as a part of this article of L. 1885, ch. 380, § 1, which gave to the supreme court and the justices of the supreme court concurrent jurisdiction under the General Assignment Act with county courts and county judges.

References.—Term "judge" defined, General Construction Law, § 26; Code Civil Procedure, § 3343, sub. 3. Concurrent jurisdiction of supreme and county courts, Code Civil Procedure, §§ 348, 349.

Federal Bankruptcy Act.—The Federal bankruptcy act of 1898 (30 U. S. Stats at Large, 544), adopted under the U. S. Constitution, authorizing Congress to enact a uniform bankruptcy law has a material bearing upon the application and effect of this article. It is provided in § 3a (4) of such act (as amended by Act of 1903, 32 Stats at Large, 797) that a general assignment for the benefit of creditors is an act of bankruptcy, and if a petition is filed within four months thereafter, the assignor may be adjudicated a bankrupt, and a trustee be appointed to take the custody of the assignor's property. It is further provided that an assignment made by a person adjudged a bankrupt within four months prior to the filing of a petition against him "with the intent and purpose on his part to hinder, delay or defraud his creditor" shall be null and void. (*Id.* § 67e.)

Effect of bankruptcy on assignments.—If an assignment or receivership or trusteeship is made or created under a State law for the benefit of creditors within four months prior to the filing of a petition in bankruptcy, and a State court in the exercise of its jurisdiction under such law assumes possession of the property, it may not retain such possession and proceed to a distribution of the property among the creditors, but upon the adjudication the bankruptcy court supersedes the State court and becomes possessed of the property for the purpose of administration. *Hooks v. Aldridge* (C. C. A., 5th Cir.), 16 Am. B. R. 658, 145 Fed. 865; *In re Knight* (D. C., Ky.), 11 Am. B. R. 1, 125 Fed. 35; *In re Watts*, 190 U. S. 1, 10 Am. B. R. 113, 47 L. Ed. 933; *Davis v. Hohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325.

A general assignment for the benefit of creditors made within four months prior to the filing of the petition is void as against the trustee in bankruptcy, so far as it interferes with the administration of the bankrupt estate. *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1, 47 L. Ed. 1165. In such case the jurisdiction of the State court in respect to the property assigned is superseded by that of the bankruptcy court. *In re Thompson* (C. C. A., 2d Cir.), 11 Am. B. R. 719, 128 Fed. 575; *In re Knight* (D. C., Ky.), 11 Am. B. R. 6, 125 Fed. 35; *In re Gray* 47 N. Y. App. Div. 554, 3 Am. B. R. 647, 62 N. Y. Supp. 618; *In re Fellerath* (D. C., Ohio), 2 Am. B. R. 40, 95 Fed. 121; *In re Gutwillig* (C. C. A., 2d Cir.), 1 Am. B. R. 388, 92 Fed. 337; *Davis v. Bohle* (C. C. A., 8th Cir.), 1 Am. B. R. 412, 92 Fed. 325; *In re Sievers* (D. C., N. Y.), 1 Am. B. R. 117, 91 Fed. 366.

Jurisdiction of Supreme Court.—This section gives the supreme court concurrent jurisdiction with the county court of an action to compel an assignee for the benefit of creditors to account. *Mills v. Husson* (1893), 140 N. Y. 99, 35 N. E. 422.

The conferring upon the County Courts by the law of 1877 of jurisdiction over assignees for the benefit of creditors, and over all matters connected with their

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duties, did not deprive the Supreme Court of its jurisdiction over an action brought therein by a creditor to compel such an assignee to appear and account. *Hurth v. Bower* (1883), 30 Hun. 151.

A County judge has the power to make an order amending schedules and inventory *nunc pro tunc* so as to conform substantially to the statement of the debt in the assignment. *Roberts & Co. v. Buckley* (1885), 145 N. Y. 215, 39 N. E. 966.

§ 3. **Requisites of general assignment.**—Every conveyance or assignment made by a debtor of his estate, real or personal, or both, to an assignee for the creditors of such debtor, shall be in writing, and shall specifically state therein the residence and kind of business carried on by such debtor at the time of making the assignment, and the place at which such business shall then be conducted, and if such place be in a city, the street and number thereof, and if in a village or town such apt designation as shall reasonably identify such debtor.

Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds and shall be recorded in the county clerk's office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. An assignment by a corporation shall be recorded in the county where its principal place of business is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated.

The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged.

In all cases where an assignment is made by a corporation the right to recover the amount due from stockholders on unpaid capital stock issued to or subscribed for by them shall pass to the assignee whether mentioned in the assignment or not. (*Amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 2, as amended by L. 1888, ch. 294.

References.—Trusts of real property for benefit of creditors, Real Property Law, § 96; termination of trust for creditors, *Id.* § 111. Trusts of personal property, vesting in supreme court, Personal Property Law, § 20; revocation by consent of parties, *Id.* § 23; disaffirmance of fraudulent assignments, *Id.* § 19.

Acknowledgments of instruments, General Construction Law, § 10; contents of certificate, Real Property Law, § 306; requisites of acknowledgments, *Id.* § 303; by whom made, *Id.* § 292; by corporation, *Id.* § 309.

Construction of assignment.—The intent of the parties must be carried out. *Crook v. Rindskopf* (1887), 105 N. Y. 476 12 N. E. 174. *Roberts v. Buckley* (1895), 145 N. Y. 215 39 N. E. 966. *Emigrant Ind. Sav. Bank v. Roche* (1883), 93 N. Y. 374. In giving effect to the language of an assignment for the benefit of creditors,

the same intendments are to be made in support of the instrument, the same presumption is to prevail in favor of good faith, and the same rules of construction are to be applied, as in the case of ordinary contracts and conveyances. *Townsend v. Stearns* (1865), 32 N. Y. 209. The meaning and intention of the assignor must be gathered from the whole instrument, and where two different constructions are possible, that is to be chosen which sustains and does not destroy the instrument. *Pearson v. Eggert* (1897), 15 App. Div. 125, 44 N. Y. Supp. 330. *Benedict v. Huntington* (1865), 32 N. Y. 219; *Eliassof v. Dewandelaer* (1898), 30 App. Div. 155, 51 N. Y. Supp. 892.

Where the assignment authorized the assignee to "compromise with the creditors" of the assignor for all his debts and liabilities if in the opinion of the assignee "it would be advantageous" to the creditors and the assignor, it was held that the effect and intent of the provision was to delay the payment of debts and create a trust for the assignor and so rendered the assignment void. *McConnell v. Sherwood* (1881), 84 N. Y. 522, 38 Am. R. 537.

Purpose and essential characteristics of assignment.—An assignment for the benefit of creditors is a means which the statute permits to be adopted by an insolvent debtor, for the distribution of his estate among his creditors, and so long as he has acted without fraud, in fact or in law, and has complied with the provisions of the statute, his conveyances to an assignee for the purposes stated therein will stand and be effective. *Mills v. Parkhurst* (1891), 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472.

The material and essential characteristic of a general assignment is the presence of a trust; the assignee is merely trustee and not absolute owner; he buys nothing and pays nothing, but takes the title for the purpose of trust duties. *Brown v. Guthrie* (1888), 110 N. Y. 435, 18 N. E. 254; *Taggart v. Herrick* (1890), 55 Hun 569, 9 N. Y. Supp. 758; *Boak v. Blair* (1890), 32 N. Y. St. Rep. 911, 10 N. Y. Supp. 898; *Strickland v. Laraway* (1890), 29 N. Y. St. Rep. 873, 9 N. Y. Supp. 761; *Walsh v. Brown* (1889), 22 N. Y. St. Rep. 844, 6 N. Y. Supp. 97.

One of the chief requisites of such an assignment is that the assignor shall place all of his property, both real and personal, in the possession of his trustee. The failure to do so makes the assignment under the statutes absolutely void. *Paddell v. Janes* (1914), 84 misc. 212, 222, 145 N. Y. Supp. 868.

Designation of assignee.—An assignment to a person "his heirs, executors, administrators and assigns" is not void, where it is not understood nor was it the intent to convey to the class of persons named. *Flagler v. Schoeffel* (1886), 40 Hun 178. So where an assignment is made to "his successors and assigns." *Hess v. Blakeslee* (1886), 2 N. Y. St. Rep. 309.

Sale and assignment distinguished.—*Young v. Stone* (1901), 61 App. Div. 364, 70 N. Y. Supp. 558, *affd.* 174 N. Y. 517, 63 N. E. 118.

A bill of sale, though absolute on its face, may be shown by parol evidence to have been given in trust for creditors. *Britton v. Lorenz* (1871), 45 N. Y. 51.

Written transfers, by which debtors convey substantially all of their property to pay or secure debts, the property being at once delivered and the debtors thereupon at once ceasing to do business, constitute general assignments for creditors within the meaning of a policy prepared for use, not in a particular state or locality, but throughout the country generally, insuring against loss on sales sustained by the insolvency of debtors, who have made a general assignment for the benefit of their creditors. *People v. Mercantile Credit Guarantee Co.* (1901), 166 N. Y. 416, 60 N. E. 24.

Kind and place of business.—The provision which requires the assignor to state in the assignment the residence and the kind of business carried on by such

debtor is directory only; the object of such provision being to identify the assignor and prevent his being confounded with other persons bearing the same name. *D. C. M. Ins. Co. v. Van Wagonen* (1892), 132 N. Y. 398, 30 N. E. 971; *Boak v. Blair* (1890), 10 N. Y. Supp. 898, 32 N. Y. St. R. 911; *Mullin v. Sisson* (1890), 31 N. Y. St. Rep. 210, 10 N. Y. Supp. 301; *Strickland v. Laraway* (1890), 9 N. Y. Supp. 761, 55 Hun 612 mem.; *Otis v. Hodgson* (1892), 18 N. Y. Supp. 599, 63 App. Div. 634 mem.; *Taggart v. Sisson* (1890), 9 N. Y. Supp. 758, 55 Hun 569. Contra, *Bloomington v. Seligman* (1888), 28 Abb. N. C. 98, 3 N. Y. Supp. 243.

Where, therefore, in an action to set aside an assignment which stated the residence of the assignor and assignee to be in the town of M., giving the county and state, but giving no statement of the kind or place of business of the assignor, it appeared that the assignor for forty years had kept a country store at S., a hamlet not incorporated as a village, in said town, and was known to almost every person of mature age there, and there was no other person of the same name residing in the town, it was held that the omission did not render the assignment void, the description being sufficient to identify the assignor. *Dutchess County Mutual Insurance Co. v. Van Wagonen* (1892), 132 N. Y. 398, 30 N. E. 971.

Acknowledgment; necessity.—A proper acknowledgment is necessary to the validity of an assignment, and if there be a substantial defect therein the assignment will be invalidated. *Rogers v. Pell* (1900), 47 App. Div. 240, 62 N. Y. Supp. 92, *affd.* 168 N. Y. 587, 60 N. E. 1112, S. C. 154 N. Y. 518, 49 N. E. 75. See also *Young v. Stone* (1901), 61 App. Div. 364, 70 N. Y. Supp. 558, *affirmed* 174 N. Y. 517, 66 N. E. 1118.

Even though the assignment be in writing, and be delivered together with the possession of the assigned property, creditors of the assignor may attach the property in the hands of the assignees, prior to the making of the statutory acknowledgment. *Hardmann v. Bowen* (1868), 39 N. Y. 196, 5 Abb. Pr. N. S. 332.

The provisions of this section regarding acknowledgments apply to instruments which, though absolute upon their face, are in fact made in trust for creditors, and such instruments, when not properly acknowledged as the law requires, are void. *Britton v. Lorenz* (1871), 45 N. Y. 51.

Where a certificate of the acknowledgment of a partnership assignment fails to state anything as to the authority of the partner who executed it, the officer may testify that the partner executing stated that he acknowledged it for the copartnership. *National Bank of Troy v. Scriven* (1892), 63 Hun 375, 18 N. Y. Supp. 277.

Acknowledgment; sufficiency.—A clerical error in the acknowledgment, which declared that the party executed "the same" instead of "the within instrument," does not invalidate the assignment. *Smith v. Boyd*, (1886), 101 N. Y. 472, 5 N. E. 319; *Clafin v. Smith* (1885), 35 Hun 372, 15 Abb. N. C. 241.

Acknowledgment, by whom made.—Acknowledgment by an agent, holding a power of attorney, is sufficient. *Lowenstein v. Flauraud* (1877), 11 Hun 399, *affd.* 82 N. Y. 494. Also an assignment executed and acknowledged by an attorney duly authorized for that purpose. *Lowenstein v. Flauraud* (1880), 32 N. Y. 494. By surviving partners with assent of personal representatives of deceased. *Beste v. Burger* (1885), 13 Daly 317, *affd.* 110 N. Y. 644, 17 N. E. 734. Or by sole surviving partner. *Williams v. Whedon* (1886), 39 Hun 98, *affd.* 109 N. Y. 333, 16 N. E. 365, 4 Am. St. Rep. 460. An acknowledgment by a creditor not a party to the assignment is valid. *Wendell v. Reves* (1887), 26 Wk. Dig. 239, 6 N. Y. St. Rep. 863.

Acknowledgment, certificate of.—While the acknowledgment is a necessary prerequisite of the assignment, the certification by the officer taking the acknowledgment need not be so; and a defect in such certificate where acknowledgment has

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been actually and properly made will not invalidate an assignment. *Linderman v. Hastings Card & Paper Co.* (1899), 38 App. Div. 488, 56 N. Y. Supp. 456. Such certificate may be subsequently corrected by such officer, and the defect in the assignment will be cured thereby. *Camp v. Buxton* (1885), 34 Hun 511.

Rules for the construction of a certificate of acknowledgment collated and discussed. *Claffin v. Smith* (1885), 33 Hun 372, 15 Abb. N. C. 241.

Recording assignment; time and validity.—Delay in recording a general assignment, executed Saturday afternoon, when the county clerk's office is closed, until after a creditors' meeting on the following Monday afternoon, does not establish fraud. *Irving Nat. Bank v. Wilson Bros. Co.* (1898), 34 App. Div. 481, 54 N. Y. Supp. 313. And an assignment is not inoperative until recorded. *Armstrong v. Borden's Condensed Milk Co.* (1901), 65 App. Div. 503, 72 N. Y. Supp. 1014; *revd.* on other grounds, 174 N. Y. 510, 66 N. E. 1104.

Assent of assignee.—Assent may be embraced in separate paper. Where an assent written upon the assignment was ineffectual because not acknowledged, a subsequent assent duly acknowledged and recorded makes an assignment effectual from that date. *Franey v. Smith* (1890), 125 N. Y. 44, 25 N. E. 1079. *Contra*, *Schwartz v. Soutter* (1886), 41 Hun 323, *affd.* on other grounds, 103 N. Y. 683, 9 N. E. 448; *Noyes v. Wernberg* (1885), 15 Abb. N. C. 164.

An assignment recorded without the assent of the assignee to act, having been duly subscribed and acknowledged by him thereon, although he may have agreed to act, is void as against creditors claiming under attachments against the property of the assignor. *Rennie v. Bean* (1881), 24 Hun 123.

Where a general assignment for the benefit of creditors is subscribed and acknowledged by both the assignor and assignee before the same is recorded, it is a sufficient assent to its terms to meet the statutory requirement. *Scott v. Mills* (1889), 115 N. Y. 376, 22 N. E. 156.

Assent of creditors.—An assignment is in no sense a contract between the debtor and his creditors, and it does not depend for its validity upon their assent; it is a payment by the assignor of his debts upon his own plans. *Mills v. Parkhurst* (1891), 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472.

When title passes.—Title acquired by assignee upon delivery of assignment. *Warner v. Jaffray* (1884), 96 N. Y. 248; *Nicoll v. Spowers* (1887), 105 N. Y. 1; *McBlain v. Speelman* (1885), 35 Hun 263; *Ryan v. Webb* (1886), 39 Hun 435; *So. Danvers Nat. Bank v. Stevens* (1896), 5 App. Div. 392, 39 N. Y. Supp. 298; *McIlhargy v. Chambers* (1889), 117 N. Y. 532, 23 N. E. 561; *Kingston v. Koch* (1890), 57 Hun 12, 10 N. Y. Supp. 363; *Pancoast v. Spowers* (1885), *Super. Ct.* (20 Jones & S.) 523, *affd.* 105 N. Y. 617, 11 N. E. 141.

Title passes even if the conveyance is fraudulent. *Nassau Bank v. Yandes* (1887), 44 Hun 55, N. Y. St. R. 415.

Time assignment effective.—A general assignment for the benefit of creditors, executed as prescribed by this section, takes effect, so far as property situate in this state is concerned, from the time of its delivery; all requirements subsequent to the delivery are directory merely, and an omission to obey any of them does not avoid the assignment. Such an assignment, however, does not take effect to pass title to personal property situate in another state in contravention of the laws of that state. *Warner v. Jaffray* (1884), 96 N. Y. 248. See also *Nicoll v. Spowers* (1887), 105 N. Y. 1, 11 N. E. 138.

Nonresident debtors.—The law regarding assignments for the benefit of creditors is only applicable to debtors residing in this state. A voluntary assignment by a debtor residing in another state or country, valid by the laws of his domicile and not invalidated by any law of this state, operates as an assignment of the

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debtor's property situate in this state. *Ockerman v. Cross* (1873), 54 N. Y. 29.

Assignment by infant.—An assignment by copartners is not fraudulent and void in law because one of the assignors is an infant. If voidable, it can only be avoided at the election of the infant, and where he has ratified it after coming of age, no fraud, in fact, can be claimed because of the infancy. *Yates v. Lyon* (1874), 61 N. Y. 344, revg. 61 Barb. 205. *Contra, Fox v. Heath* (1861), 21 How. Pr. 384.

Partnership assignment.—While one or more members of a copartnership cannot execute a general assignment for the benefit of creditors, without the consent of all, if it appears by the acts or declarations, before or after the assignment of the member or members who did not sign, that he or they assented to making it, or that it was made by his or their authority, it is valid. *Klumpp v. Gardner* (1889), 114 N. Y. 153, 21 N. E. 99; *Postman v. Rowan*, 123 N. Y. Supp. 913.

A general assignment, relating solely to the property of a general partnership, all of which is personal, and reciting that it is made by the firm, to which the firm's name is subscribed by one of the partners, who declares in the certificate of acknowledgment that he executed the same as and for the firm and under its authority and instructions of the members of the firm is not void on its face by reason of the manner of its execution. *Hooper v. Baillie* (1890), 118 N. Y. 413, 23 N. E. 569 rev'g. 7 N. Y. St. R. 405.

A general assignment to a trustee, of all the effects and funds of a partnership, in the exercise of power without the scope of the partnership enterprise and cannot be implied from the partnership relation. *Welles v. March* (1864), 30 N. Y. 344.

An assignment is void where but three of a firm of five signed individually and one of the three signed the firm name as attorney in fact, there being no evidence that the two copartners not signing authorized the signature by attorney. In *Re Lawrence* (1881), 5 Fed. 349.

A surviving partner has no power, without the consent and concurrence of the representatives of the deceased partner, to make an assignment by which preferences are created among the creditors of the firm. *Nelson v. Fenney* (1885), 36 Hun. 327, 2 How. Pr. N. S. 272, appeal dismissed in 100 N. Y. 627.

Right of corporation to make assignment.—*Croll v. Empire State Knitting Co.* (1897), 17 App. Div. 282, 45 N. Y. Supp. 680.

Foreign corporation.—A corporation of another state has the power to make a general assignment for the benefit of creditors under the laws of this state, provided the assignment is also valid under the law of the domicile of the corporation. *Rogers v. Pell* (1898), 154 N. Y. 518, 49 N. E. 75; *Vanderfoel v. Gorman* (1894), 140 N. Y. 563, 35 N. E. 932.

Assignment for part of creditors.—An assignment by an insolvent debtor of part of his property in trust for the benefit of part of his creditors, no fraud being intended, is valid. *Matter of Gordon* (1888), 49 Hun 370, 3 N. Y. Supp. 589.

The General Assignment Act of 1877 did not apply to a specific assignment by a debtor for the benefit of one or a portion of his creditors, and such an assignment was not void because not executed in compliance with the act. *Royer Wheel Co. v. Fielding* (1886), 101 N. Y. 504, 509, 5 N. E. 431.

Affect of second assignment where first void as to creditors.—After an assignment, not reserving the power of revocation, has been executed and delivered, and accepted by the assignees, the assignors have no such control over the property assigned as will enable them to make a new assignment, so as to confer upon the assignees any additional title to, or authority over, the assigned property, or to render the title which they have already obtained valid as against the

creditors of the assignors, where the original assignment was void as to them, though valid as to the assignors. *Metcalf v. Van Brunt* (1862), 87 Barb. 621.

Presumption of good faith.—The making of a general assignment in the manner authorized by statute does not raise a presumption that the object in view is to prevent a distribution of the property assigned, and to coerce a settlement with creditors. *Van Bergen v. Lehmaier* (1893), 72 Hun 304, 25 N. Y. Supp. 356.

Presumption of fraud.—A voluntary conveyance by one indebted at the time is presumptively fraudulent as against existing creditors. *Kerker v. Levy* (1912), 206 N. Y. 109, 99 N. E. 181.

Estoppel of creditor to contest validity of assignment.—The fact that a judgment creditor of a corporation which has made a general assignment for the benefit of creditors without preferences, files with the general assignee a claim for the amount of his judgments and at the same time serves notice that, while he demands his proportionate share of the assets, he assails the validity and legality of the proceedings taken by the assignee for their distribution, does not estop him from contesting the validity of the assignment, nor from attempting to secure the removal of the assignee on the charges of misconduct. *Croll v. Empire Knitting Co.* (1897), 17 App Div. 282, 45 N. Y. Supp. 680.

Wage preferences.—The instrument of assignment is not rendered void by the omission to insert therein a clause giving the wage preferences provided for in section 27 as the instrument is to be read in connection with the statute, as if the said provision formed a part of it. *Richardson v. Thurber* (1887), 104 N. Y. 606, 11 N. E. 133.

Actions; evidence.—An assignee may be bound in an action, though brought against him individually. *Landon v. Townshend* (1887), 44 Hun 561, *affd.* 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712; *Wagner v. Hodge* (1885), 34 Hun 524, *affd.* 98 N. Y. 654. Declarations of assignor are inadmissible. *Flagler v. Schoeffel* (1886), 40 Hun 178; *Burhams v. Kelly* (1888), 17 N. Y. St. Rep. 552, 2 N. Y. Supp. 175; *Cohen v. Irion* (1889), 26 N. Y. St. Rep. 1, 7 N. Y. Supp. 106; *Pease v. Batten* (1890), 31 N. Y. St. Rep. 57, 9 N. Y. Supp. 621.

Void assignments; effect of.—*Smedley v. Smith* (1889), 28 N. Y. St. Rep. 414, 8 N. Y. Supp. 100, *affd.* 126 N. Y. 637, 27 N. E. 411. Usurious debt, effect of. *Chapin v. Thompson* (1882), 89 N. Y. 270.

Fraudulent assignments.—The question as to the validity of an assignment is to be determined by the facts existing at the time it was made, and, if when delivered it represented an honest purpose and was made in good faith, fraud cannot be fastened upon it thereafter by any act or statement, whether verbal or written, of the assignor. *Roberts & Co. v. Buckley* (1895), 145 N. Y. 215, 39 N. E. 966.

The following cases are cited as bearing on the question of fraud: *McConnell v. Sherwood* (1881), 84 N. Y. 522, 38 Am. Rep. 537; *Hauselt v. Vilmar* (1879), 76 N. Y. 630; *Shultz v. Hoagland* (1881), 85 N. Y. 464; *Loos v. Wilkenson* (1888), 110 N. Y. 195, 18 N. E. 99, *aff'g.* 10 N. Y. St. R. 297; *Hooper v. Baillie* (1890), 118 N. Y. 413, 23 N. E. 569, *rev'g.* 7 St. R. 405; *Peyser v. Myers* (1892), 135 N. Y. 599, 32 N. E. 699; *Dimon v. Delmonico* (1861), 35 Barb. 554; *Wilcox v. Payne* (1890), 55 Hun 607 *mem.* 8 N. Y. Supp. 407; *Hone v. Woolsey* (1834), 2 Edw. 239; *McLean v. Prentice* (1885), 347 Hun 504; *White v. Benjamin* (1893), 3 misc. 490, 23 N. Y. Supp. 981, *affd.* 8 Misc. 684, *affd.* 150 N. Y. 258, 44 N. E. 956; *Talcott v. Hess* (1883), 31 Hun 282; *Rothschild v. Salomon* (1889), 52 Hun 486, 5 N. Y. Supp. 865; *Zimmer v. Hays* (1896), 8 App. Div. 34, 40 N. Y. Supp. 397; *York Haven Paper Co. v. Place* (1900), 51 App. Div. 499, 64 N. Y. Supp. 715; *Munsinger v. United Press* (1900), 52 App. Div. 338, 65 N. Y. Supp. 194; *White v. Fagan*

(1884), 18 Week. Dig. 358; *Passavant v. Cantor* (1891), 43 N. Y. St. Rep. 247, 17 N. Y. Supp. 37; *Manning v. Beck* (1891), 35 N. Y. St. Rep. 978, 13 N. Y. Supp. 869; *Illinois Watch Co. v. Payne* (1890), 33 N. Y. St. Rep. 967, 11 N. Y. Supp. 408, affd. 132 N. Y. 597, 30 N. E. 1151; *Clark v. Andrews* (1892), 46 N. Y. St. Rep. 399, 19 N. Y. Supp. 211; *Bagley v. Bowe* (1884), 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488. What shows intent to commit fraud. *Hoyt v. Godfrey* (1882), 38 N. Y. 669. Fraudulent intent, how proven. *North River Bank v. Schumann* (1882), 63 How. Pr. 476. Fraud a question for jury. *Rose v. Meldrum* (1881), 11 Week. Dig. 354. Fraud invalidates assignment. *Clark v. Taylor* (1885), 22 Week. Dig. 295. See also *Sutherland v. Bradner* (1886), 39 Hun 134, affd. 116 N. Y. 410, 22 N. E. 554; *Richardson v. Herron* (1886), 39 Hun 537, affd. 104 N. Y. 606, 11 N. E. 133; *Crane v. Roosa* (1886), 40 Hun 455; *Haynes v. Brooks* (1885), 17 Abb. N. C. 152; *Beste v. Burger* (1885), 17 Abb. N. C. 162; *Brown v. Halstead* (1885), 17 Abb. N. C. 197; *N. Y. Life Ins. Co. v. Mayer* (1887), 19 Abb. N. C. 92, affd. 14 Daly 318, affd. 108 N. Y. 655, 15 N. E. 444; *Knapp v. McGowan* (1884), 96 N. Y. 75; *Central National Bank v. Seligman* (1893), 138 N. Y. 435, 34 N. E. 196.

Revocability.—Although, as between the parties to it, an assignment for benefit of creditors is revocable at their pleasure, such revocation cannot, in any way, prejudice or impair the rights of creditors. *Whitcomb v. Fowle* (1879), 10 Daly 23, 56 How. Pr. 365.

§ 4. **Debtor's schedule.**—A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made, and filed with the county clerk of the county where such assignment is recorded, and file a duplicate thereof with the assignee, an inventory or schedule containing:

1. The name, occupation, place of residence, and place of business, of such debtor;

2. The name and place of residence of the assignee;

3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, if known, if unknown the fact to be stated, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same;

4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same according to the best knowledge of such debtor; and a claim for such exemptions as he may be entitled to;

5. An affidavit made by such debtor, that the same is in all respects just and true.

In case such debtor shall omit, neglect or refuse to make and file such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within ten days after the date thereof, cause to be made, and filed as aforesaid such inventory or schedule as above required, in so far as he can; and for such purpose the judge shall, at any

time, upon the application of such assignee, compel by order such delinquent debtor, and any other person to appear before him and disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief.

In case the said assignee shall be unable to make and file such inventory or schedule, within said ten days, the judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said ten days or such further time as may be allowed, the judge shall require, by order, the assignee forthwith to appear before him, and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The judge is authorized, by order, to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is a contempt, and obedience to such order may be enforced by attachment.

6. The assignor shall comply with all lawful orders of the judge; examine the correctness of all claims presented against his estate, if ordered by the judge so to do, and if any is incorrect or false notify his assignee thereof immediately; deliver to his assignee all his books, papers and records; execute and deliver such papers as shall be ordered by the judge; execute and deliver to his assignee transfers of all his property outside the state of New York; if ordered by the judge attend before the assignee in the county where the assignor resides, and submit to an examination under oath concerning the conducting of his business, the cause of his inability to pay his debts, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding. (*Amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 3, as amended by L. 1878, ch. 318. L. 1909, ch. 17.

Consolidators' note.—The words "delivered to the county judge" are omitted and the words "filed with the county clerk" are inserted for the reason that there is no county judge in the county of New York and the latter part of the section provided that the inventory or schedule should be filed by the county judge in the office of the clerk of the county in which the assignment was recorded. The latter part of the section cannot be complied with in the city of New York as there is no county judge with whom to file the inventory or schedule. The change requiring the schedule to be filed with the county clerk in the first instance has therefore been made.

Necessity for schedules.—Schedules are not a necessary part of an assignment, and the latter is complete without them under the statute as it was at common law. *Burghard v. Sondheim* (1884), 50 Super. (18 J. & S.) 116.

Under the act of 1874 (L. 1874, ch. 600) an omission to make and deliver verified schedules did not invalidate the assignment. *Produce Bank v. Morton* (1876), 67 N. Y. 199, 52 How. Pr. 157. A contrary rule obtained under the act of 1860 (L. 1860, ch. 348). *Juliard v. Rathbone* (1868), 39 N. Y. 369.

Sufficiency of schedules.—No schedules are absolutely perfect and no debtor can inventory every item of his property with strict accuracy. Room must be allowed for honest mistake in such respect and possibly even for careless and thoughtless error. *McNaney v. Hall* (1895), 86 Hun 415, 33 N. Y. Supp. 518, *affd.* 159 N. Y. 544, 54 N. E. 1093.

The inventory is part of the transaction; what constitutes fraud in respect thereto. *Roberts v. Vietor* (1892), 130 N. Y. 585, 29 N. E. 1025. Schedules are to be made by assignor, and validity of assignment depends upon intent of assignor. *Denton v. Merrill* (1887), 43 Hun 224.

Where the inventory contained the names of the creditors with their residences, the amount of debts owing, and then a brief and very general statement of what the debts were created for, it was held that it complied with the requirements of the statute. *Eastern National Bank v. Hulshizer* (1886), 2 N. Y. St. Rep. 93.

Schedule annexed after assignment recorded.—Where an acknowledgment to an assignment is taken in the presence of all the parties and with all papers at hand and in view of the parties, a schedule not annexed at that time may be annexed subsequent to the recording of the assignment and the other schedules without invalidating the assignment. *Franey v. Smith* (1890), 125 N. Y. 44, 25 N. E. 1079.

The parties to an assignment must be deemed to have executed it in view of the statutory provisions which require that every debtor making an assignment in trust for creditors shall, at the date thereof, or within twenty days thereafter, make and deliver an inventory or schedule of his creditors and debts. The inventory, although not prepared until several days after the assignment is executed, is of the same effect as if it were made on the same day. When completed it is to be treated as if it had been expressly referred to in the assignment, as a schedule thereafter to be made, and is to be regarded as a part of the assignment, so far as it designates the creditors, and the amount and nature of their debts. Hence it is not erroneous for a referee to find that debts embraced in the inventory are provided for in the assignment although not expressly mentioned therein and if such debts are of a fictitious character the assignment is void. *Terry v. Butler* (1864), 43 Barb. 395.

The assignee is bound by the values stated in the schedule of assets. *Matter of Wolf and Kahn* (1886), 1 N. Y. St. Rep. 273.

The inventory is *prima facie* evidence of the facts therein set forth. *Pierpont v. McGuire* (1895), 13 Misc. 70, 34 N. Y. Supp. 150.

Promissory notes.—The inventory need not state what each promissory note was given for; it will be sufficient to state the date, time of payment, payee, to whom belonging, and the amount due thereon. *Pratt v. Stevens* (1884), 94 N. Y. 387.

Fictitious debts in schedule.—Where the assignor sets out in the schedule of debts and liabilities sworn to by him, debts due to friends, which have been paid and discharged, such conduct is fraudulent and renders the assignment voidable. *Talcott v. Hess* (1833), 31 Hun 282.

Usurious debts included in the inventory are rendered valid. *Matter of Thompson* (1833), 30 Hun 195.

Failure to include all assets in schedules.—Where an assignment purports to transfer all the property of the assignee, proof of an intentional omission from the

schedule of property assigned of items of valuable property is sufficient to establish fraudulent intent. The omission however, of an article shown to be entirely worthless is no evidence of fraud; so, also, if it is shown that the omission was accidental and unintentional. Where, therefore, it appeared that two items of property which were omitted from the schedule were, at the time, or soon after the execution of the assignment, delivered by the assignors to the assignee, and one of the former testified, without contradiction, that the omission was a mistake, it was held that the omission did not establish fraud. *Shultz v. Hoagland* (1881), 85 N. Y. 464.

Where, immediately prior to the making of a general assignment by a copartnership the partners drew \$557.50 from the funds of the firm because they had nothing to live on which amount was less than one per cent. of the assets of the firm, and as soon as the assignee heard of the misappropriation of the money he made a demand on the assignors for the money and it was returned, and the assignors testified that they had no intention of cheating their creditors. It was held in an action brought by the assignee to recover property of his assignors, levied on under attachments, that a question was presented for the consideration of the jury as to whether the amount was dishonestly, and with a fraudulent purpose of benefiting the assignors at the expense of the creditors, retained by the assignors. *Fay v. Grant* (1889), 53 Hun 44, 5 N. Y. Supp. 910, *affd.* 126 N. Y. 624, 27 N. E. 410.

The withholding for their own use, of a considerable part of their estate from the operation of a general assignment, is a fraud on the part of the assignors, which will invalidate the assignment as against creditors. *Iselin v. Henlein* (1885), 16 Abb. N. C. 73, 2 How. Pr. N. S. 211.

A withdrawal from the firm assets, before the assignment of money for the future living expenses of the assignors, and a false entry in the firm books thereof, vitiate the assignment. *Rothschild v. Salomon* (1889), 52 Hun 486, 5 N. Y. Supp. 865.

Where a debtor makes an assignment with preferences and withholds personal property in another state which state refuses to recognize assignments with preferences the assignment is not void in this state as such personal property would not be recoverable by the assignee and therefore the withholding of it would not invalidate the assignment as it would if the personal property were in this state. *Eastern National Bank v. Hulshizer* (1886), 2 N. Y. St. Rep. 93.

For other cases dealing with the effect of failure to include all assets in the schedules, see *Coursey v. Morton* (1892), 132 N. Y. 556, 30 N. E. 231; *Constable v. Hardenbergh* (1896), 4 App. Div. 143, 38 N. Y. Supp. 694; *Troescher v. Cosgrove* (1900), 46 App. Div. 498, 61 N. Y. Supp. 1036; *Blain v. Pool* (1888), 13 N. Y. St. Rep. 571; *Ellis v. Meyers* (1889), 4 Silv. 323, 28 N. Y. St. Rep. 120, 8 N. Y. Supp. 139; *Cutter v. Hume* (1891), 43 N. Y. St. Rep. 242, 17 N. Y. Supp. 255, *affd.* 255 *affd.* 138 N. Y. 630, 33 N. E. 1084; *Pittsfield Nat. Bank v. Tallor* (1892), 47 N. Y. St. Rep. 318, 19 N. Y. Supp. 937; *Manning v. Stern* (1876), 1 Abb. N. C. 409; *Matter of Assignment of Holbrook* (1885), 99 N. Y. 539, 2 N. E. 887.

Delivery of inventory.—Under the earlier law which provided that the inventory be “delivered to the county judge” it was held that there was a sufficient compliance with the law by delivery to his clerk at his office. *Pratt v. Stevens* (1884), 94 N. Y. 387. So, also, a delivery of the inventory to the county judge of an adjoining county, who at the time was holding court in the county, was sufficient. *Pratt v. Stevens* (1884), 94 N. Y. 387.

Statement of securities given.—Where an assignor has knowledge that a security, which has been given by him to a creditor, is fraudulent and void he is not bound to state the same in his inventory as the requirement of a “full statement of any

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existing security" applies only to valid securities. *Pratt v. Stevens* (1884), 94 N. Y. 387.

Affidavit of assignor.—Where an affidavit of the assignor after stating, as required by statute, that the inventory was "in all respects just and true," added "to the deponent's best knowledge, information and belief," it was held that there was a substantial compliance with the statute. *Pratt v. Stevens* (1884), 94 N. Y. 387.

Creditors; rights of.—Subsequent alterations in schedules are not permitted; mistakes cannot be shown as against rights of creditors. *Sutherland v. Bradner* (1886), 39 Hun 134, *affd.* in 116 N. Y. 410, 22 N. E. 554. And see *Matter of Meyer* (1898), 29 App. Div. 394, 51 N. Y. Supp. 1054. Creditors whose names appear in the schedules with the proper statement of their claims, and whose claims are not contested, are entitled to their dividends even though their claims are not presented to the assignee after advertisement. *Matter of Currier* (1878), 8 Daly 119.

Effect of failure to file.—Under this section, as enacted in 1877, it was held that a failure to file an inventory within thirty days rendered the assignment void not only as to creditors but as between the parties. *Matter of Leahey* (1878), 8 Daly 124, 5 Abb. N. C. 334, note.

Inspection of books and papers.—A creditor is entitled to be permitted to inspect the assignor's books irrespective of whether or not the debtor has been "delinquent" in not filing an inventory within the time fixed by the statute, notwithstanding the fact that the creditor fails to allege any reason why the inspection is necessary. *Matter of Herrmann Lumber Co.* (1897), 21 App. Div. 514, 48 N. Y. Supp. 509.

§ 5. Notice to creditors to present claims.—The judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor, duly verified, on or before a day to be specified in such advertisement, not less than ten days from the publication thereof, which advertisement or notice shall be published in one newspaper, to be designated by the judge, as most likely to give notice to the persons to be served, at least once and such additional times as the judge may direct; the last publication shall be at least one week prior to the date specified.

Said verified claim of creditor shall set forth whether any, and, if so, what securities are held for such claim, and whether any, and, if so, what payments have been made thereon.

Whenever a claim is founded upon an instrument in writing, such instrument, unless lost or destroyed, shall be filed with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. (*Amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 4.

Consolidators' note.—The reference to the "state paper" is stricken out for the reason that the old "state paper" was abolished in 1893 by section 74 of the former Executive Law, L. 1892, ch. 683, as added by L. 1893, ch. 248, § 2. The section

mentioned provides that notices then required to be published in the "state paper" should thereafter be published in the newspapers in the different localities of the state. There is a "state paper" provided for in section 73 of the Executive Law, but the matters required to be published in it are the appointments of terms of the supreme court, rules of practice, laws of the state and notices and advertisements required to be published in a newspaper by the attorney-general, the superintendent of insurance, superintendent of banks, or in actions against foreign corporations, and such publication was required to be in addition to their publication in other newspapers. Section 74 abolished the old "state paper" established by chapter 197 of the Laws of 1854 and provided that notices and advertisements in an action or special proceeding required or allowed by law to be published in the "state paper" on the first day of January, 1884, should be published in the county of the place of trial or in which the papers in such special proceeding were required to be filed, in a newspaper designated by the court or judge.

Advertisement for claims; effect of failure to make.—Ludington's Petition (1878), 5 Abb. N. C. 307. In case of failure, assignee settles estate at his own risk. *Id.* Assignee will not be discharged without advertisement. *Matter of Horsfall* (1878), 8 Daly 190, 5 Abb. N. C. 289, note; *Matter of Cook* (1881), 12 Wk. Dig. 158; *Matter of Merwin* (1878), 10 Daly 13; *Matter of Wiltse and Fromer* (1893), 5 Misc. 105, 25 N. Y. Supp. 733. Advertisement not the only method of notifying creditors. *Matter of Gilbert* (1881), 9 Daly 479. Proof of service of notice. *Matter of Phillips* (1881), 10 Daly 47.

Creditors must present claims.—*Matter of Bailey* (1880), 58 How. Pr. 446.

Where a creditor duly mails a verified claim to an assignee it is duly presented. *Matter of Wiltse & Fromer* (1893), 5 Misc. 105, 25 N. Y. Supp. 733.

§ 6. Bond of assignee.—The assignee named in any such assignment shall, within thirty days after the date thereof, and before he shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the state of New York, in an amount to be ordered and directed by the judge, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee, and for the due accounting of all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded, but in case the debtor shall fail to present such inventory within the ten days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to said judge by verified petition for leave to file a provisional bond, until such time as he may be able to present the schedule or inventory as hereinbefore provided. (*Amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 5.

Form of bond.—It is no objection to a bond that it is joint and several instead of being joint only. *People v. White* (1882), 28 Hun 289.

Scope of bond; liability of sureties.—The sureties upon the bond of an assignee are not liable for the failure of their principal to account for the assets in his hands, as required by a judgment in favor of creditors declaring the assignment void as to them, and directing the assignee to pay over the assets and the avails thereof in his hands, to be applied in satisfaction of their claims. *People v. Chalmers* (1875), 60 N. Y. 154. But it has been held that an assignee's bond

extends not merely to the rendering of an account of the moneys in his hands but also to the making of distribution according to the terms of any lawful decree on a final accounting. *Van Slyke v. Bush* (1890), 123 N. Y. 47, 25 N. E. 196.

The provision of section 5 of the act of 1860 (L. 1860, ch. 348), authorizing the prosecution of the bond upon the omission or refusal of the assignee to perform "any decree or order" etc., referred to the order or decree provided for in the previous section made on an accounting, or at least one made to enforce the duty of the assignee under the assignment; not to secure the payment of assets upon judgments in hostility to the assignment. *People v. Chalmers* (1875), 60 N. Y. 154.

The surety is only liable to the extent of the funds that come into the hands of his principal as assignee, and not for moneys subsequently deposited with him to be checked out for the benefit of the person making the deposit. *Israel v. Jordan* (1895), 12 Misc. 552, 34 N. Y. Supp. 21.

The mere delay of a creditor to call an assignee to account until after he has become insolvent, will not relieve the sureties on his bond from liability. *People v. White* (1882), 28 Hun 289.

Failure to file bond.—Upon failure to file bond, assignee will not be discharged of his own motion; he will be held to a strict accountability. *Matter of Parker* (1878), 5 Abb. N. C. 334. And see *Ludington's Petition* (1878), 5 Abb. N. C. 307. Filing of bond is not requisite to passing title. *Bostwick v. Burnett* (1878), 74 N. Y. 317; *Brennan v. Willson* (1877), 71 N. Y. 502; *Ryan v. Webb* (1886), 39 Hun 435. Judge must approve bond. *Matter of Robinson* (1884), 10 Daly 148. Failure to file bond does not render the assignment void. *Thrasher v. Bentley* (1874), 59 N. Y. 649; *Smith v. Newell* (1884), 32 Hun 501; *Von Hein v. Elkus* (1876), 8 Hun 516; *Sinclair v. Oakley* (1878), 6 Wk. Dig. 513. An assignee is not entitled to recover damages, resulting from his being prevented from selling property during the time it was levied upon under attachment proceedings where it appears that during the time of the attachment the assignee had no power to sell the property owing to his failure to file a bond. *Rambaut v. Irving National Bank* (1899), 42 App. Div. 143, 58 N. Y. Supp. 1056.

An assignee may obtain an attachment for goods of the assigned estate before he has filed a bond. *Easton v. Durland's Riding Academy* (1896), 7 App. Div. 288, 40 N. Y. Supp. 283.

Sale of articles with consent of creditors.—The fact that the assignee has sold small articles of property for cash before he has filed his bond, the sales having been made with the consent of the creditors attending a meeting at which the party subsequently objecting thereto was present, does not afford a just ground for complaint. *Irving Nat. Bank v. Wilson Bros. Co.* (1898), 34 App. Div. 481, 54 N. Y. Supp. 313.

Action on bond; parties.—In an action by a surety on a bond for an accounting, creditors are not necessary parties. *Schuehle v. Reiman* (1881), 86 N. Y. 270. Section cited in connection with § 10 post, as to action on bond. *Cohen v. Amer. Surety Co.* (1908), 192 N. Y. 227, 84 N. E. 947, affg. 123 App. Div. 519, 108 N. Y. Supp. 385.

§ 7. Further security.—The judge may, upon his own motion or upon the application of any party in interest, and on such notice as he may direct to be given to the assignor, assignee and surety, require further security to be given whenever, in his judgment, the security afforded by the bond on file is not adequate.

Source.—L. 1877, ch. 466, § 7.

§ 8. Discharge or removal of assignee; correction of inventory or schedule; supplemental inventories or schedules.—The judge shall, in the case provided in section four, and may also, at any time, on the petition of one or more creditors, showing misconduct or incompetency of the assignee, or on petition of the assignee himself, showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety and such other person as the judge may prescribe, remove or discharge the assignee, and appoint one or more in his place, and order an accounting of the assignee so removed or discharged, and may enjoin such assignee from interfering with the assignor's estate, and make provision by order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and, upon the discharge of the assignee upon his own application, such assignee's bond shall be canceled and discharged. The new assignee shall give a bond, to be approved as required by section six. The judge shall have power, by order, to require or allow any inventory or schedule filed to be corrected or amended. The judge may also require and compel, from time to time, supplemental inventories or schedules to be made and filed within such time as he shall prescribe, and to enforce obedience to all orders by attachment. (*Amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 6, as amended by L. 1878, ch. 318, § 2.

Jurisdiction to remove assignee.—See *Matter of Sheldon* (1902), 72 App. Div. 625, 76 N. Y. Supp. 278, *affd.* 173 N. Y. 287, 65 N. E. 1096.

Raising question of jurisdiction.—The question whether the circumstances are so exceptional that the court will assume jurisdiction of an action to remove an assignee, because of his misconduct and to obtain an accounting, or will relegate the plaintiff to his remedy by petition and citation, cannot be raised by demurrer, but only by motion at the trial. *Morrell v. Ball* (1899), 45 App. Div. 584, 61 N. Y. Supp. 405.

Removal of assignee; what justifies.—*Matter of Rauth* (1880), 10 Daly 52; *Matter of Mellen* (1892), 45 N. Y. St. Rep. 349, 18 N. Y. Supp. 515; *Matter of Mayer* (1883), 10 Daly 143, 66 How Pr. 106; *Matter of Robinson* (1884), 10 Daly 148.

Notice to assignor.—In a proceeding for the removal of an assignee who has misconducted himself, where there are three assignors, one of whom has left the state, notice to one assignor is properly notice to all; though the better course would be to give the statutory five days' notice to the two within the state, in the ordinary way, and to serve the absent assignor by depositing a notice in the post-office, addressed to him at his last known place of residence, giving double time. *Matter of Cohen & Co.* (1885), 2 How Pr. (N. S.) 523, 13 Daly 310.

Advertisement for claims and accounting as condition precedent.—An assignee and the sureties on his bond will not be discharged until after the assignee has advertised for claims, and has accounted, although a composition with all of the creditors has been made and the amount thereof paid to them. *Matter of Groencke* (1878), 10 Daly 17; *Matter of Yeager* (1878), 10 Daly 7; *Matter of Lewenthal* (1878), 10 Daly 14; *Matter of Merwin* (1878), 10 Daly 13; *Matter of Dryer* (1878), 10 Daly 8; *Matter of Phillips* (1878), 10 Daly 47; *Matter of Horsfall* (1879), 5 Abb. N. C. 289, 59 How. Pr. 265, appeal dismissed in 77 N. Y. 514.

Necessity for notice to all parties.—An assignee, and the sureties on his bond,

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will be discharged only upon a proceeding for an accounting instituted by citation, of which all parties interested in the estate, even though they have signed releases, must have notice. *Matter of Lewenthal* (1878), 10 Daly 14; *Matter of Merwin* (1878), 10 Daly 13.

"Misconduct or incompetency" embrace all reasons for which an assignee ought to be removed. *Matter of Petition of Cohn* (1879), 78 N. Y. 248. And see *Matter of Horsfall*, 5 Abb. N. C. 295, note; *Matter of Kaughran* (1886), 13 Daly 526; *Matter of Smith* (1882), 10 Daly 106.

Delay in collecting assets.—The fact that an assignee failed to collect assets of the assigned estate for a long time after the money was awaiting his demand and the filing of the proper proofs of his authority to receive it, warrants his removal, irrespective of whether he was guilty of *mala fides* or not. *Tompkins v. Sheehan* (1896), 6 App. Div. 76, 39 N. Y. Supp. 466.

Filing provisional bond; paying preferred claims before maturity.—That an assignee has obtained an order of the court that he file a provisional bond, and has filed such a bond before the expiration of the time allowed for the filing of the inventory and schedules by the assignor; and that he has proceeded thereupon to pay preferred claims even before maturity, and although unpreferred creditors are threatening proceedings to set aside the assignment as fraudulent, will not justify the removal of the assignee. *Matter of Mayer* (1883), 10 Daly 148.

Amendment of schedules.—A county judge has the power to make an order amending the schedules *nunc pro tunc* so as to conform substantially to the statement of the debt in the assignment, and when such order is made it is as much a part of the assignment as the inventory which it modifies. *Roberts & Co. v. Buckley* (1895), 145 N. Y. 215, 39 N. E. 966.

§ 9. Failure to file bond.—A failure to file any bond required by or under this article, within the specified time will not deprive the judge of his power over the assignee or the trust estate.

Source.—L. 1877, ch. 466, § 8.

See cases cited under § 6, ante.

§ 10. Action on bond; application of recovery.—Any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon shall be applied by direction of the judge in satisfaction of the debts of the assignor in the same manner as the same ought to have been applied by such assignee.

Source.—L. 1877, ch. 466, § 9.

Number of actions.—Under section 1915 of the Code of Civil Procedure, which applies to actions upon bonds of assignees for the benefit of creditors, the court may authorize any number of actions on such a bond, and leave to sue will be granted to any creditor who shows himself entitled thereto. *Matter of Stockbridge* (1879), 10 Daly 33, 58 How. Pr. 128.

A demand is not necessary where a judgment has been recovered against the assignee. *Pierpoint v. McGuire* (1895), 13 Misc. 70, 34 N. Y. Supp. 150.

The statute of limitations does not run against the claims of the assignor's creditors while the estate remains unsettled in the hands of the assignee, as against the sureties on his bond. *People v. White* (1882), 28 Hun 289.

Who may prosecute.—The provisions of this section in reference to the prosecution of the assignor's bond does not limit the right to the benefit of the bond exclusively to the original assignor, but are intended primarily to prevent one

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creditor gaining an undue priority over another from the mere fact that he first procured the bond to be prosecuted. *Barrick v. Schifferdecker* (1890), 123 N. Y. 47, 25 N. E. 365.

A trustee in bankruptcy is a party in interest within the meaning of this section and may prosecute an action on the bond. *Cohen v. American Surety Co.* (1908), 192 N. Y. 227, 84 N. E. 947, affg. 123 App. Div. 519, 108 N. Y. Supp. 385.

Pleading.—An allegation of the recovery of a judgment against an assignee is a sufficient pleading of indebtedness in an action against the surety on the assignee's bond. *Pierpoint v. McGuire* (1895), 13 Misc. 70, 34 N. Y. Supp. 150.

Evidence.—In an action on an assignee's bond the inventory made by the assignee is *prima facie* evidence of the facts therein set forth. *Pierpoint v. McGuire* (1895), 13 Misc. 70, 34 N. Y. Supp. 150.

In an action brought against the sureties on an assignee's bond to recover an amount which he had been directed but failed to pay, the order made in the proceedings against the assignee is *prima facie*, but not conclusive evidence of his failure to faithfully discharge his duties and account for all moneys received by him. *People v. White* (1882), 28 Hun 289.

Application of money recovered.—A creditor, at whose instance the assignment is declared to be void as to him, is not entitled to share in moneys recovered upon the bond of the assignee. *Matter of Cantor* (1898), 31 App. Div. 19, 52 N. Y. Supp. 382.

See also cases cited under § 6, ante.

§ 11. **Proceedings in case of death of assignee.**—In case an assignee shall die during the pendency of any proceeding under this article, or at any time subsequent to the filing of any bond required herein, his personal representative or successor in office, or both, may be brought in and substituted in such proceeding on such notice, of not less than eight days, as the judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted as well as the property of such deceased assignee, provided, however, that if such assignee dies subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety.

Source.—L. 1877, ch. 466, § 10.

Power of court to appoint.—Under section 25 post the court has power to appoint a substituted assignee in the place of a deceased assignee for the benefit of creditors of a debtor whose business was conducted, and general assignment was recorded, in the county, and the power is not confined to the case provided in the above section. *Rogers v. Pell* (1901), 166 N. Y. 565, 60 N. E. 265. The court need not appoint a personal representative of a deceased assignee as his successor. *Matter of Tousey* (1896), 2 App. Div. 569, 37 N. Y. Supp. 1025. *Contra*, *In re Magnus* (1893), 22 N. Y. Supp. 70, 2 Misc. 347, affd. 137 N. Y. 630, 33 N. E. 745.

Citation of creditors.—Where a general assignee dies and a compulsory proceeding is taken by certain of the creditors to have his personal representatives render a final accounting of the trust, and this results in a direction by the court that the representatives account for the assets, that the assets be transferred by them to the substituted assignee, and that upon such transfer the surety of the deceased assignee be discharged, all creditors interested in the trust must be

cited as otherwise the surety cannot lawfully procure the discharge to which he is entitled. *Matter of Farmer* (1901), 35 Misc. 150, 71 N. Y. Supp. 462.

Title to assets.—The administrator of the deceased general assignee of a firm takes no title to the firm assets, and hence a former partner of the firm, who claims title to one of its trade-marks, under a transfer made by the administrator without authority of the court, cannot maintain an action to restrain its use, by his partner, in a new firm, formed after the old firm had made a general assignment. *Hayne v. Sealy* (1898), 22 Misc. 243, 48 N. Y. Supp. 769, *affd.* 35 App. Div. 633, 55 N. Y. Supp. 1141.

The report of a referee, appointed to take and state the accounts of an assignee, signed before the death of the assignee, but not delivered, cannot lawfully be filed until the proceeding is continued against the assignee's personal representatives. The continuance of the proceedings against the assignee's personal representatives does not operate to render valid the previous filing of the referee's report. *Matter of Venable* (1905), 104 App. Div. 531, 93 N. Y. Supp. 1074; *Matter of Venable* (1906), 111 App. Div. 508, 97 N. Y. Supp. 938.

§§ 12-20. Accounting, citation and service.—(*Sections repealed by L. 1914, ch. 360.*)

§ 12. Notices to parties interested in the estate as creditors or otherwise.—Parties interested in the estate as creditors, or parties otherwise interested, if the judge so directs, shall have at least ten days' notice by mail to their respective addresses as they appear in the schedule filed by the assignor, or at such other addresses as they shall have filed with the assignee, of (a) all proposed sales of property, (b) the declaration and time of payment of dividends, (c) the filing of the final account of the assignee and of the hearing thereon, (d) the proposed compromise of any controversy. Such notice may be published as the judge shall direct and must be returnable in court.

The judge may cause such notices to be sent or published on the petition of the assignee at any time after the assignment, or on petition of any other person interested in the estate, at any time after the lapse of sixty days from the filing of such assignment, or where an assignee has been removed and ordered to account as hereinbefore provided on the petition of a creditor, or an assignee's surety, or assignor, and on good cause being shown, the judge may grant an order directing the assignee to show cause at the time specified why a sale of the property should not be had or a dividend should not be paid, or a settlement of his account should not be had, or such other matters as in the opinion of the judge should be disposed of.

Upon the hearing and determination of such order to show cause the judge may make such order in the premises as justice requires. (*Added by L. 1914, ch. 360, and amended by L. 1915, ch. 469.*)

Source.—L. 1877, ch. 466, § 11, as amended by L. 1878, ch. 318, § 3.

Sufficiency of citation.—A citation requiring the parties to appear "before one of the judges of this court at chambers," confers no jurisdiction and cannot be

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amended. Where such a citation has been set aside the petition on which it was issued may properly be used in obtaining a new citation. The omission of the name of the chief justice of the court from the teste of such citation is not a material defect, where the citation bears the signatures of the clerks of the attorney for the petitioner, and is under the seal of the court. *Matter of Davis* (1879), 10 Daly 31.

Citations served by mail. *Matter of Schaller* (1881), 62 How. Pr. 40. Defective citations.

Preferred creditors must be given notice. *Matter of Gorey* (1885), 13 Daly 413. Rights of preferred creditors. *Matter of Nims* (1897), 22 App. Div. 195, 47 N. Y. Supp. 1027.

Sureties must be served with citation. *Matter of Betts* (1898), 33 App. Div. 257, 53 N. Y. Supp. 721.

Former law cited.—*Matter of Kautsky* (1900), 56 App. Div. 440, 67 N. Y. Supp. 832.

See also cases cited under § 21, *post*.

§ 13. Debts which may be proved against the estate.—Debts of the assignor may be proved and allowed against his estate which are (a) a fixed liability, as evidenced by a judgment absolutely owing at the time of the assignment, or (b) a claim for taxable costs incurred before the assignment, in good faith, in an action to recover a provable debt; (c) or founded upon an open account, or upon a contract, express or implied whether due or not due.

In allowing the claims against the estate, in all cases of mutual debts or credits between the estate of the assignor and a creditor the amount shall be stated and one debt shall be set off against the other, and the balance only shall be allowed.

A set-off or counterclaim shall not be allowed in favor of any debtor of the assignor which (a) is not provable against the estate; or (b) was purchased by or transferred to him after the filing of the general assignment or with intent to such use and with knowledge or notice, or if he had reasonable cause to believe, that such assignor was insolvent. (*Added by L. 1914, ch. 360.*)

Necessity for proof of claim.—A creditor, named as such in the schedules, is not entitled to a distributive share of the trust funds without making presentation or proof of his claims. *Matter of Bailey* (1880), 58 How. Pr. 446.

What claims are provable.—A claim for damages for breach of a contract by the assignors, whereby the claimant lost possible profits accruing after the assignment, is not provable as a "debt" against the estate of an insolvent, assigned for the benefit of creditors. *Matter of Adams* (1884), 15 Abb. N. C. 61.

A verdict rendered in favor of the plaintiff in an action of libel creates a "liability" within the meaning of an assignment executed by the defendant the day after the verdict was rendered and six days before the judgment was entered thereon, directing the assignee to apply the assets to the payment of "all the debts and liabilities now due or to grow due from" the assignor. *Matter of Workingmen's Pub. Assn.* (1901), 62 App. Div. 604, 71 N. Y. Supp. 248.

Compare *In re Ives* (1890), 11 N. Y. Supp. 650.

Under an assignment which does not provide for the payment or indemnification

of persons who subsequently incur liabilities or make advances for the assignor, a claim by a surety for the assignor upon a lease, for money paid by him, subsequent to the assignment, for rent due upon the lease and a bonus for its cancellation, cannot be allowed. *Matter of Risley* (1880), 10 Daly 44.

If an assignment for the benefit of creditors gives a preference to a debt which the assignor did not owe, it will be adjudged fraudulent in an action brought by a creditor, but in the absence of objections from creditors, the assignee is bound to pay the debt. *Matter of McCallum* (1881), 10 Daly 72.

Right of creditor to setoff; unmatured claim against debtor.—Since the enactment of this section, providing that debts of the assignor may be proved and allowed against his estate “whether due or not due,” unmatured claims against the debtor are subject to the right of setoff by a creditor. *Matter of Bluestone* (1915), 169 App. Div. 462, 155 N. Y. Supp. 161; see also *In re Dickenson* (1915), 171 App. Div. 486, 157 N. Y. Supp. 248.

Section cited.—*Wolf v. National City Bank* (1915), 170 App. Div. 565, 156 N. Y. Supp. 575.

§ 14. **Duties of assignee.**—It shall be the duty of the assignee to collect and reduce to money the property of the estate, under the direction of the court; report promptly to the court any claims presented to him which are not provable, or are incorrect or false and shall also report promptly for allowance all claims presented to him which are not disputed; close up the estate as expeditiously as possible; furnish such information concerning the estate as may be requested by parties in interest; keep regular accounts; pay dividends as often as is compatible with the best interests of the estate; file a final report and account at least fifteen days before the final meeting of creditors. (*Added by L. 1914, ch. 360.*)

Duties of assignee generally.—The authority of the assignee and the control of the court over him is limited by the terms of the assignment and he can only be compelled to perform the trust therein defined and therefore he cannot be compelled to pay taxes on mortgaged land of the assignor. *Matter of Lewis* (1880), 81 N. Y. 421.

An assignee for creditors is merely the representative of the assignor in the payment of debts and is accountable to him for all property not used for that purpose, and takes the property subject to the equities of third parties. *Paddell v. Janes* (1914), 84 Misc. 212, 145 N. Y. Supp. 868.

An assignee is something more than the hand of the assignor; he is a trustee for the creditors, and his transaction in respect to the assigned property may be deemed to have been conducted by him as such trustee in behalf of such creditors. *Bowdish v. Page* (1894), 81 Hun 170, 30 N. Y. Supp. 691, *affd.* 153 N. Y. 104, 47 N. E. 44. See also *Flint v. Bell* (1882), 27 Hun 155.

An assignee is bound to exercise, in the discharge of his trust, that degree of diligence which persons of ordinary prudence are accustomed to use in their own affairs. This duty extends to all the interests committed to his charge, and his whole conduct in the management of the trust, when called in question, is to be considered in view of the powers which he may exercise in the collection, recovery and application of the assets and the general management of the trust. *Matter of Cornell* (1888), 110 N. Y. 351, 18 N. E. 142.

An assignee for creditors cannot bind the assigned estate by an executory contract having no relation to the obligations of his assignor but such fact does

not prevent his incurring a personal liability when another has acted upon the faith of his promise. *Standard Audit Co. v. Robotham* (1909), 62 Misc. 466, 115 N. Y. Supp. 152.

Authority of assignees and receivers distinguished.—An assignee for the benefit of creditors stands in a somewhat different position before the court than that of a receiver, appointed by the court as its officer, to take possession and distribute the property under the general jurisdiction of a court of equity. The authority granted to such assignee depends not upon his appointment by the court, but upon the act of the assignor and the assignment under which the title to the property vests in him, by the terms of which he is bound. He is subjected to the general jurisdiction of a court of equity as a trustee, holding property for the benefit of those interested in it, but such jurisdiction over him is to be exercised in the way in which courts of equity exercise jurisdiction over trustees, or others, in the general administration of equity jurisdiction. He is also subject to the provisions of this act but the court has no summary jurisdiction over him as it has over its own officer, by which, upon motion, he can be directed to dispose of the property in his hands. Except as authorized by this act, an assignee has a right to have claims against him enforced in the usual way, that is, by actions rather than by a summary application for an order. *Matter of Devlin & Co.* (1897), 24 App. Div. 219, 48 N. Y. Supp. 950.

Upholding assignment.—It is the duty of the assignee to uphold his trust, not to impeach it. He cannot object to the payment of a creditor preferred in the assignment, on the ground that the preference is fraudulent. *Matter of Ward* (1880), 10 Daly 67.

Protection of estate.—Where an assignee is without funds and necessity arises for the protection of the assigned estate from spoliation, he may either make them himself and trust to being allowed therefor upon his accounting, or he may petition the court for authority to engage others to protect the estate upon the credit of the fund. *Standard Audit Co. v. Robotham* (1909), 62 Misc. 466, 115 N. Y. Supp. 152.

Continuance of business.—In the *Matter of the Accounting of Dean* (1881), 86 N. Y. 398, it appeared that the assets transferred to the assignee consisted of property used in a livery business and debts due the assignor, and that there were chattel mortgages covering the property for more than its value. The assignee carried on the business for more than two months at a loss, and then sold the entire property, subject to the mortgages, for one dollar. It was held that upon the accounting the items for receipts and disbursements while he was carrying on the business were properly rejected and that he was simply authorized to convert the assets into money and distribute it among the creditors, and the estate could not be charged with a loss incurred in the unauthorized use of the property.

Fraudulent conveyances.—The right of action to set aside a fraudulent conveyance of the debtor's property, made before the execution of the assignment, is vested in the assignee alone. *Swift v. Hart* (1885), 35 Hun 128; *Loos v. Wilkinson* (1888), 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250, affg. 10 N. Y. St. Rep. 297. If the assignee refuses to bring such an action a judgment creditor may bring it and make the assignee a party defendant, in which case the fund recovered will be directed to be paid to the assignee, to be distributed as prescribed in the assignment, even though the latter contain preferences. *Swift v. Hart* (1885), 35 Hun 128; *C. Riessner & Co. v. Cohn* (1888), 22 Abb. N. C. 312.

A negligent omission of the assignee to assail fraudulent transfers of property made by the assignor prior to the assignment is a breach of trust, and upon an accounting the court has jurisdiction to inquire in respect to the execution of the

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power conferred on the assignee by statute and subject the assignee to any liability for any loss to the assigned estate arising from a culpable neglect to exercise it. The measure of liability for such neglect is the actual loss sustained, or such as can reasonably be inferred from his misconduct. *Matter of Cornell* (1888), 110 N. Y. 351, 18 N. E. 142.

Fraudulent conveyance from assignor to assignee, shortly before an assignment, cannot be attacked upon the accounting of the latter, but the property, it seems, should be recovered in an action by a new assignee. *Matter of Raymond* (1882), 27 Hun 508.

An assignee may attack a chattel mortgage, executed by his assignor, as fraudulent and void as to creditors. *Ball v. Slaften* (1885), 98 N. Y. 622.

Liability of one assignee for acts of others. *Bruen v. Gillet* (1889), 115 N. Y. 10, 21 N. E. 676, 4 L. R. A. 529, 12 Am. St. R. 764.

Fraudulent judgments.—As to the liability of an assignee for failure to attack fraudulent judgments conferred shortly before the assignment, see *Matter of Mather* (1891), 61 Hun 214, 215, 16 N. Y. Supp. 13.

Recovery of surplus from collaterals.—Where several insurance policies, which constituted a large part of the debtor's estate had been transferred to persons claiming to be creditors, as collateral security, and there was a surplus above the amount for which the policies were held as collateral, it was held that it was the duty of the assignee to recover any surplus arising from the collaterals held by a creditor after payment of the debt. *Matter of Carpenter* (1897), 45 Hun 552.

Election of remedies.—An assignee cannot, by pursuing a futile remedy, produce a forfeiture of the vested rights of his *cestuis que trust* to have the property, held by him in that relation, made available for their benefit, nor can he voluntarily relinquish their rights in that respect. *Bowdish v. Page* (1894), 81 Hun 170, 30 N. Y. Supp. 691, *affd.* 153 N. Y. 104, 47 N. E. 44.

Lent; leases; use and occupation.—An assignee may elect whether or not he will accept a lease. If the assignee, with the knowledge and consent of the lessor enters into the possession of the demised premises he is liable individually for the value of the use and occupation of the premises during the time he remains in possession thereof, notwithstanding that the assignment has been declared void *ab initio*. *Mead v. Madden* (1903), 85 App. Div. 10, 82 N. Y. Supp. 900.

Whether a lease is to be deemed property, so as to pass under a general assignment of the lessee's property, depends upon the election of the assignee to enter under it, or his determining his right to elect by some other act or omission to act. *Carter v. Hammett* (1851), 12 Barb. 253.

A general assignee of a tenant is not liable to the landlord for a monthly payment of rent which fell due on a secular legal holiday occurring on the day before making the assignment and the commencement of his occupation, nor for use and occupation where the lease has remained in effect during the entire period of his occupancy, and therefore neither the rent nor the value of the rent and occupation can be offset by the landlord against a claim by the assignee for the price of chattels of the assignor sold by the assignee, during the occupation, to the landlord. *Walton v. Stafford* (1900), 162 N. Y. 558, 57 N. E. 92.

An assignee cannot be compelled by an order of the court to pay rent for premises leased to his assignor for the period of such occupation by him, except in proceedings for an accounting, in which all creditors and other interested parties are before the court. *Matter of Devlin & Co.* (1897), 24 App. Div. 219, 48 N. Y. Supp. 950.

When an assignee has incurred liability for rent by retaining premises occupied by the assignor, in determining whether such rent shall be charged to

the estate or to the assignee personally, the question is, did the assignee in so doing act as a cautious and prudent man would have acted in his own affairs. *Matter of Edwards* (1880), 10 Daly 68.

A direction, in an assignment, to the assignee to pay rent, taxes and assessments on the real estate until the same shall be sold, is a power necessary to the preservation of the property, and one which the assignee would be authorized to exercise, if it were not included in the assignment. *Van Dine v. Willett* (1862), 38 Barb. 319.

For other cases dealing with the liability for rent, see *Bachroch v. Leventritt* (1899), 45 App. Div. 533, 61 N. Y. Supp. 343; *Man v. Katz* (1903), 40 Misc. 645, 83 N. Y. Supp. 94; *Paddell v. Janes* (1914), 84 Misc. 212, 145 N. Y. Supp. 868.

Distribution of estate.—The principle which requires an assignee to distribute the trust estate in accordance with the directions of the assignment, does not impose upon him the obligation to pay a preferred debt he knows, or believes, to be wholly fictitious, or in excess of its true amount. *Brown v. Halsted* (1885), 17 Abb. N. C. 197.

Liability of assignee.—An assignee for the benefit of creditors is liable for ordinary negligence, or the want of that degree of diligence which persons of ordinary prudence are accustomed to exercise in their own business. *Matter of the Accounting of Dean* (1881), 86 N. Y. 398; *Litchfield v. White* (1852), 7 N. Y. 438.

A voluntary assignment containing a provision that the trustee shall not be accountable for any loss sustained by the trust property unless it shall happen from gross negligence or wilful misfeasance, is void. *Litchfield v. White* (1852), 7 N. Y. 438.

Inspection of stock by creditors.—An assignee will not be compelled to permit an inspection by the creditors of the assigned stock. If the creditors make an offer to purchase, the assignee will be responsible for the exercise of his discretion in accepting or refusing such offer. *Matter of Crowder* (1883), 10 Daly 132.

§ 15. **Power of court.**—The court shall have power:

1. To allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against the estate.

2. To authorize the business of assignor to be conducted for limited periods by assignee, if necessary in the best interests of the estate, and allow additional compensation for such services.

3. To bring in and substitute additional persons or parties in the proceeding when necessary for the complete determination of a matter in controversy, by issuing a citation directed to such persons or parties and to be served as ordered by the court.

4. To reopen estates whenever it appears they were closed before being fully administered.

5. To determine all claims of assignors to their exemptions.

6. To authorize an assignee to bring an action, which he is hereby empowered to maintain, against any person who has received, taken or in any manner interfered with the estate, property or effects of the debtor in fraud of his creditors and which might have been avoided by a creditor of the assignee and the assignee may recover the property so transferred or its value.

7. To direct upon the final settlement of the estate that the assignee pay to the lawful creditors their proportionate dividend notwithstanding their claim has not been presented in accordance with the notice sent out by the assignee, provided one year has not elapsed since the filing of the general assignment.

8. To allow secured creditors such sum only as to the court seems to be owing over and above the value of their securities.

9. To examine the parties and witnesses on oath in relation to the assignment and accounting and all matters connected therewith and to compel their attendance for that purpose and their answers to questions, and the production of books and papers;

10. To require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account;

11. To take and state such account, or to appoint a referee to take and state it, and such referee shall have the powers enumerated in subdivision nine of this section;

12. To settle and adjudicate upon the account and the claims presented and to decree payment of any creditor's just proportional part of the fund or, in case of a partial accounting, so much thereof as the circumstances of the case render just and proper;

13. To discharge the assignee and his surety at any time, upon performance of the decree, from all further liability upon matters included in the accounting, to creditors appearing and to creditors not having appeared after due citation, or not having presented their claims after due advertisement;

14. On proof of a composition between the assignor and his creditor to discharge the assignee and his sureties from all further liability to the compounding creditors appearing or duly cited, and to authorize the assignee to release the assets to the assignor; provided, however, that if there be any creditors not assenting to the composition, the court shall determine what proportion of the fund shall be paid to or reserved for creditors not assenting, which shall not be less than the sum or share to which they would be entitled if no composition had been made, and may decree distribution accordingly;

15. To adjourn the proceedings from time to time, grant further orders if necessary, and amend the petition and proceedings thereon before decree in furtherance of justice;

16. To punish as for a contempt any disobedience or violation of any order made or process issued in pursuance of this article, and to restrain by arrest and imprisonment any party or witness when it shall satisfactorily appear that such party or witness is about to leave the jurisdiction of the court, and to take bail to secure the attendance of such party or witness,

to be prosecuted under the order of the court in case of forfeiture by and for the benefit of the party in whose interest such examination shall be ordered;

17. To exercise such other or further powers in respect to the proceedings and the accounting therein as a surrogate may by law exercise in reference to an accounting by an executor or administrator. (*Former § 21, re-numbered and amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 20, as amended by L. 1878, ch. 318, § 5.

Jurisdiction of court.—Court may direct creditor to return amount paid to him by mistake. *Matter of Morgan* (1885), 99 N. Y. 145, 1 N. E. 406; and see *Matter of Wiltse and Fromer* (1893), 5 Misc. 105, 25 N. Y. Supp. 733. County judge has the power of a surrogate on an accounting. *Matter of Raymond* (1882), 27 Hun 508. Entire original jurisdiction was imposed on county court. *Matter of Nicholas* (1878), 15 Hun 317. But see *Hurth v. Bower* (1883), 30 Hun 151. The statute gives the court very broad and general powers over assignments and assigned estates. *Matter of Devlin & Co.* (1897), 24 App. Div. 219, 48 N. Y. Supp. 950; and see *Matter of Stockbridge* (1879), 10 Daly 33, 7 Abb. N. C. 395, 58 How. Pr. 128; *Matter of Ward* (1880), 10 Daly 66.

While the power vested in the County Court to take and settle the accounts of an assignee for the benefit of creditors is not exclusive, but in its jurisdiction is concurrent with the Supreme Court, yet where the County Court has first acquired jurisdiction its jurisdiction will not be interrupted or restrained unless for some substantial reason. *Niagara County National Bank v. Lord* (1884), 33 Hun 567.

The Supreme Court has ample jurisdiction to entertain an action for an accounting by an assignee for the benefit of creditors. *Stoerzer v. Nolan* (1897), 19 App. Div. 338, 46 N. Y. Supp. 587, appeal dismissed 155 N. Y. 667, 49 N. E. 1104.

The fact that the earlier law specifically gave County Courts jurisdiction over assignees for the benefit of creditors did not take away the jurisdiction of the Supreme Court of an action to compel an accounting by such an assignee as such jurisdiction is inherent in such court as a court of equity. *Hurth v. Bower* (1883), 30 Hun 151.

Continuance of business.—An assignment contained a provision that "should it be necessary and to the better performance of the trust," the assignee shall have power "to finish such work as is unfinished," paying the necessary charges and expenses before paying the debts and liabilities as provided for in the assignment. In an action to set aside the assignment as fraudulent it was held that no power to determine as to the necessity was vested in the assignee by the instrument, but that the power conferred was conditioned upon a necessity to be determined by the court; that the assignee could not safely exercise it except under order of the court; and that, therefore, the provision did not vitiate the assignment. *Robbins v. Butcher* (1887), 104 N. Y. 575, 11 N. E. 272. See also *Watson v. Butcher* (1885), 37 Hun 391. Compare *Dunham v. Waterman* (1858), 17 N. Y. 9.

Accounting.—Action to compel accounting is not equitable, *Hynes v. Alexander* (1896), 2 App. Div. 109, 37 N. Y. Supp. 527; may be brought in supreme court. *Miles v. Huxson* (1893), 140 N. Y. 99, 35 N. E. 422. Commissions when not allowed on accounting. *Dorney v. Thacher* (1894), 76 Hun 361, 27 N. Y. Supp. 787. Proof of claims on accounting. *In re Ives* (1890), 11 N. Y. Supp. 650. Creditor may compel assignee to account. *Matter of Stowell* (1882), 26 Hun 258; *Matter of Rosenback* (1883), 10 Daly 128. Proceedings, how conducted. *Matter of*

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Merwin (1878), 10 Daly 13; In re O'Brien (1882), 16 Wk. Dig. 435. Personal representative of deceased assignor need not be made party. Wells v. Knox (1889), 55 Hun 245, 8 N. Y. Supp. 58. Effect of other actions on accounting. Matter of Dare (1885), 13 Daly 220.

The Supreme Court and its justices have the same jurisdiction to entertain an action for an accounting by an assignee for the benefit of creditors as that formerly possessed by County Courts and county judges, and may proceed in such matter either by action, or by citation and petition, and having prescribed the latter form of action by its rules, a creditor has no right to insist upon adopting the remedy by action to compel such accounting. Stoerzer v. Nolan (1897), 19 App. Div. 338, 46 N. Y. Supp. 587, appeal dismissed 155 N. Y. 667, 49 N. E. 1104.

The question whether the circumstances are so exceptional that the court will assume jurisdiction of an action to remove an assignee, because of his misconduct, and to obtain an accounting, or will relegate the plaintiff to his remedy by petition and citation, cannot be raised by demurrer, but only by motion at the trial. Morrell v. Ball (1899), 45 App. Div. 584, 61 N. Y. Supp. 405.

An accounting is a condition precedent to a discharge. Matter of Horsfall (1879), 5 Abb. N. C. 289.

The surety of an assignee for the benefit of creditors is not entitled to require an accounting. Matter of Castle (1877), 1 Abb. N. C. 399.

When, at the commencement of an action in the Supreme Court by judgment creditors against a general assignee and others to have certain property formerly belonging to the firm treated as firm assets and distributed among creditors, proceedings were pending in a County Court for an accounting by the assignee, it was held that the accounts of the assignee should not be taken in the Supreme Court action. Niagara County National Bank v. Lord (1884), 33 Hun 557.

The court will not permit an assignee for the benefit of creditors, whom it has removed for disobedience and ordered to account to his successor, to apply, of his own motion and by a new attorney, for an order passing his accounts, fixing his commissions and counsel fees, cancelling his bond and discharging his surety upon turning over to his successor the balance shown by his accounts, filed where no citation has been issued and served on all the parties interested in the estate of the debtor as they have a right, by means of a reference, to have the accounts duly proved and the *corpus* at the time of the transfer fixed, to have it determined whether the removed assignee is entitled to or has forfeited commissions and counsel fees, and also to have a determination whether he or the estate should pay the costs of the accounting. Matter of Reynolds & Co. (1900), 30 Misc. 397, 62 N. Y. Supp. 515.

Where, after a debtor has made a general assignment for the benefit of his creditors, he is declared a bankrupt in involuntary proceedings instituted against him in a United States court the mere fact that a composition with his creditors is thereafter made, as provided in the bankrupt act, does not relieve the assignee, acting under the general assignment from accounting to the creditors for the property received by him, unless the creditors have in some way relinquished their right to such accounting, or the United States court has ordered the assignee to return the property to the bankrupt. Matter of Allen (1881), 24 Hun 408.

Bringing in other creditors.—Where different actions have been brought by creditors, in behalf of themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to make an order to compel all the creditors to come in and prove their claims in the suit first brought, or wherein interlocutory judgment is first

obtained, and to stay all proceedings in the other actions. *Travis v. Myers* (1876), 67 N. Y. 542.

After a judgment creditor has commenced an action to compel a general assignee to account, and the action has been sent to a referee to take and state the account, other creditors have no right to intervene and be made parties plaintiff, as the action, although brought by one creditor, is in reality for the benefit of all of the other creditors. *Matter of Lewis v. Hake* (1886), 42 Hun 542. See also *Douglas v. Smith* (1893), 50 N. Y. St. Rep. 808, 21 N. Y. Supp. 813.

Right of creditors to compel accounting.—Under the act of 1877 (L. 1877, ch. 466, amended by L. 1878, ch. 318) the court might, upon the application of a creditor, require the assignee to render an account, and this without bringing all of the parties interested in the estate or proceeding to a final settlement. *Matter of Cowing & Co.* (1882), 26 Hun 214.

It is in the discretion of the judge to refuse an application by a single creditor to compel an assignee to account, and he will do so if adverse proceedings in bankruptcy are pending. *Matter of Bowery National Bank* (1877), 1 Abb. N. C. 404.

Failure to file bond.—The fact that an assignee does not give the bond required does not shield him from liability to show what has become of the property which went into his hands, where the allegation is that he has converted it to his own use. *Matter of Farnam* (1878), 75 N. Y. 187.

Grounds for denying petition for accounting.—Where the petition for an accounting is made by a creditor, the fact that the assignee disputes the claim of the petitioner is not a ground for denying the application. *Matter of Davis* (1879), 10 Daly 31.

Preferred creditors must be served with citation of accounting, notwithstanding fact that they have not presented claims. *Matter of Nims* (1897), 22 App. Div. 195, 47 N. Y. Supp. 1027.

Enforcement of decree.—A final decree upon an accounting by an assignee, requiring the payment of money by the assignee, cannot be enforced by attachment, and fine and imprisonment as for contempt. *Matter of Stockbridge* (1879), 10 Daly 33.

Reference.—The court is without power to dispense with a reference on the hearing of the final account of an assignee for the benefit of creditors. *Matter of McMahon* (1915), 92 Misc. 305, 155 N. Y. Supp. 864.

The report of a referee appointed to take an accounting, which is filed after the death of the assignee, is a nullity, and should be returned so as to enable the referee to proceed with the reference after the substitution of the assignee's personal representative, as provided in section 11. *Matter of Venable* (1906), 111 App. Div. 508, 97 N. Y. Supp. 938.

When, in an action brought in the Supreme Court by a creditor to compel an assignee for the benefit of creditors to appear and account, the court refers the action, it may prescribe the notice to be given by the referee to the creditors of the assignor. It is not required to adopt the notice prescribed by the statute. *Huith v. Bower* (1883), 30 Hun 151.

The court will not order a reference to pass on objections filed by a petitioning creditor to an account filed by the assignee, without bringing in the other creditors. *Matter of Cottlow* (1878), 5 Abb. N. C. 301, note.

Where there is no opposition to the allowance of the account presented by the assignee it is not the duty of the referee to inquire into the items of the account. *Matter of May* (1885), 13 Daly 24.

Upon a reference of an accounting by an assignee the referee has no power to consider a claim made against the funds in the assignee's hands on the ground

that he had converted goods of the claimants to the use of the estate. *Matter of Marklin* (1885), 13 Daly 105.

Discharge of assignee.—Effect of decree discharging assignee. *Julien v. Lalor*, (1888), 47 Hun 164, 14 N. Y. St. Rep. 392. When court will refuse application for discharge. *Matter of Darrow* (1883), 10 Daly 141. When assignee should be discharged. *Matter of Parker* (1878), 5 Abb. N. C. 334, 10 Daly 16. Assignee not to be discharged without an accounting. *Matter of Horsfall* 5 Abb. N. C. 293, note; *Matter of Lewenthal*, 10 Daly 14, 5 Abb. N. C. 304, note; *Matter of Dryer*, 10 Daly 8, 5 Abb. N. C. 303, note; *Matter of Yeager* (1878), 5 Abb. N. C. 302, note, 10 Daly 7.

An application for an order discharging an assignee after the execution of a composition agreement by creditors alleged to be all of the creditors of the assignor will not be granted where it appears that the notice to present claims has not been published. *In re Lewis* (1915), 156 N. Y. Supp. 307.

See also note to section 8, *ante*.

Liability of assignee.—Assignee must use due diligence and care in discharge of his duties. He will be charged with neglect to bring suit to set aside fraudulent transfers. *Matter of Cornell* (1888), 110 N. Y. 351, 18 N. E. 142; *Matter of Carpenter* (1887), 45 Hun 552, 10 N. Y. St. Rep. 581; *Matter of Raymond* (1882), 27 Hun 508; *Matter of Mather* (1891), 61 Hun 214, 16 N. Y. Supp. 13; *Matter of Gerry* (1895), 13 Daly 373; *in re Accounting of Dean* (1881), 86 N. Y. 398, 13 Wk. Dig. 77.

Composition.—No power is conferred upon the court by the provisions of subdivision 14 of this section to determine on a final accounting by the assignee thereunder that a compounding creditor has released the assignor from all liability on his debt. *Halstead v. Ives* (1893), 73 Hun 56, 25 N. Y. Supp. 1058, *affd.* 144 N. Y. 705, 39 N. E. 857.

Appeals.—An appeal from the decree of a county judge, made upon the final accounting of an assignee for the benefit of creditors, is subject to the rules governing appeals from final judgments rendered by County Courts under section 1340 of the Code of Civil Procedure, and to be effectual the security required by section 1341 must be given. *Matter of Beckwith* (1878), 15 Hun 22.

§ 16. **Examination of witnesses.**—The judge may also, at any time, on petition of the assignee or any party interested, order the examination of witnesses and the production of any books and papers by any party or witness before him or before a referee appointed by him for such purpose or before the assignee who shall have power to administer oaths, compel the attendance of witnesses, and production of books, records and papers by the issuance of subpoena, and the evidence so taken, together with books and papers, or extracts therefrom, as the case may be, shall be filed in the county clerk's office, and may be used in evidence by any creditor or assignee in any action or proceeding then pending, or which may hereafter be instituted. No witness or party as above provided shall be excused from answering on the ground that his answer may incriminate him, but such answer shall not be used against him in any criminal action or proceeding. (*Former* § 22, *renumbered and amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 21.

Discretion of judge.—The judge to whom an application for the examination of witnesses is made has a discretion in the matter, and unless an abuse of dis-

cretion appears, his decision may not be reviewed on appeal. *Matter of Holbrook* (1885), 99 N. Y. 539, 2 N. E. 887.

Purpose of examination.—An examination will be allowed only in aid of the assignment and matters connected therewith. *Matter of Holbrook* (1885), 99 N. Y. 539, 2 N. E. 887; *Matter of Brown* (1882), 10 Daly 115; *Matter of Everit* (1881), 10 Daly 99.

An order may properly be made for the examination of one of the members of a copartnership which has made an assignment, to ascertain whether a particular trademark belongs to the assigned estate, where the facts upon which the ownership of such trademark depends are within the knowledge of the partner for whose examination the order is made. *Matter of Swezey* (1882), 10 Daly 107.

The examination of the assignors should not extend to an inquiry as to whether the preferences are fraudulent, or whether there was legal or actual fraud in making the assignment, or in the anterior transactions. *Matter of Rindskoff* (1885), 16 Abb. N. C. 316, note.

But the mere fact that the examination of the assignor and assignee may develop evidence sufficient to support an action to set aside the assignment as fraudulent is not a ground for refusing an examination. *Matter of Wilkinson* (1885), 21 Wkly. Dig. 265, 36 Hun 134; *Matter of Kapelovich* (1885), 22 Wkly. Dig. 13. Thus an order for the examination of the assignor and assignee cannot be sustained by allegations of facts tending to show fraud by the assignors in conducting their business and in making the assignment as such proceeding is in hostility to, not in aid of the assignment. *Matter of Goldsmith* (1882), 10 Daly 112.

Where, shortly before making an assignment, the assignor had allowed a judgment by default to be entered against him, under which his stock of goods was levied on and sold, and the facts and circumstances of the transaction tended to show that the claim sued on was fictitious, and that it was done for the purpose of defrauding the actual creditors of the assignor, the court allowed the assignee to bring suit for the recovery of the property, but refused to allow him to examine the persons who were alleged to have taken part in or have knowledge of the scheme. *Matter of Burnett* (1879), 8 Daly 363.

Who may make application for examination.—A verdict in favor of the plaintiff in an action of libel creates a liability within the meaning of this act, and the person in whose favor such a verdict was rendered is interested in the assigned estate and may make an application under this section for an examination of the assignor and assignee, and of the assignor's books and accounts. *Matter of Workmen's Publishing Assn.* (1901), 62 App. Div. 604, 71 N. Y. Supp. 248.

Necessity for pending proceedings.—An order for the examination of witnesses and the production of books and papers may be had at any time and is not necessarily confined to cases where a proceeding under the act is pending. *Matter of Bryce & Smith*, 10 Daly 18, 56 How. Pr. 359.

Examination of assignor.—If an assignment be made in fraud of creditors or in violation of the statute, a creditor may, in disregard of the assignment, examine the assignor in supplementary proceedings as to any property he may have and to discover the circumstances under which he transferred it, including the general assignment. *Matter of Rutaced Co.* (1910), 137 App. Div. 716, 122 N. Y. Supp. 454.

An assignor who refuses to deliver the title deeds or give necessary information of the assigned estate to the assignee, may be ordered, on application of the latter, to appear and submit to examination. *Matter of Strauss* (1877), 1 Abb. N. C. 402.

An attorney, who has loaned money to the assignor, upon security, for himself and for his clients, may be compelled to testify in order to enable the assignee to

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make an inventory. *Matter of Merriam* (1898), 27 App. Div. 112, 50 N. Y. Supp. 114.

Examination of third persons.—An assignee for the benefit of creditors is entitled to examine persons who have taken possession of and sold the bankrupt's property under the contention that they delivered it to the insolvent under contracts of conditional sale. *Matter of U. S. Restaurant & Realty Co.* (1911), 146 App. Div. 114, 130 N. Y. Supp. 606.

Inspection of books.—An assignee should allow the creditors reasonable opportunity to examine the books of the assignor. *Manning v. Stern* (1876), 1 Abb. N. C. 409.

A creditor of an assignor is entitled to examine the assignor's books irrespective of whether the assignor has filed an inventory notwithstanding the fact that the creditor fails to allege any reason why the inspection is necessary. *Matter of Herrmann Lumber Co.* (1897), 21 App. Div. 514, 48 N. Y. Supp. 509.

The inspection of books need not be made by the creditor personally. He may designate some one to make it for him, and it cannot be an objection that the person so designated is an expert. *Matter of Isidor & Hein* (1880), 59 How. Pr. 98.

An order for the examination of the books of persons dealing with the assignee should be confined to purchases of merchandise from the assignee, and all dealings with him, and to sales of merchandise purchased from the assignee. *In re Farmer*, 38 App. Div. 621, 56 N. Y. Supp. 323.

The petition for an order to examine an assignor must state facts showing its necessity or propriety; the mere statement of a belief that the rights of creditors will be protected by such examination is insufficient. *Matter of Koonz* (1880), 11 Wkly. Dig. 55.

A petition by a corporation for the examination of witnesses should be signed and verified by an officer of the corporation. *Matter of Brown* (1882), 10 Daly 115.

An affidavit of an attorney for the petitioner simply of his belief that the testimony of a witness named is material to the matters concerned, is not sufficient to require the issuing of an order for his examination. *Matter of Holbrook* (1885), 99 N. Y. 539, 2 N. E. 887.

Reference.—The examination only can be committed to a referee who is to take and file the testimony. The judge has no authority to direct the referee to report his opinion on the evidence or to examine such witnesses, or to compel the production of such books and papers as the petitioners may desire; the judge himself must in his order name the witnesses and the books and papers. The propriety of an examination sought is to be determined by the judge and not delegated to the referee. *Matter of Holbrook* (1885), 99 N. Y. 539, 2 N. E. 887. See also *U. S. Restaurant & Realty Co.* (1911), 146 App. Div. 114, 130 N. Y. Supp. 606.

§ 17. **Invalid claims.**—Claims which for want of record or for other reasons would not have been valid as against the claims of creditors of the assignor shall not be liens against his estate. (*Added by L. 1914, ch. 360.*)

§ 18. **Effect of orders; power of judge and duties of clerk.**—All orders or decrees in proceedings under this article shall have the same force and effect, and may be entered, docketed and enforced and appealed from the same as if made in an original action brought in the court in which the proceeding is pending; provided, however, that a final decree, directing the

payment of money, may be enforced by serving a certified copy thereof personally upon the assignee for the benefit of creditors, and if said assignee wilfully neglects to obey said decree, by punishing him for a contempt of court. The imprisonment of said assignee, by virtue of proceedings to punish him for contempt, as prescribed in this section, or a levy upon his property by virtue of an action, shall not bar, suspend or otherwise affect an action against the sureties on his final bond. All proceedings under this article shall be deemed to be had in court. The said court shall always be open for proceedings under this article. The judge, when named in this article, shall, in such proceedings, be deemed to be acting as the court. The clerk of the court shall keep a separate book, in which shall be entered, in each case, the date and place of record of the assignment, and a minute of all proceedings therein, under this article, with such particularity as the court shall direct by general order. He shall record therein at length the orders and decrees of the court, settling, rejecting or adjusting claims, and directing the payment of money, or releasing assets by the assignee, and removing or discharging the assignee and his sureties, and such other orders as the courts shall direct by general order. The said clerk shall securely keep the papers in each case in a file by themselves, and shall be entitled to a fee of one dollar for filing all the papers in each case, and entering the proceedings in the minute-book, and fifty cents to be paid by the assignee, unless otherwise directed, for recording each order or decree required by this article or the general order of the court. (*Former § 23, renumbered by L. 1914, ch. 15.*)

Source.—L. 1877, ch. 466, § 22, as amended by L. 1878, ch. 318, and L. 1894, ch. 134.

Contempt.—The supreme court has concurrent jurisdiction with the county court to exercise the power conferred by this section, of punishing for contempt of court an assignee for the benefit of creditors who wilfully neglects to obey a final decree for the payment of money, when he has been personally served with a certified copy of such decree. *Matter of Merklen* (1904), 44 Misc. 169, 89 N. Y. Supp. 786.

An assignee who fails to comply with an order of the court directing the payment by him as assignee of a sum of money generally, and not out of any specific fund, is not punishable therefor as for contempt. *Matter of Radtke* (1882), 10 Daly 119.

A final decree against an assignee for the benefit of creditors could not be enforced by attachment for contempt under the act of 1877. *Stockbridge's Assignment* (1879), 7 Abb. N. C. 395.

A claim to property, in possession of an assignee who denies the claimant's title, should not be determined on the petition of the claimant. *Matter of Potter v. Durfee* (1887), 44 7 Hun 187.

Order discharging assignee.—It is a complete defense to an action brought by a judgment-creditor to set aside as fraudulent, a general assignment, to show that, prior to the commencement of the action, the whole of the assigned estate had been distributed under a decree of the County Court, and that the assignee had

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been absolutely discharged upon the accounting. *McLean v. Prentice* (1885), 34 Hun 504.

Former section cited.—*Matter of Morgan* (1885), 99 N. Y. 145, 1 N. E. 406.

And see cases cited under § 15, *ante*.

§ 19. **Sale and compromise of claims and property.**—The judge may, upon the application of the assignee and for good and sufficient cause shown, and upon such terms as he may direct, authorize the assignee to sell, compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing upon the final accounting of such assignee that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any assignee shall be valid, subject, however, to the approval of the judge, and the assignee shall be charged with and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him.

All sales shall be had at public auction unless otherwise ordered by the judge. Upon application to the judge, and for good cause shown, the assignee may be authorized to sell any portion of the estate at private sale; in which case he shall keep an accurate record of each article sold, and the price received therefor, and to whom sold; which account he shall file at once. Upon application by the assignee or a creditor setting forth that a part or the whole of the estate is perishable, the nature and location of such perishable property, and that there will be loss if the same is not sold immediately, the judge, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold with or without notice to creditors. (*Former § 24, renumbered and amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 23, as amended by L. 1885, ch. 464.

Compromise of claims due assignor.—An assignment is not invalidated by a provision authorizing the assignee to compound or compromise debts owing to the assignor. *Bagley v. Bowe* (1887), 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488; *Coyne v. Weaver*, 84 N. Y. 386; *Linther v. Richmond* (1879), 18 Hun 232.

A trustee is authorized to compromise claims due the assignor when it is for the best interests of the parties in interest that it should be done although such power is not specifically given by the instrument of assignment. *Anonymous v. Gelpcke* (1875), 5 Hun 245.

Under the General Assignment Act of 1877 the assignee has no authority to compromise debts owing the estate, nor could such authority, in general terms, be given him by the county judge. Each case depended on its own particular facts. *Matter of Ransom* (1878), 8 Daly 89.

Notice of compromise petition.—On an application by an assignee for leave to compromise a claim due the estate, the court may, in its discretion, require notice to be given to the creditors so that they be heard. *Matter of Youngs* (1879), 5 Abb. N. C. 346.

A compromise made under an order of the court, on a petition by one trustee, purporting to be made on behalf of himself and his co-trustee, but without notice to the assignor or co-trustee, who he knew were opposed to the compromise,

will not protect the trustee on an application for the passing of his accounts. *Anonymous v. Gelpcke* (1875), 5 Hun 245.

Composition with creditors.—An assignment which provides that should there not be sufficient funds to pay the debts in full, the assignees may compromise as to the same and require discharge on payment of a dividend, does not compel the creditors to release the whole of their demands before they can take a dividend. *Jewett v. Woodward* (1831), 1 Edw. 195.

Where the assignment authorized the assignee "to compromise with the creditors" of the assignor for all of his debts and liabilities if in the opinion of the assignee "it would be advantageous" to the creditors and the assignor, it was held that the effect and intent of the provision was to delay the payment of debts and create a trust for the assignor and so rendered the assignment void. *McConnell v. Sherwood* (1831), 34 N. Y. 522.

The authority of an assignee, which, by the terms of the assignment, is limited to the payment of "all the debts and liabilities now due or to grow due" from the assignor, is not exceeded when such assignee, acting in good faith, and by advice of counsel, compromises to the advantage of the estate, and with the approval of the Supreme Court, the obligation of the assignor under an existing lease which has four years to run. *Matter of Ludeke* (1898), 33 App. Div. 397, 54 N. Y. Supp. 121.

Rights of creditors refusing to join composition.—Where, after an assignment, a composition is entered into, creditors who refuse to join in the composition are entitled, on the final accounting of the assignee, only to the proportion they, in common with all of the creditors, would have received of the assets had no composition been made. *Matter of Orsor* (1879), 10 Daly 26.

Proof of acceptance of composition.—If a creditor executes or assents to a composition executed by other creditors of a general assignor, by which the debtor is discharged from his debt, such discharge, if pleaded as a bar to an action brought on the debt, must be established by producing it, if in writing; the recital in a decree of the court, made in a proceeding under the statute for a final accounting by the assignee after such a composition, to the effect that the creditor had so executed or assented to the composition, is no evidence of the fact. *Halstead v. Ives* (1893), 73 Hun 56, 25 N. Y. Supp. 1058, *affd.* 144 N. Y. 705, 39 N. E. 857.

Sale of claim to third person.—Where the creditors contract with a third person to sell and assign to him their claims at a certain percentage, in the absence of proof that such person was acting merely as agent of the debtor, the transaction is to be considered as a purchase and sale, not a compromise. *Grant v. Chapman* (1868), 38 N. Y. 293; *Goldenbergh v. Hoffman* (1877), 69 N. Y. 322.

Discharge of assignee.—The assignee must advertise for claims before he can be discharged by reason of a compromise between the assignor and the creditors. *Matter of Lewenthal* (1878), 10 Daly 14.

Sale of property.—In conformity with the extensive amendments to the Debtor and Creditor Law effected by chapter 360 of the Laws of 1913 and chapter 469 of the Laws of 1915, an assignee for the benefit of creditors may not sell at public auction the assets of the assigned estate without previous order of the court obtained on the return of notice to creditors and others interested. *Matter of Gurian* (1915), 92 Misc. 296, 155 N. Y. Supp. 930.

The assignee is bound to sell the property either at public or private sale, without delay, and to pay over the proceeds to the creditors, and he cannot delay the creditors until the property can be sold at its highest retail prices, without being guilty of a breach of trust. *Hart v. Crane* (1837), 7 Paige 37.

A direction to the assignee to sell the property "within convenient time as to

them should seem meet" makes the assignment void. *Woodburn v. Mosher* (1850), 9 Barb. 255.

A clause in an assignment conferring on the assignee power to execute bills of sale or other conveyances which he might consider necessary or requisite "to carry into effect the intent and purpose" of the instrument in the name of the assignors "for such consideration in money or other things" as he should deem sufficient it was held that the clause did not convey authority to sell on credit or to exchange the assigned property for other property, and so, it did not invalidate the assignment. *Bagley v. Bowe* (1887), 105 N. Y. 171, 11 N. E. 386, 59 Am. Rep. 488, 51 Super. Ct. (19 J. & S.) 169, 1 How. Pr., N. S. 170.

A trust to dispose of property at such time, and in such manner, "as may be most conducive to the interests of the creditors" of the assignor, "and convert the same into money as soon as may be consistent with such interests," was construed as not vesting in the assignee any absolute discretion, but as only superfluously stating that which the law would give him subject to the control of the courts and therefore not void. *Jessup v. Hulse* (1860), 21 N. Y. 168. See also *Benedict v. Huntington* (1865), 32 N. Y. 219; *Townsend v. Stearns* (1865), 32 N. Y. 209.

A direction to the trustee to sell the property without delay, for the best price that can be procured was construed as meaning only that the assignee should sell without unnecessary or unreasonable delay, and not as such an absolute direction for a sale immediately, irrespective of the interest of creditors as would remove the subject from the control of the courts, and thereby avoid the trust. *Griffin v. Marquardt* (1860), 21 N. Y. 121.

Sale on credit.—An assignment which authorizes the assignee to sell the assigned property on credit is fraudulent and void as against the creditors of the assignors. *Nicholson v. Leavitt* (1852), 6 N. Y. 510; *Burdick v. Post* (1852), 6 N. Y. 522; *Barney v. Griffin* (1849), 2 N. Y. 365; *Rapalee v. Stewart* (1863), 27 N. Y. 310; *Townsend v. Stearns* (1865), 32 N. Y. 209; *Burdick v. Post* (1851), 12 Barb. 168; *Murphy v. Bell* (1853), 8 How. Pr. 468.

And on the other hand, it has been held that an assignment expressly withholding from the assignee any discretion to sell the trust property upon credit, and requiring it to be sold only for cash, is valid. *Carpenter v. Underwood* (1859), 19 N. Y. 520.

It has been held that an assignment which authorizes the trustees to convert the property into "money or available means" is void as authorizing a sale on credit. *Brigham v. Tillinghast* (1855), 13 N. Y. 215.

Sale by assignor.—Where, after an assignment and mere symbolical delivery, the assignee permitted the assignor and his clerk to continue in possession of the goods, selling them as before the assignment, and apparently for the benefit of the assignor, it was held that the facts, unexplained were evidence that the assignment was made in fraud of creditors. *Adams v. Davidson* (1851), 10 N. Y. 309.

The assignor may purchase the assigned estate, provided he does so fairly and openly and without detriment to the rights of creditors. *Curnen v. Reilly* (1904), 99 App. Div. 159, 90 N. Y. Supp. 974, affd. 184 N. Y. 518, 76 N. E. 1093.

Vacating sale.—A purchaser at an assignee's sale is a party to a proceeding for the conversion, disposition and distribution of an assigned estate, and is subject to the jurisdiction of the court, and the court may, in a proper case, set aside and vacate the sale without an action brought therefor. *Matter of Sheldon* (1903), 173 N. Y. 287, 65 N. E. 1096.

§ 20. **General powers of court.**—Any proceeding under this article shall be deemed for all purposes, including review by appeal or otherwise, to

be a proceeding had in the court as a court of general jurisdiction, and the court shall have full jurisdiction to do all and every act relating to the assigned estate, the assignees, assignors and creditors, and jurisdiction shall be presumed in support of the orders and decrees therein unless the contrary be shown; and after the filing or recording of an assignment under this article, the court may exercise the powers of a court of equity in reference to the trust and any matters involved therein. (*Former § 25, renumbered by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 25.

Powers of county court.—The foundation of the jurisdiction is the assignment, and while the court may exercise not only specific statutory power, but also "the powers of a court of equity," it is confined by the very words of the act to those "in reference to the trust and any matters involved therein." *Matter of Holbrook* (1885), 99 N. Y. 539, 2 N. E. 887. See *Wiltse and Fromer* (1893), 5 Misc. 105, 25 N. Y. Supp. 733; *McLean v. Prentice* (1885), 34 Hun 504, *affd. rearg.* 23 Wk. Dig. 73; *Ætna Nat. Bank v. Shotwell* (1891), 37 N. Y. St. Rep. 253, 13 N. Y. Supp. 828; *Matter of Morgan* (1885), 99 N. Y. 145, 1 N. E. 406; *Bloomington v. Maas* (1900), 30 Misc. 672.

Thus where one H procured from the County Court an order directing an assignee of one W and others, who had been carrying on the business of bankers, to pay to him a certain sum of money on the ground that H had deposited a check for the sum named with W to purchase drafts, which, owing to the lateness of the hour at which the money was deposited, were to be delivered the next morning, and on the next morning the bank made a general assignment for the benefit of creditors, it was held that the County Court had no jurisdiction to make the order. *Matter of Witmer* (1886), 40 Hun 64.

But the County Court has no jurisdiction of an action provided upon an alleged claim adverse to the assignment, and in hostility to the execution of the trust. Thus it has no power to determine a controversy between a claimant and the assignee, as to the title to certain property, on the petition of the claimant, where the assignee is in possession and claims to own the property. *Matter of Potter v. Durfee* (1887), 44 Hun 197.

Appointment of substituted assignee.—Under this section the County Court has power to appoint a substituted assignee in the case of a deceased assignee of a debtor whose business was conducted, and general assignment was recorded, in the county, and the power is not confined to the case provided in section 11. *Rogers v. Pell* (1901), 166 N. Y. 565, 60 N. E. 265.

Proceedings taken by creditors and other interested parties under the assignment acts are special proceedings. *Matter of Thorn* (1881), 10 Daly 71.

References.—Whether or no the court has power to grant a reference on the petition of an assignee for the purpose of advising him whether persons who equipped premises leased by the assignor under a contract whereby they retained title until the price was paid have a right to remove the articles, it will not do so where the financial responsibility of the conditional vendors is not questioned, where they can enforce their right to retake the articles by other proceedings, where the rights of the mortgagees, judgment creditors and lienors cannot be adjudicated on the reference, and it will be so long and expensive as to defeat the purpose of the application. *Matter of United States Restaurant & Realty Co.* (1910), 140 App. Div. 486, 125 N. Y. Supp. 408.

Former section cited.—*Schuehle v. Reiman* (1881), 86 N. Y. 270.

See notes and cases cited under § 15, *ante*.

§ 21. Trial, costs and commissions.—The court, in its discretion, may order a trial by jury or before a referee, of any disputed claim or matter arising under the provisions of this article. It may in its discretion award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under this article. The assignee or assignees named in any assignment shall receive for his or their services a commission of not to exceed five per centum on the whole sum which will have come into his or their hands, except in a case where such percentage shall not equal two hundred dollars in which case the court may grant such a sum which with such percentage shall equal two hundred dollars. If the assignee continues the business the court may allow him additional compensation equal to what he might be allowed as hereinabove provided.

The actual and necessary expenses incurred by the assignee in the administration of the estate shall be reported in detail, under oath, and examined and approved or disapproved by the court. If approved they shall be paid out of the estate. (*Former § 26, renumbered and amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 26, as amended by L. 1878, ch. 318, § 7.

Construction.—This section is not retroactive. *Hunker v. Bing* (1881), 9 Fed. 277.

Discretion of court to order trial by jury or before a referee. *Matter of Morgan* (1885), 99 N. Y. 145, 148, 1 N. E. 406; *Matter of Marklin* (1885), 13 Daly 105.

Reference of disputed claims.—*Matter of Fairchild* (1881), 10 Daly 74; *Matter of Atwood*, (1896), 3 App. Div. 578, 38 N. Y. Supp. 338; *Matter of Friedman* (1880), 82 N. Y. 609; *Matter of Jesselson* (1882), 10 Daly 104.

Compensation of assignee.—The provision that the assignee shall receive the commissions specified "on the whole sum which will have come into his hands" refers to the money actually received, not to the property assigned. *Matter of Hulburt* (1882), 89 N. Y. 259.

The assignee is not entitled to commissions on the value of the mortgaged property, but only on what was received therefor. *Matter of Dean* (1881), 86 N. Y. 398. *Contra, Cox v. Schermerhorn* (1879), 18 Hun 16.

Where the assignee, by arrangement with creditors to whom the insolvent firm had pledged rice, which being unmilled was quite unmarketable, procures the rice to be milled, sells the same, and realizes a surplus for the assigned estate, he is not entitled to commission upon the entire sale price, but only upon the surplus which was paid to the assigned estate. *Matter of Talmage* (1899), 39 App. Div. 466, 57 N. Y. Supp. 427, *affd.* 161 N. Y. 643, 57 N. E. 1126.

An assignment is not rendered void by a provision giving the assignees, one of them being a lawyer, "a just and reasonable compensation for labor, time, services, and attention," in the business as the language is to be construed as meaning no more than the commissions fixed by law. *Campbell v. Woodworth* (1862), 24 N. Y. 304. See also *Jacobs v. Remsen* (1867), 36 N. Y. 667.

An assignee who uses the funds of the assigned estate in the purchase of claims against the assignors, for less than the estate would have yielded to creditors on an honest administration, is not entitled to the profits derived from such pur-

chase; creditors influenced by him so to transfer their claims should be allowed to present claims for the balance due upon their ratable proportions of the estate and no commissions or expenses should be allowed to the assignee from the time that he began to so misuse his position. *Matter of Coffin* (1879), 10 Daly 27.

For other cases dealing with the compensation of assignees, see *Barney v. Griffin* (1849), 2 N. Y. 365; *Jewett v. Woodward* (1831), 1 Edw. Ch. 195; *Wynkoop v. Shardon* (1865), 44 Barb 83; *Matter of Fulton* (1883), 30 Hun 258; *McCann v. O'Brien* (1899), 40 App. Div. 193, 57 N. Y. Supp. 897.

Payment of fees and expenses deferred until final accounting.—*Matter of Brien Co.* (1915), 165 App. Div. 679, 151 N. Y. Supp. 103.

Assignment set aside for fraud.—It seems that it is not usual to allow commissions and expenses to an assignee for the benefit of creditors, where the assignment has been held void and set aside for fraud. *Matter of Thoesen & Brother* (1901), 62 App. Div. 87, 70 N. Y. Supp. 924; *Dorney v. Thacher* (1894), 76 Hun 361, 27 N. Y. Supp. 787; *Dexter v. Adler* (1888), 1 N. Y. Supp. 684.

Costs, fees and allowances.—An authority to the assignee to employ and pay for all necessary attorneys, clerks and agents, does not, of itself, render the assignment void, as it authorizes no more than is implied by law. *Jacobs v. Remsen* (1867), 36 N. Y. 668.

In proceedings under a general assignment neither costs or counsel fees, payable out of the assigned estate, can be allowed to parties other than the assignee. *Matter of Currier* (1878), 8 Daly 119.

Upon the trial of a disputed claim arising under this act costs and reasonable counsel fee may be awarded to the prevailing party. *Matter of Barr & Co.*, 6 Misc. 526, 27 N. Y. Supp. 416.

Costs of an accounting, including referees and stenographer's fees and allowances to the assignee, should be taxed by the clerk on notice to all parties who have appeared in the proceeding. *Matter of Oakley* (1903), 41 Misc. 652, 85 N. Y. Supp. 227.

Where an assignee carries on the former business of the assignor, and it does not appear that such continuance was a benefit to the estate, he will not be allowed the expenses thereby incurred. *Matter of Marklin* (1883), 10 Daly 122; See also *Matter of Orsor* (1879), 10 Daly 260; *Matter of Petchell* (1882), 10 Daly 102.

Counsel fees of a general assignee should not be allowed by order, but should be paid by him and be made a part of his account. *Matter of Reynolds & Co.* (1900), 30 Misc. 397, 62 N. Y. Supp. 515.

The assignee cannot be allowed for counsel fees and disbursements in depending actions against the assignor, or in any litigation not involved in the performance of duties required by the trust. *Levy's Accounting* (1876), 1 Abb. N. C. 177.

Where the attorneys for the assignee had, subsequently to the filing of his account, performed services, for which they had not been paid and for which taxable costs would not compensate them properly, an allowance additional to taxable costs was made. *Matter of Oakley* (1903), 41 Misc. 653, 85 N. Y. Supp. 227.

Allowance for legal services rendered to the assignee, are made to the assignee and not to counsel. *Matter of Worthley* (1878), 10 Daly 12.

For other cases dealing with costs, fees and allowances, see *Mead v. Phillip* (1843), 1 Sard. ch. 85; *Matter of Manahan* (1879), 10 Daly 39; *Matter of Elmore* (1880), 10 Daly 48; *Smith v. Wise* (1892), 132 N. Y. 172, 30 N. E. 229; *Matter of Carrick* (1885), 13 Daly 181; *Matter of Weinhaus* (1878), 5 Abb. N. C. 355; *Matter of Wolff* (1886), 13 Daly 481, 1 N. Y. St. Rep. 273; *Matter of Risley* (1880), 10 Daly 44; *Matter of Rauth* (1880), 10 Daly 52; *Mayer v. Hazard* (1888), 49 Hun 222, 1 N. Y. Supp. 680; *Etna National Bank v. Shotwell* (1891), 13 N. Y. Supp. 828;

L. 1909, ch. 17.

Assignments for benefit of creditors.

§ 22.

Matter of Watt (1878), 10 Daly 11; *Matter of Schaller* (1880), 10 Daly 57; *Dorney v. Thacher* (1894), 76 Hun 361, 27 N. Y. Supp. 787.

§ 22. **Wages and preferred claims.**—In all distribution of assets under all assignments made in pursuance to this article, the wages or salaries actually owing to the employees of the assignor or assignors at the time of the execution of the assignment for services rendered within three months prior to the execution of the assignment, not exceeding three hundred dollars to each employee, shall be preferred before any other debt; and should the assets of the assignor or assignors not be sufficient to pay in full all the claims preferred, pursuant to this section, they shall be applied to the payment of the same pro rata to the amount of each such claim. (*Former § 27, renumbered and amended by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 29, as amended by L. 1884, ch. 328; L. 1886, ch. 283; L. 1897, ch. 266; L. 1897, ch. 624.

Consolidators' note.—The general assignment act was twice amended in the year 1897, once by chapter 266 and again by chapter 624. The earlier statute took effect about one month prior to the later one. There was an amendment contained in the earlier statute as follows: "All sums due to truckmen or cartmen for the payment of freight and for the carriage of goods, wares or merchandise shall be deemed and treated as wages for the purposes of this act." This provision was omitted when the statute was amended the second time by chapter 624. It may be that this omission was made by inadvertence, but there is nothing in the statutes themselves to indicate that it was an error, and therefore, following the usual rule for the construction of statutes, chapter 624 has been treated as superseding chapter 266 and the words which were found in chapter 266 and not in chapter 624 relating to truckmen or cartmen have been omitted as having been repealed.

Reference.—Payment of wages by receiver of corporation or partnership, Labor Law, § 9.

Constitutionality.—The provisions of this section are not unconstitutional as the legislature may permit a voluntary assignment to be made only on expressed conditions, and the assignor, by the act of making the assignment, accepts the conditions. *Richardson v. Thurber* (1887), 104 N. Y. 606, 607, 11 N. E. 133.

Not retroactive.—The provisions of this section created no preference in favor of employes for wages earned before its enactment. *Matter of Scott* (1896), 148 N. Y. 588, 42 N. E. 1079.

A lien is created by this section in favor of wage claimants which will follow a fund transferred from assignee in a state court to a trustee in bankruptcy. In *re Slomka* (1902), 117 Fed. 688, revd. on the ground that the priority is created only at the distribution of the debtor's estate by the assignee, 122 Fed. 630 (1903), 58 C. C. A. 322.

An express provision for the preference of wages of employees is not necessary to the validity of the assignment. *Richardson v. Herron* (1886), 39 Hun 537; *Burley v. Burley* (1886), 40 Hun 121; *Johnston v. Kelly* (1887), 43 Hun 379.

A salesman on commission is an "employee" even though his compensation is measured in part by the profits. *Matter of Donaldson* (1899), 27 Misc. 745, 59 N. Y. Supp. 656; *Matter of Smith* (1899), 59 N. Y. Supp. 799.

Independent contractors are not entitled to a preference as employees. *Matter of Ripeom & Newland Fur Co.* (1900), 32 Misc. 56, 66 N. Y. Supp. 113.

Independent consignee.—Commissions earned by an employee as an independent consignee are not entitled to a preference. *Matter of Fowler* (1899), 29 Misc. 425, 60 N. Y. Supp. 545.

Services for cartage rendered to an assignor in trucking and carting merchandise are not entitled to a preference under this section. *Matter of Kimberly* (1899), 37 App. Div. 106, 55 N. Y. Supp. 1024.

Promissory note taken for wages.—The preference granted by this section is not nullified by the fact that the assignor had given the employee a promissory note for the amount of his wages. *Matter of Scott* (1896), 148 N. Y. 588, 42 N. E. 1079; *Matter of Heath* (1887), 46 Hun 114.

But if the employee has transferred such notes before the assignment and after the assignment buys them back he is not entitled to a preference in their payment. *Spencer v. Hodgman* (1890), 57 Hun 490, 11 N. Y. Supp. 241.

An employee of an assignor is entitled to be scheduled as a preferred creditor for salary due at the date of the assignment, and also for amounts due on notes executed prior to the assignment in payment of monthly bonuses, but not due until after the date of the assignment. Such notes should be considered as "actually owing" within the meaning of the statute, although not presently payable. *Strauss v. Morrison* (1914), 165 App. Div. 163, 150 N. Y. Supp. 587.

Former employees.—The preference granted by this section includes wages and salaries actually owing to former employees of the assignor at the time of the execution of the assignment, and is not limited to the wages and salaries of those in his employ at the time. *Matter of Scott* (1896), 148 N. Y. 588, 42 N. E. 1079; *Matter of Heath* (1887), 46 Hun 114.

Compensation dependent on amount of purchases.—A person in the employ of a corporation engaged in the wholesale pickle business, whose duties were to contract for the purchase of pickles from the producers, to receive them at the factory, sort, weigh and prepare them for shipment, and whose compensation was regulated by the amount of his purchases, is an employee of the corporation within the meaning of this section. *Hopkins v. Cromwell* (1903), 89 App. Div. 481, 85 N. Y. Supp. 839.

Salary and percentage of net profits.—Where the employment of one employed for a year at a fixed salary with an additional percentage on the net profits of the business conducted by him, provided they amounted to \$20,000 for the year, was terminated within five months by the employer making an assignment for the benefit of creditors, and after more than \$10,000 net profits had been realized from the business conducted by the employee it was held that the contingency upon which the commission was to be earned having been prevented by the assignor in terminating the contract the employee became immediately entitled to a percentage of the net profits earned at the time of the assignment, and that such percentage was salary and entitled to a preference. *Matter of Sawyer* (1894), 31 Abb. N. C. 342, 29 N. Y. Supp. 1097.

Wages turned into the business.—Where the alleged employee was the reputed wife of the assignor, and came and went as she chose, and testified that she never drew any salary but turned it back into the business, it was held, that even if she were an employee, which, under the facts of the case, the court doubted, still by turning the money back into the business it had become a loan and was no longer a claim for salary due an employee and therefore was not within the protection of this section. *Clark v. Andrews* (1892), 19 N. Y. Supp. 211.

§ 23. **Limitation of preferences.**—In all general assignments of the estates of debtors for the benefit of creditors any preference created therein, other than for the wages or salaries of employees under the last section,

shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries, and the costs and expenses of executing such trust; and should said one-third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then said assets shall be applied to the payment of the same pro rata to the amount of each of said preferred claims. (*Former § 28, renumbered by L. 1914, ch. 360.*)

Source.—L. 1877, ch. 466, § 30, as added by L. 1887, ch. 503.

Consolidators' note.—The reference in this section to L. 1884, ch. 328, and L. 1886, ch. 283, is omitted as obsolete. These chapters were acts amendatory of the General Assignment Act, § 29, prior to the amendments by L. 1897, ch. 266 and 624.

References.—Transfers by insolvent corporations, Stock Corporations Law, § 66. Fraudulent conveyances and transfers by insolvents, Personal Property Law, § 35; Real Property Law, §§ 262–266.

Effect of giving prohibited preference.—A preference exceeding in amount one-third of the assets of an insolvent who has made an assignment for the benefit of creditors, given either in the assignment or by a separate instrument, which may be construed as part of the assignment, does not, in the absence of any question as to the *bona fides* of the debt preferred, or of any claim of fraud, render the assignment wholly void. The statute operates on the preference only, not upon the assignment itself or the title of the assignee; and it only operates to reduce the preference to one-third, and this, although the assignor and the preferred creditor were, when the act was done operating as a preference, cognizant of the fact that it would exceed the statutory limit. *Central National Bank v. Seligman* (1893), 138 N. Y. 435, 34 N. E. 196, revg. 64 Hun 615, 19 N. Y. Supp. 362; *Abegg v. Bishop* (1894), 142 N. Y. 286, 36 N. E. 1058; *Cutter v. Hume* (1891), 17 N. Y. Supp. 255. An action, therefore, is not maintainable to set aside the transfer or assignment because of the unlawful preference. *Abegg v. Bishop* (1894), 142 N. Y. 286, 36 N. E. 1058.

Where separate and independent transfers of the property of a debtor are made to particular creditors in payment of their debts there is no violation of this section. *Maass v. Falk* (1895), 146 N. Y. 34, 40 N. E. 504; *Dodge v. McKechnie* (1898), 156 N. Y. 514, 51 N. E. 268.

To invalidate transfers in payment of *bona fide* existing debts made by an assignor after his insolvency and shortly before the assignment, upon the ground that they constitute an unlawful preference within this section, the evidence must fairly show a knowledge by the creditors that an assignment was contemplated, and that the purpose of the transfer was to give a preference in excess of that allowed by this section. *Shotwell v. Dixon* (1900), 163 N. Y. 43, 44, 57 N. E. 178.

Sale of entire assets to one creditor.—An absolute sale and transfer by an insolvent debtor of all of his property, both real and personal, at its full value, in payment of debts to but one creditor, without making or contemplating any general assignment, is not within the provisions of this section prohibiting preferences in such assignments for more than one-third of the value of the assigned estate. *Tompkins v. Hunter* (1896), 149 N. Y. 117, 43 N. Y. 532.

Transfers as security.—This section was not intended to and does not prevent a creditor from obtaining payment of, or security and thereby a preference for, his debt even from an insolvent debtor and if he accepts in ignorance of any intent on the part of the debtor to make an assignment the section does not apply,

and the security is not thereby rendered invalid by the fact that the debtor does thereafter execute an assignment. *Manning v. Beck* (1891), 129 N. Y. 1, 29 N. E. 90, 14 L. R. A. 198.

But if the creditor accepts the security with knowledge that the debtor intends to make an assignment and that the security was executed in contemplation thereof, the security will be considered a part of the preference mentioned in the statute. *Berger v. Varreimann* (1891), 127 N. Y. 281, 27 N. E. 1065, 12 L. R. A. 808.

Where a chattel mortgage, executed and delivered by a debtor to one of his creditors, and a transfer of business accounts to a third person, do not cover all the debtor's property, and are only intended to secure the payment of debts of the mortgage and certain other creditors mentioned therein they are not within the prohibitions of this section. *Delaney v. Valentine* (1898), 154 N. Y. 692, 49 N. E. 65.

An assignment of all of a debtor's property to a creditor to secure a debt, followed by an assignment of the surplus to other creditors does not create an assignment for the benefit of creditors void either in whole or in part under this section. *Boessneck v. Cohn* (1889), 7 N. Y. Supp. 620.

Confession of judgment.—The fact that the whole of the stock in trade of a debtor has been levied upon by virtue of an execution on a confessed judgment does not violate this section as the provisions of this section have no application to the case of a judgment and execution levied thereunder, but apply only to cases of general assignment. *Stein v. Levy* (1890), 55 Hun 381, 8 N. Y. Supp. 505.

Where it appeared that an insolvent firm had an assignment prepared and executed it, and at the same time made confessions of judgment in favor of certain *bona fide* creditors and waited, before delivering the assignment, until they were informed that a levy had been made under the judgments the amount of which exceeded one-third of their estate, it was held that all of their acts were part of one scheme, the effect of which was to create forbidden preferences, and that the assignment and judgments preceding it were fraudulent and void. *First National Bank v. Bard* (1891), 59 Hun 529, 13 N. Y. Supp. 688. Of similar effect, see *Spelman v. Freidman* (1892), 130 N. Y. 421, 29 N. E. 765; *Abegg v. Schwab* (1889), 23 Abb. N. C. 7; *Wilcox v. Payne* (1890), 8 N. Y. Supp. 407.

Assignment by partners.—While a partner may apply his individual property to the payment of the firm debts, he must, if he undertakes to do so by a general assignment, respect this section. *Wheeler v. Childs* (1897), 22 App. Div. 613, 48 N. Y. Supp. 1023.

Preference made by one of the members of a firm.—A clause in a general assignment of individual property made by a member of a firm, the property of which has been distributed under an assignment by the firm, which directs after the payment of certain preferred claims not exceeding one-third of the assets of his estate, the distribution of the remainder of his estate among the firm as well as his individual creditors, ratably and in the same proportion, creates a preference in favor of the firm creditors that is in contravention of the statute and is therefore void, and such remainder should be distributed among his individual creditors. *Matter of Dauchy* (1901), 169 N. Y. 460, reversing 59 App. Div. 383, 69 N. Y. Supp. 827.

Direction to follow statute.—An assignment which gave preferences which were directed to be paid in full "only in case one-third of the assigned estate shall be sufficient for that purpose, and the said preferences shall, in every particular, be made in accordance with the law of the State of New York in regulation of preferential assignments" was held to be valid. *Chambers v. Smith* (1891), 60 Hun 248, 14 N. Y. Supp. 706.

Foreign corporations.—An assignment by a foreign corporation, of property situated in the State of New York, executed in this state by a foreign corporation doing business herein, is subject to the provisions of this section. *Matter of Halstead*, 42 App. Div. 101, 58 N. Y. Supp. 898.

Only one-third of the net balance remaining in the hands of the assignee, after paying "such wages or salaries, and the costs and expenses of executing such trust," is applicable to the payment of the preferences which are provided for by the assignor in his deed. *In re Tuller's Estate* (1889), 5 N. Y. Supp. 647.

The rights of creditors can only be asserted, in the case of unlawful preferences in violation of this section, by the assignee by an action in aid of the assignment for the benefit of all creditors. *Central National Bank v. Seligman* (1893), 138 N. Y. 435, 34 N. E. 196, revg. 64 Hun 615, 19 N. Y. Supp. 362.

Action to set aside transfers.—An assignee may maintain an action to set aside transfers made by his assignors in violation of this section where the complaint, although not alleging that the transfers were made with fraudulent intent, alleges that such payments and transfers were made by the assignors and were received by their transferees with knowledge of the insolvency of the assignors and in contemplation of the impending general assignment. *Wile v. Cauffman* (1899), 33 App. Div. 206, 207, 57 N. Y. Supp. 240.

A motion, to compel a general assignee to make a preferred payment of a claim for services under this section, will be denied as prematurely made, where an action is pending to set aside the assignment and it does not appear whether the services were rendered within a year of it, nor whether the assignee had funds enough to pay in full all preferred claims of the nature of the one in question. *Matter of Jacobs* (1899), 27 Misc. 757, 59 N. Y. Supp. 549.

Trust creditors are not entitled to preference over general creditors. *Matter of Cavin v. Gleason* (1887), 105 N. Y. 256, 11 N. E. 504.

Scaling down preferences.—*Johnson v. Rapalyea* (1896), 1 App. Div. 463, 37 N. Y. Supp. 540.

The words "pro rata" apply where the one-third of the assets, which might be applied in payment of preferred claims, was not enough to pay all of the preferred creditors, to the creditors embraced in some one class, and not to any right of preference or payment between the different creditors in the several classes of preferred creditors. *Matter of Eaton* (1891), 59 Hun 84, 13 N. Y. Supp. 135, affd. 126 N. Y. 655, 27 N. E. 853; *Matter of Bryce* (1891), 16 Daly 443.

Order of payment.—Where an assignment directs the assignee "to pay and discharge in full the following described indebtedness of the assignors to the individual hereinafter mentioned for the amounts specified in their order," the assignee is justified in paying such claims in their order, with interest, although, by so doing, the fund applicable to preferred debts is exhausted before all the preferred creditors are paid. *Matter of Fay* (1894), 6 Misc. 462, 27 N. Y. Supp. 910. To the same effect, see *Matter of Sisson* (1891), 59 Hun 330, 12 N. Y. Supp. 820; *Matter of Eaton* (1891), 59 Hun 84, 13 N. Y. Supp. 135, affd. 126 N. Y. 655, 27 N. E. 853.

§ 24. **Appraisal of insolvent estate in the hands of assignee.**—Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part any insolvent estate in the hands of any assignee for the benefit of creditors, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate

similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time. (*Former § 29, renumbered by L. 1914, ch. 360.*)

Source.—L. 1891, ch. 34.

ARTICLE III.

INSOLVENT'S DISCHARGE FROM DEBTS.

Section 50. Who may be discharged.

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87. Discharge, when void.

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§ 50. Who may be discharged.—An insolvent debtor who is a resident of the state at the time of presenting his petition, may be discharged from his debts, as prescribed in this article.

Source.—Code of Civ. Pro. § 2149, as added by L. 1880, ch. 178; originally derived from R. S., pt. 2, ch. 5, tit. 1, § 1.

Consolidators' note.—Although this article has been superseded by the enactment of the National Bankruptcy Act, it has not been repealed. It has been retained in the event of the repeal of the national act.

For history of legislation on this subject, see *American Flask, etc., Co. v. Son* (1867), 30 Super. (7 Rob.) 233, 3 Abb. N. S. 333.

Effect of bankruptcy act.—The Federal Bankruptcy Act of 1898 operates as a suspension of proceedings under this article for the discharge of an insolvent from his debts. The rule is that when congress has exercised its constitutional power to enact a uniform bankruptcy law, all existing state insolvency laws applying to the same persons are suspended; but this power not being exclusive, state laws are valid and continue operative so far as they do not conflict with the paramount federal laws. *Ogden v. Saunders* (1827), 12 Wheat. (U. S.) 213; *Sturges v. Crowninshield* (1819), 4 Wheat. (U. S.) 122; *Singer v. Nat. Bedstead Mfg. Co.* (1903), 11 Am. B. R. 276. See *Collier on Bankruptcy* (11th ed.),

§ 51. To what court application to be made.—Application for such a discharge must be made, by the petition of the insolvent, addressed to the county court of the county in which he resides; or, if he resides in the city of New York, to the supreme court.

Source.—Code Civ. Pro. § 2150, as added by L. 1880, ch. 178, and amended by L. 1895, ch. 946; originally derived from R. S., pt. 2, ch. 5, tit. 1, §§ 1 and 2.

Place of residence.—Where it appeared that an application for a discharge was made to the County Court of Ulster County, in which county the petitioner with four associates owned a club house in a solitary region of the Catskill mountains, where it was his custom to remain several months of each year for rest and recreation, but that his actual domicile was in Elizabeth, New Jersey, where he and his family lived, it was held that the term residence embraced the idea of domicile, either for the purpose of living or business, and that the county of Ulster was not the place where the petitioner resided or had a domicile within the meaning of this section. *Matter of Dimock* (1896), 4 App. Div. 301, 39 N. Y. Supp. 501.

Decision as *res judicata*.—Where, upon an application made by an insolvent debtor for a discharge, it appears that a similar application has already been made to another court having jurisdiction, and decided against the applicant on the merits, the matter should be regarded as *res judicata* and the second application denied. *Matter of Roberts* (1877), 10 Hun 253.

§ 52. Contents of petition.—The petition must be in writing; it must be signed by the insolvent, and specify his residence; it must set forth, in substance, that he is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and, in all other respects, to comply with the provisions of this article, for the purpose of

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being discharged from his debts; and it must pray that, upon his so doing, he may be discharged accordingly. It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect, that the petition is in all respects true, in matter of fact.

Source.—Code Civ. Pro. § 2151, as added by L. 1880, ch. 178.

§ 53. Consent of creditors to be annexed.—The petitioner must annex to his petition one or more written instruments, executed by one or more of his creditors, residing in the United States, having debts owing to him or them in good faith, then due or thereafter to become due, which amount to not less than two-thirds of all the debts, owing by the petitioner to creditors residing within the United States. Each instrument must be to the effect, that the person or corporation, executing it, consents to the discharge of the petitioner from his debts, upon his complying with the provisions of this article.

Source.—Code Civ. Pro. § 2152, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 2.

To confer jurisdiction upon the court to grant the discharge it must appear from the petition and schedule that creditors representing debts owing to them in good faith, amounting to two thirds of all the debts owing by the insolvent debtor to creditors residing within the United States, have consented thereto; otherwise the discharge is void and may be attacked collaterally. *Duer v. Hunt* (1899), 41 App. Div. 581, 58 N. Y. Supp. 742.

Where the schedule annexed to the petition presented by an insolvent debtor shows, upon its face, that the creditors joining in the petition do not own two-thirds of the debts the officer acquires no jurisdiction, and a discharge based upon the petition is void. *Morrow v. Freeman* (1875), 61 N. Y. 515.

Validity of consent.—Where it appeared that most of the consents were obtained upon the promise of the petitioner that if he obtained his discharge he would devote five years of his life to the benefit of his consenting creditors, it was held that, while the arrangement was, perhaps, not obnoxious to sections 61 and 64, *post*, it bore upon the question of good faith and made the consents given of doubtful validity. *Matter of Dimock* (1896), 4 App. Div. 301, 39 N. Y. Supp. 501.

Consent by attorney in fact.—A consent, subscribed by a person who describes himself as attorney in fact for a creditor, unaccompanied by any evidence of his authority to do so, is fatally defective. *Duer v. Hunt* (1899), 41 App. Div. 581, 58 N. Y. Supp. 742.

A consent signed by certain persons as next of kin of a deceased creditor, unaccompanied by any evidence that the estate of the creditor had been administered and the claim transferred by the personal representative of the deceased creditor to the next of kin, is insufficient. *Duer v. Hunt* (1899), 41 App. Div. 581, 58 N. Y. Supp. 742.

Who are creditors.—*Matter of Dimock* (1896), 4 App. Div. 301, 39 N. Y. Supp. 501.

§ 54. Consent of executor, administrator, receiver, or trustee.—An executor or administrator may become a consenting creditor, under the order of the surrogate's court from which his letters issued. A trustee, official assignee, or receiver of the property of a creditor of the petitioner, whether created by operation of law or by the act of parties, may become a consent:

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ing creditor, under the order of a justice of the supreme court. A person who becomes a consenting creditor, as prescribed in this section, is chargeable only for the sum which he actually receives, as a dividend of the insolvent's property.

Source.—Code Civ. Pro. § 2153, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 3; L. 1850, ch. 210.

§ 55. **Consent of corporation or joint-stock association.**—Where a corporation or joint-stock associations becomes a consenting creditor, its consent must be executed under its common seal, and may be attested by any director or other officer thereof, duly authorized for that purpose; who may make any affidavit, required of a creditor in the proceedings.

Source.—Code Civ. Pro. § 2154, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 7.

§ 56. **Consent of partnership.**—Where a partnership becomes a consenting creditor, the consent may be executed in its behalf, and any affidavit, required of a creditor in the proceedings, may be made, by either of the partners.

Source.—Code Civ. Pro. § 2155, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 8.

§ 57. **Effect of consent where petitioner is a joint debtor.**—A creditor's consent does not affect his remedy against any person or persons indebted jointly with the petitioner; and the petitioner's discharge has the effect, as between the creditor and the other joint debtors, of a composition between the petitioner and the creditor, made as prescribed in article eight of this chapter.

Source.—Code Civ. Pro. § 2156, as added by L. 1880, ch. 178; derived from L. 1849, ch. 176.

§ 58. **Consent of purchaser or assignee of debt.**—Where a consenting creditor is the purchaser or assignee of a debt against the petitioner, or the executor, administrator, trustee, or receiver of such a purchaser or assignee, he is deemed, for all the purposes of this article, except as to the declaration and receipt of dividends, a creditor only to the amount, actually and in good faith paid for the debt, by him, or by the decedent or other person, from whom he derives title, and remaining uncollected. This section is not affected by the recovery of a judgment for the debt, after the purchase or assignment; but in that case, the consenting creditor may include the uncollected costs, as if they were part of the sum paid for the debt.

Source.—Code Civ. Pro. § 2157, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 10.

An assignee or purchaser of a debt, who consents to the discharge, should, in his consent, specify the sum actually and in good faith paid for the debt; an allegation

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that he paid "full consideration" is insufficient. *Duer v. Hunt* (1899), 41 App. Div. 581, 58 N. Y. Supp. 742.

The fact that a person becomes a petitioning creditor for the nominal amount of a debt purchased by him, rather, than for the amount actually paid by him, will not, *per se*, vitiate the discharge. *Small v. Graves* (1850), 7 Barb. 576. But one who has become a creditor of an insolvent, knowing him to be such, by buying a demand against him for less than the nominal amount of such demand, cannot, by prosecuting the demand to judgment, and recovering the whole amount, entitle himself to be considered a creditor for the whole amount. *Emberson's Case* (1863), 16 Abb. Pr. 457.

§ 59. **Consenting creditor must relinquish security.**—A creditor who has, in his own name, or in trust for him, a mortgage, judgment, or other security, for the payment of a sum of money, which is a lien upon, or otherwise affects, real or personal property belonging to the petitioner, or transferred by him since the lien was created, cannot become a consenting creditor, with respect to the debt so secured, unless he adds to or includes in his consent, a written declaration, under his hand, to the effect, that he relinquishes the mortgage, judgment, or other security, so far as it affects that property, to the trustee to be appointed pursuant to the petition, for the benefit of all the creditors. Such a declaration operates, to that extent, as an assignment to the trustee, of the mortgage, judgment, or other security; and vests in him accordingly all the right and interest of the consenting creditor therein.

Source.—Code of Civ. Pro. § 2158, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 11.

Effect of failure to relinquish security.—The omission of a petitioning creditor to relinquish a security held by him, does not affect the jurisdiction of the officer, nor avoid the discharge. *Russell & Erwin Mfg. Co. v. Armstrong* (1861), 12 Abb. Pr. 472; *Matter of Phillips* (1864), 43 Barb. 108; *Soule v. Chase* (1863), 1 Robt. 322.

Effect of release on joint judgment of creditor.—Where a creditor has a joint judgment against two, the signing of the petition for one does not transfer to the assignee his claim against or lien upon the property of the others. *Elsworth v. Caldwell* (1872), 48 N. Y. 680.

§ 60. **Penalty if creditor swears falsely.**—If a creditor knowingly swears, in any proceedings authorized by this article, that the petitioner is, or will become, indebted to him, in a sum of money, which is not really due, or thereafter to become due; or in more than the true amount; or that more was paid for a debt, which was purchased or assigned, than the sum, actually and in good faith paid therefor; he forfeits to the trustee, to be recovered in an action, twice the sum, so falsely sworn to.

Source.—Code of Civ. Pro. § 2159, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 12.

§ 61. **Affidavit of consenting creditor.**—The consent of a creditor must be accompanied with his affidavit, stating as follows:

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1. That the petitioner is justly indebted to him, or will become indebted to him, at a future day specified therein, in a sum therein specified; and, if he, or the person from whom he derives title, is or was the purchaser or assignee of the debt, he must also specify the sum, actually and in good faith paid for the debt, as prescribed in section fifty-eight of this chapter.

2. The nature of the demand, and whether it arose upon written security, or otherwise, with the general ground or consideration of the indebtedness.

3. That neither he, nor any person to his use, has received from the petitioner, or from any other person, payment of a demand, or any part thereof, in money or in any other way, or any gift or reward of any kind, upon an express or implied trust, confidence, or understanding, that he should consent to the discharge of the petitioner.

Where a consenting creditor is an executor, administrator, trustee, receiver, or assignee, he may state the necessary facts, in his affidavit, upon information and belief, setting forth therein the grounds of his belief; but in that case, the consent must also be accompanied with the affidavit of the insolvent, to the effect, that all the matters of fact stated in the affidavit of the consenting creditor, are true.

Source.—Code Civ. Pro. § 2160, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 4; L. 1850, ch. 210, § 2.

Statement of nature of claims.—*Matter of Dimock* (1896), 4 App. Div. 301, 39 N. Y. Supp. 501; *Schaeffer v. Soule* (1881), 23 Hun 583; *Soule v. Chase* (1863), 1 App. Pr. N. S. 48; *Merry v. Sweet* (1865), 43 Barb. 475; *Wright v. Crawford* (1859), 2 Hilt. 338.

Affidavit made outside state.—*Rusher v. Sherman* (1858), 28 Barb. 416.

§ 62. When non-resident creditor to annex accounts and securities.—A consenting creditor, residing without the state, and within the United States, must annex to his consent the original accounts, or sworn copies thereof, and the original specialties or other written securities, if any, upon which his demand arose or depends. Provided, however, that when such original specialties, or other written securities, are lost, such fact must be stated as a reason for not annexing thereto the consent, and the fact of the loss, and the manner of the loss thereof must be stated in the affidavit of the creditor to the best of his knowledge, or must be otherwise proved by affidavit to the satisfaction of the court; and the court may thereupon, in such case or proceeding, by its order, dispense with the annexing to such consent of the original specialties or other written securities.

Source.—Code Civ. Pro. § 2161, as added by L. 1880, ch. 178, and amended by L. 1889, ch. 502; originally derived from R. S. pt. 2, ch. 5, tit. 1, § 9.

Non-resident creditors.—*Warrin's case* (1861), 16 Abb. Pr. 457, note.

§ 63. Petitioner's schedule.—The petitioner must annex to his petition a schedule, containing:

1. A full and true account of all his creditors.

2. A statement of the place of residence of each creditor, if it is known; or, if it is not known, a statement of that fact.

3. A statement of the sum which he owes to each creditor, and the nature of each debt or demand, whether arising on written security, on account, or otherwise.

4. A statement of the true cause and consideration of his indebtedness to each creditor, and the place where the indebtedness accrued.

5. A statement of any existing judgment, mortgage, or collateral or other security, for the payment of the debt.

6. A full and true inventory of all his property, in law or in equity, of the incumbrances existing thereon, and of all the books, vouchers, and securities, relating thereto.

Source.—Code Civ. Pro. § 2162, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 5.

Sufficiency of schedule.—To confer jurisdiction on the officer the schedule of the insolvent's creditors annexed to his petition should state the amount owing to each creditor therein named. Where the schedule was blank as to the sum owing to one of the creditors named therein it was held that this was a jurisdictional defect which rendered the discharge void notwithstanding it recited that two-thirds in amount of the creditors united in the petition. *Stanton v. Ellis* (1855), 12 N. Y. 575.

Unintentional errors or omission.—The bare omission, by an insolvent debtor, to insert the name of a creditor in his schedule of debts, or the misstatement of the amount due any creditor, will not, alone, vitiate the discharge. *Small v. Graves* (1850), 7 Barb. 576; *American Flask & Cap Co. v. Son* (1867), 7 Robt. 233; *Ayres v. Scribner* (1837), 17 Wend. 407.

The fact that in the schedule the name of a creditor appeared who had died before the assignment, whereas properly the name of his administrator should have been entered, does not require that the discharge be set aside where there is no evidence that the petitioner was aware of the death of the creditor. *Wheeler v. Emmeluth* (1890), 58 Hun 369, 12 N. Y. Supp. 58, affd. 125 N. Y. 750, 27 N. E. 408.

Addresses of creditors.—Where the schedules, in giving the place of residence of each creditor, gave the names of streets and house numbers only, not specifying any city, town, or village, it was held that there was not a sufficient compliance with the statute and the proceedings were dismissed. *Matter of Cohen*, 16 Daly 69.

Advice of counsel.—It seems that the omission to insert the name of a creditor in the schedules is not excused by showing that it was omitted under advice of counsel, especially where it appears that such advice could not have been given or received in good faith. *Starr v. Patterson* (1891), 27 Abb. N. C. 19.

§ 64. **Petitioner's affidavit.**—An affidavit, in the following form, subscribed and taken by the petitioner before the county judge, or, in the city of New York, before the judge holding the term of the court, at which the order specified in the next section is made, must be annexed to the schedule:

"I, ———, do swear," (or "affirm," as the case may be), "that the matters of fact stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, in contemplation of my becoming insolvent,

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or within two years before presenting the petition herein, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; that I have not, in any instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view fraudulently to obtain the prayer of my petition; that I have not done, suffered or been privy to any act, matter or thing which, if accomplished, would be ground for withholding my discharge under the provisions of this act, or invalidate such discharge if granted."

Source.—Code Civ. Pro. § 2163, as added by L. 1880, ch. 178, and amended by L. 1896, ch. 278; originally derived from R. S. pt. 2, ch. 5, tit. 1, § 7.

Sufficiency of affidavit.—*Hale v. Sweet* (1869), 40 N. Y. 97; *Small v. Wheaton* (1855), 4 E. D. Smith 306; *Matter of Dimock* (1896), 4 App. Div. 301, 39 N. Y. Supp. 501.

Time of making.—When the affidavit annexed to the petition of an insolvent is not sworn to by him before the judge, nor subscribed by the judge prior to granting the order for the creditors to appear to show cause, there is a fatal defect in the proceedings, which render the assignment and discharge void, for want of jurisdiction and the subsequent verification of the petition will not cure the defect. *Ely v. Cook* (1863), 28 N. Y. 365.

§ 65. **Order to show cause.**—The petition and other papers, specified in the foregoing sections of this article, must be presented to the court, and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why an assignment of the insolvent's property should not be made, and he be thereupon discharged from his debt, as prescribed in this article; and directing that the order be published and served, as prescribed in the next section.

Source.—Code Civ. Pro. § 2164, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, §§ 8, 10.

Proof of publication of the notice of the order to show cause is not essential to give jurisdiction. A discharge which recites due publication and that due proof thereof was presented, is not invalidated by defects in the notice, in its publication, or in the proof thereof on file. *Soule v. Chase* (1863), 1 Abb. Pr. N. S. 48, *revid.* on other grounds, 39 N. Y. 342.

§ 66. **How order published and served.**—The order must be published and served in the following manner:

1. The petitioner must cause a copy thereof to be published in a newspaper, designated in the order, published in the county; and also, if one-fourth part of the insolvent's debts accrued or are due to creditors residing in the city of New York, in a newspaper published in that city, designated in the order. The publication must be made at least once in each

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of ten weeks, immediately preceding the day in which cause is to be shown, unless all the creditors reside within one hundred miles of the place where cause is to be shown, in which case the publication must be made at least once in each of the six weeks, immediately preceding that day.

2. The petitioner must also serve upon each creditor, residing within the United States, whose place of residence is known to him, a copy of the order to show cause, either personally, at least twenty days before the day when cause is to be shown, or by depositing it, at least forty days before that day, in the post-office, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.

Where the state is a creditor of the petitioner, a copy of the order must be served upon the attorney-general, who must represent the state in the subsequent proceedings.

Source.—Code Civ. Pro. § 2165, as added by L. 1880, ch. 178, and amended by L. 1890, ch. 231; originally derived from R. S. pt. 2, ch. 5, tit. 1, §§ 10, 11, 30; L. 1847, ch. 306, § 1.

Time of publication.—There must be at least seventy days between the time of first publication and the time of beginning proceedings. *People ex rel. Demarest v. Gray* (1860), 10 Abb. Pr. 468.

Sufficiency of publication.—*Soule v. Chase* (1863), 1 Abb. Pr. N. S. 48, revd. on other grounds, 39 N. Y. 48.

Strict compliance with statute.—Where the order for service of the order to show cause provided for depositing copies of the order in the post office addressed to each creditor at "his place of business" instead of at "his usual place of business" as required by the statute it was held that the court did not acquire jurisdiction. *Billings v. Pickert* (1886), 39 Hun 504.

Service of a notice without a signature, of an order to show cause why a discharge should not be granted, which notice states an order made by another officer than the one before whom the proceeding was pending is insufficient. *People ex rel. Demarest v. Gray* (1860), 10 Abb. Pr. 468.

§ 67. **Hearing.**—On the day specified in the order, and before any other proceedings are taken in the matter, the petitioner must present to the court, and file with the clerk, proof, to the satisfaction of the court, that the order has been published and served, as prescribed in the last section; and thereupon, on the same day, or upon the day to which the hearing is adjourned, the court must hear the allegations and proofs of the parties appearing. Proof of personal service of a copy of the order upon any person, must be made, in like manner as proof of the personal service of a summons, in an action brought in the supreme court.

Source.—Code Civ. Pro. § 2166, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 12; L. 1847, ch. 306, § 2.

Sufficiency of proof of service.—*People ex rel. Kenyon v. Sutherland* (1880), 81 N. Y. 1; *Lewis v. Page* (1869), 8 Abb. Pr. N. S. 200.

Parol evidence to prove service.—Where a debtor sets up his discharge under this act as a defense to an action on a debt, and the record does not show proper service of the order to show cause, the debtor will not be permitted to testify as

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to the manner in which he served the order. *Billings v. Pickert* (1886), 39 Hun 504.

§ 68. Putting cause on calendar.—Where the insolvent's discharge is opposed, the court may direct the special proceeding to be placed upon the calendar for trial. In that case, the parties must appear, and the proceedings are the same, as in an action, except as otherwise prescribed in this article; and costs, as in an action, except for proceedings before notice of trial, may be awarded to either party, in the discretion of the court.

Source.—Code Civ. Pro. § 2167, as added by L. 1880, ch. 178.

§ 69. Opposing creditor to file specifications, and may demand jury trial.—In order to entitle a creditor to oppose the discharge of the insolvent, he must, on the day fixed to show cause, or at such other time as the court may direct, file with the clerk a specification of his objections; and he may then, but not afterwards, demand a trial, by a jury, of the questions of fact arising thereupon. If a trial by a jury is not then demanded, the questions of fact must be tried by the court, without a jury. Where one of two or more opposing creditors demands a trial by a jury, all the material questions of fact, arising upon the objections of all the creditors, must be tried in like manner, and at the same time. The court may, in its discretion, direct the questions to be settled, and plainly stated, in an order, as where an order is made by the supreme court, in an action pending therein, for the trial of questions of fact by a jury.

Source.—Code Civ. Pro. § 2168, as added by L. 1880, ch. 178; partly derived from R. S. pt. 2, ch. 5, tit. 1, § 13.

§ 70. Opposing creditor to file proofs, if not named in schedule.—Where the name of an opposing creditor does not appear in the schedule, he must file, with the specification of his objections, proof, by affidavit, that he is a creditor; and, if his debt is not set forth in the schedule, he must also file his affidavit, to the effect specified in subdivisions first and second of section sixty-one of this chapter.

Source.—Code Civ. Pro. § 2169, as added by L. 1880, ch. 178.

§ 71. Proceedings if jurors do not agree.—There shall be but one trial by jury. If the jurors cannot agree, after being kept together for such a time as the court deems reasonable, the court must discharge them, and determine the questions of fact, or those questions as to which the jurors have not agreed, upon the evidence taken before the jury, as if a jury had not been demanded.

Source.—Code Civ. Pro. § 2170, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 19.

§ 72. When insolvent required to produce his non-resident wife.—Where the petitioner's wife resides without the state, the court, or a judge thereof out of court, may, upon the application of any creditor, make an order,

requiring the petitioner to bring his wife before the court, at the hearing or trial, to the end that she may be examined as a witness. A copy of the order must be personally served upon the petitioner, at least three weeks before the hearing. If it appears, upon the hearing, that service could not, with due diligence, be so made, in consequence of the petitioner's sickness or absence, the court may, in its discretion, adjourn the hearing or trial, and prescribe the time and manner of service of the order for the adjourned day. If, after due service, the petitioner's wife does not attend at the time and place appointed, the petitioner is not entitled to his discharge, unless he proves, to the satisfaction of the court, by his affidavit, or upon his oral examination, or otherwise, that he was unable to procure her attendance.

Source.—Code Civ. Pro. § 2171, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, §§ 20, 21.

§ 73. Examination of insolvent.—At the hearing or trial, the petitioner must be examined under oath, at the instance of any creditor, touching his property or debts, or any other matter stated in his schedule, or any changes that have occurred in the situation of his property, since the making of the schedule; and particularly whether he has collected any debts or demands, or made any transfers of, or otherwise affected, his real or personal property. Any creditor may contradict or impeach, by other competent evidence, the testimony of the insolvent or of his wife.

Source.—Code Civ. Pro. § 2172, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 22.

§ 74. When insolvent cannot be discharged.—In either of the following cases, the petitioner is not entitled to a discharge:

1. Where it appears, upon the hearing or trial, that, after making the schedule annexed to his petition, he has collected a debt or demand, or transferred, absolutely, conditionally, or otherwise, any of his property, not exempt by law from levy and sale by virtue of an execution, and he neglects or refuses forthwith to pay over to the clerk, the full amount of all debts and demands so collected, and the full value of all property so transferred, except so much of the money, and of the value of the property, as appears to have been necessarily expended by him for the support of himself or his family.

2. Where it appears, in like manner, that the petitioner, within two years before presenting the petition, has, in contemplation of his becoming insolvent, or of his petitioning for his discharge, or knowing of his insolvency, made an assignment, sale, or transfer, either absolute or conditional, of any of his property, or of any interest therein, or confessed a judgment, or given any security, with a view of giving a preference to a creditor for an antecedent debt.

Source.—Code of Civ. Pro. § 2173, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, §§ 23, 24, as amended by L. 1864, ch. 147.

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An assignment by a debtor for the benefit of his creditors is conclusive evidence of his insolvency at the time of its execution and such assignment, giving preference to some creditors in the payment of their claims is a bar to the discharge of the debtor under this act, from debts which existed when the assignment was made. *Morewood v. Hollister* (1852), 6 N. Y. 309.

Facts throwing suspicion upon the honesty of the insolvency proceeding. *Cohen's Case*, 10 Abb. Pr. 257.

§ 75. When assignment to be directed.—An order, directing the execution of an assignment, must be made by the court, where it appears, by the verdict of the jury; or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court; as follows:

1. That the petitioner is justly and truly indebted to the consenting creditors, in sums which amount, in the aggregate, to two-thirds of all the debts, which the petitioner owed, at the time of presenting his petition, to creditors residing within the United States.

2. That he has honestly and fairly given a true account of his property.

3. That he has, in all things, conformed to the matters required of him by this article.

Source.—Code Civ. Pro. § 2174, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, §§ 25, 26.

§ 76. Assignment; contents, and to whom made.—The order must designate one or more trustees, residents of the state; and must direct the petitioner to execute, to him or them, an assignment of all his property, at law or in equity, in possession, reversion, or remainder, excepting only so much thereof, as is exempt by law from levy and sale, by virtue of an execution. The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county. Where it appears, from the schedule or otherwise, that real property will pass thereby, it must be also recorded as a deed, in the proper office for recording deeds, of each county where the real property is situated.

Source.—Code Civ. Pro. § 2175, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 25.

§ 77. Trustees, how designated.—The trustees or trustees may be nominated by a majority in amount of the consenting creditors. If no person is so nominated, one or more persons must be appointed by the court for the purpose. The nomination may be included in the consent, or made in a separate paper, or orally upon the hearing or trial, and entered in the minutes.

Source.—Code Civ. Pro. § 2176, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 27.

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§ 78. **Effect of assignment.**—The assignment vests in the trustee or trustees all the petitioner's interest, legal or equitable, at the time of its execution, in any real or personal property, not exempt by law from levy and sale by virtue of an execution; and any contingent interest which may vest within three years thereafter. When a contingent interest so vests, it passes to the trustee, in the same manner as it would have vested in the petitioner, if he had not made an assignment.

Source.—Code Civ. Pro. § 2177, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, § 28.

Preliminary proceedings void.—An assignment purporting to have been made under this act is invalid as a conveyance of the insolvent's estate, at least as against one who is not a *bona fide* purchaser from the assignee for value without notice, where the preliminary proceedings upon which it is based are void because not in conformity with the statute. *Rockwell v. McGovern* (1877), 69 N. Y. 294.

§ 79. **When discharge to be granted.**—Upon the production by the petitioner of a certificate of the trustee or trustees, duly acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, to the effect, that the insolvent has assigned, for the benefit of all his creditors, all his property so directed to be assigned, and all the books, vouchers, and papers relating thereto, and that he has delivered so much thereof as is capable of delivery; and also of a certificate of the county clerk, that the assignment has been duly recorded in his office; the court must grant to the insolvent a discharge from his debts, which has the effect declared in the following sections of this article.

Source.—Code Civ. Pro. § 2178, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 3, § 29.

§ 80. **Order to show cause where trustee refuses to give certificate.**—If a trustee refuses or neglects, upon payment or tender by the petitioner of the expense of so doing, to execute or acknowledge a certificate, as prescribed in the last section, or to cause the assignment to be recorded, as therein prescribed, the court, upon proof by affidavit of the facts, must make an order, requiring the trustee to show cause, at a time and place therein specified, why the petitioner should not be discharged, notwithstanding his neglect or refusal; and why the trustee's appointment should not be revoked.

Source.—Code Civ. Pro. § 2179, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 7, § 23.

§ 81. **Proceedings upon return of order.**—If, upon the return of the order, it appears that the assignment has been duly executed, and that the petitioner has duly delivered all his property directed to be assigned, and all the books, vouchers, and papers relating thereto, which are capable of delivery, the court may, either

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1. Grant a discharge of the petitioner, notwithstanding the neglect or refusal of the trustee; or

2. Make an order, revoking the appointment of the trustee. Upon the entry of such an order, the powers of the trustee, and his interest in the assigned property, cease. If there is no other trustee, the court must, by the same or another order, appoint one or more new trustees. Such an appointment has the same effect, as if the person or persons so appointed were named as trustees in the original assignment.

Source.—Code Civ. Pro. § 2180, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 7, §§ 24-26.

§ 82. Discharge and other papers to be recorded.—The discharge, and the petition, affidavits, orders, schedule, and other papers, upon which the discharge is granted, exclusive of the minutes of testimony, must be recorded in the clerk's office of the county, within three months after the discharge is granted. In default thereof, the discharge becomes inoperative, from and after that time. The original discharge, the record thereof, or a transcript of the record duly authenticated, is conclusive evidence of the proceedings and facts therein contained. The other papers specified in this section, the record thereof, or a transcript of the record duly authenticated, are presumptive evidence of the proceedings and facts therein contained.

Source.—Code Civ. Pro. § 2181, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 7, § 19, as amended by L. 1866, ch. 116.

§ 83. Effect of discharge.—Except as prescribed in the next two sections, a discharge granted as prescribed in this article, exonerates and discharges the petitioner from every debt, due at the time when he executed his assignment, including a debt contracted before that time, though payable afterwards; and from every liability incurred by him, by making or indorsing a promissory note, or by accepting, drawing, or indorsing a bill of exchange, before the execution of his assignment; or incurred by him, in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment. At any time after one year has elapsed, since the recording of the discharge, and the petition, affidavits, orders, schedule and other papers upon which the discharge was granted, as prescribed in section eighty-two of this chapter, the petitioner may apply, upon proof of his discharge, to the court in which a judgment shall have been rendered against him, for an order directing the judgment to be canceled and discharged of record. If it appears that he has been discharged from the payment of that judgment, an order must be made accordingly, and thereupon the clerk must cancel and discharge the docket thereof, as if the proper satisfaction-piece of the judgment was filed. Notice of the application, accompanied with copies

of the papers upon which it is made, must be given to the judgment creditor, unless his written consent to the granting of the order, with satisfactory proof of the execution thereof, and if he is not the party in whose favor the judgment was rendered, that he is the owner thereof, is presented to the court upon the application.

Source.—Code Civ. Pro. § 2182, as added by L. 1889, ch. 178, and amended by L. 1883, ch. 402; originally derived from R. S. pt. 2, ch. 5, tit. 1, Article 3, §§ 30, 31.

Conclusiveness.—After an insolvent's discharge is granted, if the officer has acquired jurisdiction, it is conclusive in all other proceedings in which it comes in question. *Rusher v. Sherman* (1858), 28 Barb. 416.

Notice to judgment creditor.—Where, after an insolvent's discharge, an order canceling and discharging of record two judgments against him was granted upon his application, without notice to the owner of the judgments, and without proof of his consent, it was held, on motion to vacate the order, that it was made without authority, and that the owner was entitled to have it vacated on showing want of notice; that he was not required to give any reason why the discharge did not operate upon his judgment or to state any facts showing that the judgment should not be cancelled, until served with notice of the application for that purpose. *Wheeler v. Emmeluth* (1890), 121 N. Y. 241, 24 N. E. 285, revg. 28 N. Y. St. Rep. 737, 7 N. Y. Supp. 807.

An unliquidated claim for damages arising out of a tortious act is not to be regarded as a debt within the provisions of this act. *Zinn v. Ritterman* (1867), 2 Abb. Pr. (N. S.) 261.

§ 84. Effect of discharge as to foreign contracts or creditors.—In either of the following cases, such a discharge does not affect a debt or liability, founded upon a contract, unless it was owing, when the petition was presented, to a resident of the state; or the creditor has executed a consent to the discharge; or has appeared in the proceedings; or has received a dividend from the trustee:

1. Where the contract was made with a person, not a resident of the state.
2. Where it was made and to be performed without the state.
3. Where the creditor was not, at the time of the discharge, a resident of the state.

Source.—Code Civ. Pro. § 2183, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 3, §§ 30, 31.

Note payable in this state.—A discharge is no defense to an action by a citizen of another state, upon a note given before the proceedings for a discharge, although such note is made payable, and the action is brought in this state. *Pratt v. Chase* (1871), 44 N. Y. 597. See also *Baldwin v. Hale* (1863), 1 Wall. 223.

Foreign creditor party to proceedings.—Where a foreign creditor voluntarily makes himself a party to proceedings under this act, and accepts a dividend, he is estopped from denying the regularity and validity of such proceedings. *Soule v. Chase* (1868), 39 N. Y. 342.

§ 85. Effect of discharge as to debts to the United States and the state.—Such a discharge does not affect:

1. A debt or duty to the United States; or

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2. A debt or duty to the state, for taxes or for money received or collected by any person as a public officer, or in a fiduciary capacity, or a cause of action specified in section nineteen hundred sixty-nine of the code of civil procedure or a judgment recovered upon such a cause of action.

Except as prescribed in this section, the discharge exonerates the petitioner from a debt or other liability to the state, in like manner and to the same extent, as from a debt or liability to an individual.

Source.—Code Civ. Pro. § 2184, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 7, §§ 29, 30.

§ 86. Insolvent to be released from imprisonment.—If, at the time when the discharge is granted, the petitioner is under arrest, by virtue of an execution against his person issued, or an order of arrest made, in an action or special proceeding, founded upon a debt or liability from which he is discharged, as prescribed in the foregoing sections of this article, he must be released from the arrest, upon producing to the officer his discharge, or a certified copy of the record thereof. If the adverse party wishes to test the validity of the discharge, he may procure a new order of arrest, or cause a new execution to be issued, as the case requires.

Source.—Code Civ. Pro. § 2185, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 3, §§ 33, 34.

§ 87. Discharge, when void.—A discharge, granted as prescribed in this article, is void, in either of the following cases:

1. Where the petitioner wilfully swears falsely, in the affidavit annexed to his petition or schedule, or upon his examination, in relation to any material fact, concerning his property or his debts, or to any other material fact.

2. Where, after presenting his petition, he sells, or in any way transfers or assigns, any of his property, or collects any debt or demand owing to him, and does not give a just and true account thereof, upon the hearing or trial, and does not pay the money so collected, or the value of the property so sold, transferred, or assigned, as prescribed in this article.

3. Where he secretes any part of his property, or a book, voucher, or paper relating thereto, with intent to defraud his creditors.

4. Where he fraudulently conceals the name of any creditor, or the sum owing to any creditor, or fraudulently misstates such a sum.

5. Where, in order to obtain his discharge, he procures any person to become a consenting creditor, wilfully, intentionally, and knowingly, for a sum not due from him to that person in good faith, or for a sum greater than that for which the holder of a demand, purchased or assigned, is deemed a creditor, as prescribed in this article.

6. Where he pays, or consents to the payment of, any portion of the debt or demand of a creditor, or grants or consents to the granting of any gift or reward to a creditor, upon an express or implied contract, trust, or

understanding, that the creditor so paid or rewarded should be a consenting creditor, or should abstain or desist from opposing the discharge.

7. Where he is guilty of any fraud whatsoever, contrary to the true intent of this article.

Source.—Code Civ. Pro. § 2186, as added by L. 1880, ch. 178, and amended by L. 1890, ch. 231; originally derived from R. S. pt. 2, ch. 5, tit. 1, Article 3, § 35.

Where the schedule was in blank as to the sum owing to one of the creditors named therein it was held to be a jurisdictional defect which rendered the discharge void. *Stanton v. Ellis* (1855), 12 N. Y. 575.

Petitioning creditors owning less than two-thirds of debts.—Where the schedule annexed to the petition presented by an insolvent shows, upon its face, that the creditors joining in the petition do not own two-thirds of the debts owing by the insolvent a discharge based upon the petition is void. *Morrow v. Freeman* (1875), 61 N. Y. 515.

Fraud will not be inferred from the simple fact that, from the insolvent papers themselves, it appears that the amount of the debts owing to the petitioning creditors is not equal to two-thirds of the whole amount of debts owing by the insolvent. *Ayres v. Scribner* (1837), 17 Wend. 407.

A bare omission to insert the name of a creditor in the schedule, or a misstatement of the amount due any creditor, if not intentional, will not, alone, vitiate the discharge. *Small v. Graves* (1850), 7 Barb. 576; *American Flask & Cap Co.* (1867), 3 Abb. Pr. N. S. 333; *Ayres v. Scribner* (1837), 17 Wend. 407.

Failure to give notice of proceedings.—A discharge is not rendered invalid by the fact that the petitioner omitted to give notice of the proceeding to the creditor who impeaches the discharge, unless fraudulent intent is shown. *American Flask & Cap Co.* (1867), 3 Abb. Pr. N. S. 333.

Matters not mentioned in statute.—The statute, in providing expressly that certain acts or omissions, or any fraud, shall vitiate the discharge, strongly implies that the decision of the judge who hears the application, shall be conclusive as to other matters. *People v. Stryker* (1857), 24 Barb. 649.

§ 88. Invalidity may be proved on motion to vacate order of arrest or execution.—Where a person, who has been discharged as prescribed in this article, is afterwards arrested by virtue of an order of arrest made, or an execution issued, in an action founded upon a debt or liability from which he is so discharged, the adverse party may oppose his application to be released from the arrest, by proof, by affidavit, of any cause for avoiding the discharge, for want of jurisdiction, or as specified in the last section. If such a cause is established, the application must be denied.

Source.—Code of Civ. Pro. § 2187, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 7, §§ 21, 22.

ARTICLE IV.

INSOLVENT'S EXEMPTION FROM ARREST AND IMPRISONMENT.

Section 100. Who may be exempted and by what court.

101. Contents of petition.

102. Petitioner's schedule.

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103. Petitioner's affidavit.
104. Order to show cause.
105. Proceedings on return of order.
106. Order directing assignment; assignment pursuant thereto.
107. When discharge to be granted; effect thereof.
108. Discharge and other papers to be recorded.
109. Petitioner to be released from imprisonment.
110. Debts and demands not affected.
111. Discharge, when void.

§ 100. Who may be exempted, and by what court.—An insolvent debtor may be exempted from arrest, or discharged from imprisonment, as prescribed in this article. For that purpose, he must apply, by petition, to the county court of the county in which he resides, or is imprisoned; or, if he resides or is imprisoned in the city of New York, to the supreme court. A person, who has been admitted to the jail liberties, is deemed to be imprisoned, within the meaning of this article.

Source.—Code Civ. Pro. § 2188, as added by L. 1880, ch. 178, and amended by L. 1895, ch. 946; originally derived from R. S., pt. 2, ch. 5, tit. 1, Article 5, § 1.

References.—As to jail liberties and persons admitted thereto, Prison Law, §§ 357-360; Code Civil Procedure, § 149; as to period of imprisonment on execution, *Id.* § 111.

Jurisdiction.—Three things are needed to give a judge jurisdiction to discharge a debtor from imprisonment; first, power to act on the general subject-matter—that is the discharge of an insolvent debtor; second, jurisdiction of the person of the insolvent, who must reside or be imprisoned, in the same county as the judge; third, jurisdiction of the particular case. *Develin v. Cooper* (1881), 84 N. Y. 410.

Application; to whom made.—The application must be made to a judge of the county in which the debtor resides or is imprisoned; and where another county judge holds court in the county he cannot be considered "a successor in office" of the one before whom proceedings were commenced; nor can the proceedings be continued by a justice of the supreme court not residing within such county and in case they are so continued the subsequent proceedings are void. *Matter of Roberts* (1877), 70 N. Y. 5, 53 How. Pr. 199.

Debtor arrested under execution; discharge.—Where in an action upon contract an order of arrest has been granted on the ground that defendant was guilty of fraud in contracting debt, and he has thereafter been arrested under an execution issued upon the judgment, an application for his discharge from imprisonment must be made under this article. *Develin v. Cooper* (1880), 20 Hun 188, *affd.* 84 N. Y. 410 (1881).

§ 101. Contents of petition.—The petition must be in writing; it must be signed by the insolvent, and specify his residence, and also, if he is in prison, the county in which he is imprisoned, and the cause of his imprisonment. It must set forth, in substance, that he is unable to pay all his debts in full; that he is willing to assign his property for the benefit of all his creditors, and in all other respects to comply with the provisions of this article, for the purpose of being exempted from arrest and imprisonment, as prescribed therein; and it must pray, that upon his so doing, he may thereafter be exempted from arrest, by reason of a debt, arising upon

a contract previously made; and also, if he is imprisoned, that he may be discharged from his imprisonment. It must be verified by the affidavit of the insolvent, annexed thereto, taken on the day of the presentation thereof, to the effect, that the petition is in all respects true in matter of fact.

Source.—Code Civ. Pro. § 2189, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 1.

The presentation of the petition and schedule of an imprisoned debtor, duly verified, confers jurisdiction; the order to show cause is an incident, but not essential to jurisdiction. *Matter of Jacobs* (1871), 12 Abb. Pr. N. S. 273.

Proof of residence of the petitioner may be made by the affidavit of some one other than the petitioner. A verified petition is enough if the discharge states the fact, but a petition which commences "the petition of F., of the town of S., in the county of S.," is not sufficient to show residence; but a recital that he is in the custody of the sheriff of that county and has been given bail for the liberties, gives jurisdiction. *Develin v. Cooper* (1881), 84 N. Y. 410.

A notice which apprises the creditors of the debtor's intention to ask that he may assign his estate for the benefit of his creditors and be discharged from imprisonment, is a proper notice to them to show cause why the prayer of the petitioner should not be granted. *Matter of Jacobs* (1871), 12 Abb. Pr. N. S. 273.

§ 102. *Petitioner's schedule.*—The petitioner must annex to his petition, a schedule, in all respects similar to that required of an insolvent, as prescribed in section sixty-three of this chapter.

Source.—Code Civ. Pro. § 2190, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 2, in part.

Inventory or schedule; sufficiency of.—Where in an inventory, attached to the application for discharge, all debts were sufficiently set forth and described, except one, as to which the statement was probably insufficient, it was held that the inventory was sufficient to give the officer jurisdiction, and that a discharge granted by him would protect the sheriff in releasing the debtor from imprisonment. *Develin v. Cooper* (1880), 20 Hun 188, *affd.* 84 N. Y. 410.

§ 103. *Petitioner's affidavit.*—An affidavit, in the following form, subscribed and taken by the petitioner, before the county judge, or, in the city of New York, before a justice of the supreme court, must be annexed to the schedule:

"I, ———, do swear" (or "affirm," as the case may be,) "that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, at any time, or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view that they or any of them should abstain from opposing my discharge."

Source.—Code Civ. Pro. § 2191, as added by L. 1880, ch. 178, and amended by L. 1895, ch. 946; originally derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 2 in part.

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§ 104. **Order to show cause.**—The petition, and the papers annexed thereto, must be presented to the court, and filed with the clerk. The court must thereupon make an order, requiring all the creditors of the petitioner to show cause before it, at a time and place therein specified, why the prayer of the petitioner should not be granted; and directing that the order be published and served, in the manner prescribed in section sixty-six of this chapter for the publication and service of an order, made as therein prescribed.

Source.—Code Civ. Pro. § 2192, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, §§ 3, 4.

Not jurisdictional.—The order to show cause required by this section is an incident of the jurisdiction acquired by the officer before whom the proceedings are commenced, but not essential to it. *Matter of Jacobs* (1871), 12 Abb. Pr. N. S. 273.

Publication of notice.—Until the publication of the notice as directed, and proof of such publication before the judge, he is without jurisdiction; so held where the publication was directed to be given for the sixth of June, and in fact the publication was of an application to be made on the third of June. *People ex rel. Lewis v. Daly* (1875), 4 Hun 641, 67 Barb. 325.

Place of return.—An order to show cause why the debtor should not be discharged before one of the judges (naming him) of the court of common pleas in and for the city and county of New York, is a sufficient compliance with the statute as to specifying the place of return. *Matter of Jacobs* (1871), 12 Abb. Pr. N. S. 273.

Creditors entitled to oppose discharge.—Inserting in the schedule, annexed to the petition of an insolvent for his discharge, the name of a creditor, with a memorandum that his claim is barred by limitations, is not an admission that such person is still a creditor so as to entitle him to appear and oppose without other proof. *Avery's Case* (1858), 6 Abb. Pr. 144.

§ 105. **Proceedings on return of order.**—The provisions of sections sixty-seven, sixty-eight, sixty-nine, seventy, seventy-one, seventy-three, and seventy-four of this chapter apply to a special proceeding, taken as prescribed in this article.

Source.—Code Civ. Pro. § 2193, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, §§ 5-7.

§ 106. **Order directing assignment; assignment pursuant thereto.**—An order, directing the execution of an assignment, must be made by the court, where it appears, by the verdict of the jury, or, if a jury has not been demanded, or the jurors have been discharged by reason of their inability to agree, where it satisfactorily appears to the court, as follows:

1. That the petitioner is unable to pay his debt.
2. That the schedule annexed to his petition is true.
3. That he has not been guilty of any fraud or concealment, in violation of the provisions of this article.
4. That he has, in all things, conformed to the matters required of him by this article.

The provisions of sections seventy-six, seventy-seven, and seventy-eight of this chapter apply to the order prescribed in this section, and to the assignment made in pursuance thereof, except that the trustee or trustees must be nominated, as well as appointed, by the court.

Source.—Code Civ. Pro. § 2194, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, §§ 8, 9.

The "fraud" referred to is fraud in the proceedings for discharge, not that in contracting the debt. *Develin v. Cooper* (1881), 84 N. Y. 410.

§ 107. When discharge to be granted; effect thereof.—Upon the production by the petitioner, of the certificates of the trustee or trustees, and the county clerk, to the effect prescribed in section seventy-nine of this chapter, the court must grant to the petitioner a discharge, declaring that the petitioner is forever thereafter exempted from arrest or imprisonment, by reason of any debt due at the time of making the assignment, or contracted before that time, though payable afterwards; or by reason of any liability incurred by him, by making or indorsing a promissory note, or by accepting, drawing, or indorsing a bill of exchange, before the execution of the assignment; or in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment, with the exceptions specified in section one hundred and thirty-eight of this chapter. The discharge shall have the effect therein declared, as prescribed in this section.

Source.—Code Civ. Pro. § 2195, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 10.

Order of discharge; by whom made.—An order for the discharge of the petitioner must be made by the court. *Hayes v. Bowe* (1883), 12 Daly 193, 65 How. Pr. 347; *Mather's Case* (1862), 14 Abb. Pr. 45; *Matter of Walker* (1853), 2 Duer 655.

Form and validity of discharge.—Where the discharge states "that the insolvent has conformed in all things to those matters required of him by statute," it was held sufficient in form without setting forth the matters in further detail. *Pratt v. Chase* (1865), 19 Abb. Pr. 150, 29 How. Pr. 296; *revd. on another point*, 44 N. Y. 597, 4 Am. R. 718. A discharge in insolvency is not rendered invalid by the fact that the petitioner omitted to give notice of the proceeding to the creditor who impeached the discharge; nor by the fact that he omitted to name such creditor in his schedule of creditors, unless a fraudulent omission is proved. *American Flask & Cap Co. v. Son* (1867), 3 Abb. Pr. N. S. 333, 30 Super. (7 Rob.) 233.

Where an order of discharge contains facts needed to give the court jurisdiction, the order alone will protect a sheriff acting under it, in absence of knowledge on his part of any defects in the proceedings, and the sheriff may show *altunde* the existence of a fact omitted in the recital but necessary to give such jurisdiction. *Develin v. Cooper* (1881), 84 N. Y. 410.

Who entitled to discharge.—An insolvent is not entitled to his discharge from an indebtedness which arose from his embezzlement; but the fact of the embezzlement must be clearly shown. *Matter of Pie* (1860), 10 Abb. Pr. 409.

A debtor under civil arrest for moneys appropriated by him while he was acting in a fiduciary capacity is entitled to his discharge where it is shown that, although

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he appropriated part of the money to his own use, the money so appropriated was not his own, and that he has not made over any part of his own property with a view to his own future benefit or with intent to injure his creditors. *Matter of Caamano* (1885), 2 How. Pr. N. S. 240, 8 Civ. Pro. R. 29. A discharge from imprisonment is good, as well where there are judgments against the insolvent in actions for torts as in actions on contracts. *Hayden v. Palmer* (1840), 24 Wend. 364.

Securing antecedent debt prevents discharge.—Where the debt consisted of money collected in a fiduciary capacity and it appeared that within one year previous to such application the debtor had given a chattel mortgage to secure an antecedent debt, owing by his insolvency, the application for discharge must be denied. *Matter of Mower* (1879), 1 Law Bull. 39.

Giving preferences to creditors previous to an assignment may be urged in opposition to the granting of a discharge; but it is no answer to a plea of discharge, although it appear on the face of the plea. *Hayden v. Palmer* (1840), 24 Wend. 364.

§ 108. Discharge and other papers to be recorded.—The provisions of section eighty-two of this chapter apply to the discharge, and to the petition and other papers upon which it was granted.

Source.—Code Civ. Pro. § 2196, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 10.

§ 109. Petitioner to be released from imprisonment.—If, at the time the discharge is granted, the petitioner is imprisoned, by virtue of an execution against his person issued, or of an order of arrest made, in an action or special proceeding founded upon a debt, liability, or judgment, as to which he is exempted from arrest or imprisonment, as prescribed in the last section but one, the officer must forthwith release him, on production of the discharge, or a certified copy of the record thereof.

Source.—Code Civ. Pro. § 2197, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 11.

§ 110. Debts and demands not affected.—A debt, demand, judgment, or decree, against an insolvent, discharged as prescribed in this article, is not affected or impaired by the discharge; but it remains valid and effectual, against all his property, acquired after the execution of the assignment. The lien, acquired by or under a judgment or decree, upon any property of the insolvent, is not affected by the discharge.

Source.—Code Civ. Pro. § 2198, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 12.

§ 111. Discharge, when void.—A discharge, granted to an insolvent as prescribed in this article, is void, in the same cases, so far as they are applicable, in which a discharge, granted as prescribed in article third of this chapter, is therein declared to be void; and the validity of such a discharge may be tested in the same manner.

Source.—Code Civ. Pro. § 2199, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 5, § 13.

ARTICLE V.

JUDGMENT DEBTOR'S DISCHARGE FROM IMPRISONMENT.

- Section 120. Who may be discharged.
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 138. Debtors to state or United States not to be discharged.
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§ 120. Who may be discharged.—A person, imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding, may be discharged from the imprisonment, as prescribed in this article. A person who has been admitted to the jail liberties is deemed to be imprisoned, within the meaning of this article.

Source.—Code Civ. Pro. § 2200, as added by L. 1880, ch. 178.

References.—As to period of imprisonment on execution, Code Civil Procedure, § 111. Jail liberties and persons admitted thereto, Prison Law, §§ 357-360; Code Civil Procedure, § 149. Requisites of execution against the person, Id. § 1372; in what cases to issue, Id. § 1487. Provisions respecting generally executions against the person, Id. §§ 1487-1495.

The object of the statute is the discharge of debtors who make an honest and full surrender of all their property for their creditors; a judgment debtor who has disposed of his property with intent to defraud creditors is not entitled to his discharge under this article. *Matter of Brady* (1877), 69 N. Y. 215, 53 How. Pr. 128. This article provides for the discharge of imprisoned judgment debtors upon their own application, and expressly preserves all remedies of the creditor against the property of the debtor, after the latter's discharge. *Hoyle v. McCrea* (1899), 43 App. Div. 313, 59 N. Y. Supp. 200.

Upon making an assignment of his property and otherwise conforming to the statute, a judgment debtor can be discharged even from constructive imprisonment. *Matter of Langslow* (1901), 167 N. Y. 314, 321, 60 N. E. 590.

Discharge must be granted according to law.—There is no inherent power in the court to release the defendant merely as a matter of grace or mercy; so there is no authority to release a prisoner held under an execution against the person because of his inability to endure his imprisonment; the only method provided by

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law for the release of such a defendant is that specified in this chapter. *Moore v. McMahon* (1880), 20 Hun 44.

Fraud bars discharge.—A debtor imprisoned for removing and disposing of his property with intent to defraud creditors is not entitled to bring proceedings under this article. *In re Haight* (1886) 11 N. Y. Civ. Pro. Rep. 227; *Coffin v. Gourlay* (1880), 20 Hun 308. An insertion in the judgment that defendant had disposed of his property with intent to defraud creditors and of the statutory provision that he is liable to arrest and imprisonment, does not prevent his discharge from imprisonment. *In re Zeitz* (1887), 12 Civ. Pro. Rep. 423.

An adjudication in bankruptcy entitles a person imprisoned in a civil action for a debt to be discharged from confinement. *Maas v. O'Brien* (1878), 14 Hun 95. A person who has filed a petition in bankruptcy, after the judgment was rendered against him, and has made an assignment accordingly, cannot be discharged under this and the following sections. *Matter of Fitzgerald* (1878), 8 Daly 188, 5 Abb. N. C. 357, 56 How. Pr. 190; *Matter of Fowler* (1880), 8 Daly 548, 59 How. Pr. 148.

Violation of conservation law.—A defendant, who has been convicted for a violation of the conservation law and imprisoned under section 28 thereof, cannot be discharged under Article 5 of the Debtor and Creditor Law. *Matter of Locke* (1916), 174 App. Div. 287, 160 N. Y. Supp. 431.

§ 121. To what court application to be made.—Application for such a discharge must be made by petition, addressed to the court from which the execution issued; or to the county court of the county in which he is imprisoned; or, if he is imprisoned in the city of New York, to the supreme court.

Source.—Code Civ. Pro. § 2201, as added by L. 1880, ch. 178, and amended by L. 1895, ch. 946; originally derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 1, as amended by L. 1847, ch. 390.

Application; to whom made.—An application for the discharge of an imprisoned debtor may be made in the court out of which the execution is issued. *Matter of Irving Junior* (1886), 3 How. Pr. N. S. 236. The fact that the petition is addressed to the judge and not to the court itself does not invalidate a discharge granted upon it. *Borthwick v. Howe* (1882), 27 Hun 505.

Proof essential to jurisdiction of court.—*People ex rel. Pacific Mutual Ins. Co. v. Machado* (1863), 16 Abb. Pr. 460.

Objection to the jurisdiction may be taken as well on a motion to rehear, as upon the original hearing. *Matter of Rosenberg* (1871), 10 Abb. Pr. N. S. 450.

§ 122. When petition may be presented.—A person so imprisoned may apply for such a discharge, at any time; unless the sum, or where he is imprisoned by virtue of two or more executions, the aggregate of the sums, for which he is imprisoned, exceeds five hundred dollars; in which case, he cannot present such a petition, until he has been imprisoned, by virtue of the execution or executions, for at least three months.

Source.—Code Civ. Pro. § 2202, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 1, as amended by L. 1847, ch. 390.

Application; jurisdictional facts.—An application for a discharge from imprisonment on execution should show that the petitioner is imprisoned for over \$500, and has been imprisoned for three months, such facts being jurisdictional. *Matter of Rosenberg* (1871), 10 Abb. Pr. N. S. 450. Such a discharge from imprisonment is

void where the papers show that the judgment exceeded \$500, and failed to show that debtor has been imprisoned for three months. *Browne v. Bradley* (1857), 5 Abb. Pr. 141; *Dusart v. Delacroix* (1865), 1 Abb. Pr. N. S. 409, note.

New petition.—When the petition has been refused because the proceedings are adjudged to be not fair and just, because the debtor failed to include, in his petition and account, property which he had when he was imprisoned, or when his accounts were made up, and part of which he disposed of after his imprisonment, a new petition cannot be presented stating facts explaining or justifying his acts on the former proceeding. *Matter of Thomas* (1871), 10 Abb. Pr. N. S. 114.

§ 123. **Contents of petition; schedule.**—The petition must be in writing; it must be signed by the petitioner; and it must state the cause of his imprisonment, by setting forth a copy, or the substance of the execution, or, if there are two or more executions, of each of them. The petitioner must annex thereto, and present therewith, a schedule, containing a just and true account of all his property, and of all charges affecting the same; as the property and charges existed at the time when he was first imprisoned, and also as they exist at the time when the petition is prepared; together with a just and true account of all deeds, securities, books, vouchers, and papers, relating to the property, and to the charges thereupon.

Source.—Code Civ. Pro. § 2203, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 4.

It is essential to the jurisdiction of the court that the papers upon which the application is founded should conform with exactness to the provisions of the statute. *In re Patton* (1894), 27 N. Y. Supp. 992.

Petition.—It is imperative that the petition contain recitals of all the facts necessary to give jurisdiction to the court; it is not sufficient that it shows general jurisdiction of the subject matter; or that jurisdiction of the person and of the especial case, was acquired by the taking of the necessary steps prescribed by the statute. *Bullymore v. Cooper* (1871), 46 N. Y. 236.

A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment, if it alleges that he is confined in the county jail, by virtue of an execution against his person, issued in a civil action. *Matter of Chappell* (1880), 23 Hun 179. An omission to name all the parties named in the judgment was not a fatal defect in the petition. *Goodwin v. Griggs* (1882), 83 N. Y. 629.

Schedules.—The debtor need not be held to the most perfect recollection, at the time of making up his schedule, of every minute claim, debt or item of property owned by him. If, on his examination, he remembers those particulars, the court will allow him to amend his petition on the hearing, if satisfied that the omission was not intentional or fraudulent. *Matter of Rosenberg* (1871), 10 Abb. Pr. N. S. 450.

A schedule setting forth an account of the petitioner's estate, as it existed at the time he was committed under the act, is defective. It should contain an account of his estate as it existed at the time of his arrest. But the officer to whom the application is made can allow the schedule to be amended in this respect, if satisfied that the omission was unintentional, or arose from misconception of the statute. *Matter of Andriot* (1867), 2 Daly 28.

In an application for a discharge it must appear by the defendant's petition

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either that a suit has been commenced or a judgment recovered against him by the prosecuting creditor. *Matter of Andriot* (1867), 2 Daly 28.

The statement that the petitioner before the rendition of the judgments in execution of which he was arrested, was declared bankrupt, and an assignee of all his property appointed, does not supply the defect of an account of his property at the time of imprisonment. *Bullymore v. Cooper* (1871), 46 N. Y. 236.

A recital that a petition was filed is not equivalent to a statement that the requisite schedule was annexed to the petition. An order which does not recite that the schedule is annexed, does not show that the court had jurisdiction to grant it. A statement in the petition and a recital in the order to the effect that the debtor had no property, not exempt from levy and sale under execution, out of which a judgment could be satisfied, is not equivalent to the account required to be furnished in the schedule of all his property, and does not excuse the omission to file the schedule required. *Seward v. Wales* (1899), 40 App. Div. 539, 5 N. Y. Supp. 42, *affd.* 167 N. Y. 538, 60 N. E. 1120. The schedule of the debtor's property annexed to an application for his discharge from imprisonment must set forth the facts, and not a mere conclusion from facts. *Matter of Paton* (1894), 7 Misc. 467, 27 N. Y. Supp. 992.

If the account of the property is, in any essential respect, incorrect, in a matter or manner implying that he purposely concealed any portion of his property, and did not intend to make a full and complete disclosure of it, but designedly kept back something for the future benefit of himself or family, or intentionally withheld any important or proper information in respect to its condition, or in respect to charges or liens thereon, then his proceedings will not be just and fair within the true intent of the statute. *People v. White* (1857), 14 How. Pr. 498.

§ 124. Affidavit of petitioner.—An affidavit, in the following form, subscribed and taken by the petitioner, on the day of the presentation of the petition, must be annexed to the petition and schedule:

"I, ———, do swear" (or "affirm," as the case may be), "that the matters of fact, stated in the petition and schedule hereto annexed, are, in all respects, just and true; and that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, with intent to injure or defraud any of my creditors."

Source.—Code Civ. Pro. § 2204, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 5.

Jurisdiction is not acquired by the court to issue the order unless there is endorsed upon the petition an affidavit in the form prescribed. *Bullymore v. Cooper* (1871), 46 N. Y. 236; *Browne v. Bradley* (1857), 5 Abb. Pr. 141. The affidavit must be true in its letter and spirit. *Matter of Haight* (1886), 11 Civ. Pro. 227.

Execution of affidavit.—This section does not require that the affidavit be endorsed and sworn to in the presence of the court at the time of presenting the petition, but only that at the time of its presentation the petition shall have upon it the required affidavit sworn to by the applicant. *Richmond v. Prait* (1881), 24 Hun 578.

The fact that the affidavit is annexed to, instead of being endorsed upon the petition, is immaterial. *Richmond v. Fraim* (1881), 24 Hun 578.

An affidavit made prior to the time of the presentation of the petition is void; if it could be made in advance, intermediate between the time of making it and the presentation of the petition the applicant might perhaps acquire property, the fraudulent disposition of which would neither affect his right to a discharge nor enable the plaintiff on discovering the fact to prosecute him for perjury and to issue a new execution against his body after his conviction. *Browne v. Bradley* (1857), 5 Abb. Pr. 141.

Waiver of objections to affidavit.—Although the court acquires no jurisdiction where the affidavit is made prior to the time of presenting the petition, in a case where the petition is duly served upon the attorney of the judgment creditor, and such attorney appeared on presentation of the petition and application for the order of discharge, without raising objection, it was held that this was a waiver and it could not be raised thereafter. *Shaffer v. Riseley* (1889), 114 N. Y. 23, 20 N. E. 630.

Where the order does not recite that there was annexed to the petition the affidavit prescribed, or facts excusing its presentment, it does not show that the court had jurisdiction to grant it; and the recital in the order that a petition was filed is not equivalent to a statement that the requisite affidavit was annexed to the petition. *Seward v. Wales* (1899), 40 App. Div. 539, 58 N. Y. Supp. 42, *affd.* 167 N. Y. 538, 60 N. E. 1120.

§ 125. Notice to creditors.—At least fourteen days before the petition is presented, the petitioner must serve, upon the creditor in each execution, by virtue of which he is imprisoned, a copy of the petition, and of the schedule; together with a written notice of the time when, and place where, they will be presented. If, by reason of changes occurring after the service, it is necessary, before presenting the petition and schedule, to correct any statement contained in the schedule, the correction may be made by a supplemental schedule, a copy of which need not be served, unless the court so directs.

Source.—Code Civ. Pro. § 2205, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 3.

Service indispensable, the court cannot dispense with the full fourteen days' notice. *Matter of Quick* (1904), 92 App. Div. 131, 87 N. Y. Supp. 316, *affd.* 179 N. Y. 601, 72 N. E. 1149; *Goodwin v. Griggs* (1882), 88 N. Y. 631.

Service on non-resident.—When one of two plaintiffs lived without the state and the other lived within the state it cannot be assumed that the legislature intended that both should be served with the notice, and any such construction would operate as a denial of the relief which it is the object of the act to furnish. *Goodwin v. Griggs* (1882), 88 N. Y. 631.

§ 126. Notice to creditors; when service cannot be made.—The papers, specified in the last section, may be served, either upon the creditor or his representative, or upon the attorney whose name is subscribed to the execution; and, in either case, in the manner prescribed in the code of civil procedure for the service of a paper upon an attorney, in an action in the supreme court. Where it is made to appear by affidavit, to the satisfaction

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of the court, that service cannot, with due diligence, be so made within the state, upon either, the court may make an order, prescribing the mode of service, or directing the publication of a notice in lieu of service, in such manner and for such a length of time, as it thinks proper; and thereupon, it may direct an adjournment of the hearing to such a time as it thinks proper.

Source.—Code Civ. Pro. § 2206, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, Article 6, § 3.

§ 127. **Notice to creditors; when state a creditor.**—Where the state is a creditor, the papers must be served upon the attorney-general, who must represent the state in the proceedings.

Source.—Code Civ. Pro. § 2207, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 7, § 30.

§ 128. **Proceedings on presentation of petition.**—Upon the presentation of the petition, schedule, and affidavit, with due proof of service or publication, as prescribed in the last three sections, the court must make an order, directing the petitioner to be brought before it, on a day designated therein; and on that day, or on such other days as it appoints, the court must, in a summary way, hear the allegations and proofs of the parties. If the court is satisfied that the petition and schedule are correct, and that the petitioner's proceedings are just and fair, it must make an order, directing the petitioner to execute, to one or more trustees, designated in the order, an assignment of all his property, not expressly exempt by law from levy and sale by virtue of an execution; or of so much thereof as is sufficient to satisfy the execution or executions, by virtue of which he is imprisoned.

Source.—Code Civ. Pro. § 2208, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, §§ 6, 9.

The proceedings are not "just and fair" where the debtor has removed his property with intent to defraud or to benefit himself or his family. As to proceedings which are "just and fair," see *Matter of Roberts* (1878), 59 How. Pr. 136, 8 Daly 95; *Matter of Finck* (1880), 59 How. Pr. 145; *Matter of Fowler* (1880), 8 Daly 548, 59 How. Pr. 148. In *re Haight* (1886), 11 Civ. Pro. Rep. 227.

Where judgment debtor just before making an assignment permitted his wife to withdraw all the ready money of the firm on account of indebtedness to her from the firm and on the day of the assignment appropriated a sum of the firm's money to his own use, it was held that his proceedings had not been "just and fair." In *re Howes* (1886), 9 Civ. Pro. Rep. 17. An investment by the debtor in real property in his wife's name of moneys acquired subsequent to acquiring the liability to the judgment creditor, is in fraud of the creditor and will defeat a discharge on the ground that the proceedings are not "just and fair." *Matter of Lowell* (1885), 13 Daly 306, 2 How. Pr. N. S. 285, 13 Daly 306.

A discharge was denied where it appeared that the judgment debtor was in the enjoyment of an income, and expended it in the support of his family, consisting of his father and mother, without any effort to pay the judgment, and the circumstances are such that he might have set apart a portion of his income to apply on

the judgment; his omitting to do so is not "just and fair." *Matter of Donoghue* (1886), 17 Abb. N. C. 277. It is the duty of the debtor to satisfy the court that he has made use of his credit, the circumstances which surround him and of available and practicable effort to pay his judgment. The fact that he has no property out of which the sheriff can collect the judgment is unimportant if he has available resources in his control, or which would probably be placed at his disposal if desired by him. *In re Boyce* (1890), 11 N. Y. Supp. 624, 19 Civ. Pro. Rep. 23.

Proof as to whether proceedings are "just and fair."—The burden of showing that the proceedings are not "just and fair" rests upon the creditor opposing the discharge. *Matter of Benson* (1881), 10 Daly 166, 60 How. Pr. 314. *In re Caamano* (1885), 8 Civ. Pro. Rep. 29, 2 How. Pr. N. S. 240. Whether debtor's proceedings are "just and fair" is a question to be tried by the county court and will not be reviewed on appeal. *Richmond v. Prait* (1881), 24 Hun 578. Where it is shown that the affidavit of the debtor is untrue, it is sufficient to show that the proceedings were not "just and fair." *Matter of Brady* (1877), 69 N. Y. 215, 53 How. Pr. 128.

Fraudulent disposition of property.—A judgment debtor is not entitled to his discharge where he has disposed of his property with intent to defraud the creditor at whose suit he is imprisoned. *Matter of Brady* (1877), 69 N. Y. 215, 53 How. Pr. 128; *Coffin v. Gourlay* (1880), 20 Hun 308. An insolvent will be held to have disposed of his property within the meaning of this act, where with fraudulent design he has effectually placed it beyond reach of creditors by conveying it to a remote part of the country. *Matter of Watson* (1854), 2 E. D. Smith, 429.

Where a defaulter alleged inability to account for the misappropriation of the fund, and at the time of his failure conveyed away sixty thousand dollars worth of property which he did not specify in his inventory, his application was denied on both these grounds. *People v. White* (1857), 14 How. Pr. 498.

Where the judgment recited the statutory provision that the defendant was liable to arrest and imprisonment, it was held that a denial of a motion to vacate the order of arrest, was not by such judgment made a conclusive adjudication that the defendant had disposed of his property with intent to defraud creditors. *In re Zeltz* (1887), 12 Civ. Pro. Rep. 423.

Expenditure of money obtained by fraud.—The application for a discharge will be denied where the debtor has knowingly expended upon himself and family for the necessities and luxuries of life the money obtained by fraud from his creditors. *Matter of Lowell* (1885), 13 Daly 306, 2 How. Pr. N. S. 285.

The fact that the defendant converted money received in a judiciary capacity does not permit his discharge from arrest, as it was not his own money. *Suydam v. Belknap* (1886), 20 Hun 87.

False representations as to solvency of another.—There is nothing in the statute that would authorize holding that a debtor cannot be discharged because he made a false and fraudulent representation as to the solvency of a person to whom credit was given by the person who has acquired a judgment for damages against the debtor for the injury thus sustained. *Matter of Fowler* (1880), 8 Daly 548, 59 How. Pr. 148.

Limitation as to time.—The statute contains no limitation as to time; and it is immaterial whether a fraud upon creditors is perpetrated before the debtor's imprisonment or intermediate the arrest and examination. *Matter of Watson* (1854), 2 E. D. Smith, 429; *contra*, *People v. White* (1857), 14 How. Pr. 498.

It is not necessary, to prevent a discharge, to show that the fraudulent disposition was made with a view to the proceedings for the discharge. *Matter of Brady* (1877), 69 N. Y. 215, 53 How. Pr. 128. It may be shown that the fraudulent trans-

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action took place preceding or following the recovery of the judgment or even before the inception of the cause of action. *Matter of Brown* (1886), 39 Hun 27; compare *Matter of Pearce* (1883), 29 Hun 270.

Intent to defraud.—The intent must have been to defraud existing creditors, not those whose claims have been paid or cease to exist. *Matter of Brady* (1877), 69 N. Y. 215; *In re Haight* (1886), 11 Civ. Pro. Rep. 227; *Matter of Pearce* (1883), 29 Hun 270. The fact that the debt was fraudulently contracted is no ground for refusing a discharge to the judgment debtor. *Sparks v. Andrews* (1878), 7 Wk. Dig. 276, 1 City Ct. R. 76.

The fact that a copartnership of which the imprisoned debtor was a member has been guilty of a fraudulent disposition of property, does not necessarily defeat such debtor's right to a discharge, if his personal participation in the fraud is not shown. *Matter of Benson* (1881), 10 Daly 166, 60 How. Pr. 314.

One who has filed a bankrupt petition after the judgment was obtained, and has made an assignment, cannot be discharged. *Matter of Fitzgerald* (1878), 8 Daly 188, 5 Abb. N. C. 357, 56 How. Pr. 190; *Matter of Fowler* (1878), 8 Daly 548, 56 How. Pr. 148; but see *Maas v. O'Brien* (1878), 14 Hun 95. Otherwise if the petition was filed before the judgment. *Matter of Fowler*, *supra*.

§ 129. **Adjournment.**—Upon sufficient cause being shown by a creditor, the court may, from time to time, adjourn the hearing; but not to a day later than three months after the presentation of the petition.

Source.—Code Civ. Pro. § 2209, as added by L. 1880, ch. 178; derived from R. S. pt. 1, ch. 5, tit. 1, Article 6, § 7.

§ 130. **Proceedings on adjourned day.**—An objection to a matter of form shall not be received upon an adjourned day; and, unless the opposing creditor satisfies the court that the proceedings on the part of the petitioner are not just and fair, the court must direct an assignment, as prescribed in the last section but one, and must grant a discharge, as prescribed in the following sections of this article.

Source.—Code Civ. Pro. § 2210, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 8.

§ 131. **Assignment; effect thereof.**—The assignment must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, and must be recorded in the clerk's office of the county where the petitioner is imprisoned. Where it appears, from the schedule or otherwise, that real property will pass thereby, the assignment must also be recorded as a deed, in the proper office for recording deeds, of each county where the real property is situated. The assignment vests in the trustee or trustees, for the benefit of the judgment creditors in the executions, by virtue of which the petitioner is imprisoned, all the estate, right, title, and interest of the petitioner in and to the property, so directed to be assigned.

Source.—Code Civ. Pro. § 2211, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 9, and Article 7, § 20, in part.

§ 132. **Discharge; when to be granted.**—Upon the production, by the

petitioner, of satisfactory evidence, that the petitioner has actually delivered to the trustee or trustees all the property so directed to be assigned, which is capable of delivery; or upon the petitioner's giving security, approved by the court, for the future delivery thereof; the court must make an order, discharging the petitioner from imprisonment, by virtue of each execution, specified in his petition. The sheriff, upon being served with a certified copy of the order, must discharge the petitioner as directed therein, without any detention on account of fees.

Source.—Code Civ. Pro. § 2212, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, §§ 10, 11.

Validity of order of discharge.—An order of discharge is invalid on its face unless it recites proceedings necessary to vest the court with jurisdiction. *Bullymore v. Cooper* (1869), 2 Lans. 71, *affd.* 46 N. Y. 236 (1871). See also *Shaffer v. Riseley* (1887), 44 Hun 6, 6 N. Y. St. Rep. 417; *revd.* on other grounds, 114 N. Y. 23, 20 N. E. 630. Order must recite jurisdictional facts. *Seward v. Wales* (1899), 40 App. Div. 539, 58 N. Y. Supp. 42, *affd.* 167 N. Y. 538, 60 N. E. 1120.

Delivery of property.—Some evidence must be given to show that the petitioner has actually delivered to the assignee the property directed to be assigned. *Borthwick v. Howe* (1882), 27 Hun 505. The affidavit of the assignee that the property of the debtor has been delivered to him, amounts to a certificate of that fact and is sufficient. *In re Von Schoening* (1878), 1 Law Bull. 4.

The debtor must assign all his property at the time he is ordered to make the assignment and not merely such as is described in, or as he had at the time of signing the petition. *Borthwick v. Howe* (1882), 27 Hun 505.

Duty of sheriff.—A sheriff will be protected if he can show *alibunde* the existence of a fact necessary to give the court jurisdiction. *Goodwin v. Griggs* (1882), 88 N. Y. 629; *Develin v. Cooper* (1881), 84 N. Y. 410.

Where an order of discharge contains recitals of all of the facts needed to give jurisdiction to the officer granting it, the order alone will protect a sheriff acting under it, in the absence of proof of knowledge, on his part, of any defects in the proceedings. *Develin v. Cooper* (1881), 84 N. Y. 410.

An order for the discharge of an imprisoned debtor which did not recite the fact of an affidavit made and annexed when in fact such affidavit was not made on the day therein directed, does not protect the sheriff making the discharge as directed. *Shaffer v. Riseley* (1867), 44 Hun 6, 6 N. Y. St. Rep. 417; *revd.* on another point, 114 N. Y. 23, 20 N. E. 630. Where the order does not upon its face show that it was made by the court, a sheriff is not liable to an action for false imprisonment for refusing to discharge debtor from imprisonment. *Hayes v. Bowe* (1883), 12 Daly 193, 65 How. Pr. 347.

Inability to perform ground for discharge.—Under the old code it was held that where one has been imprisoned for contracting a debt fraudulently and for disposing of property with fraudulent intent, inability to perform the act required of him may sustain an order discharging him from imprisonment. *Russak v. Sabey* (1883), 29 Hun 491, *affd.* 94 N. Y. 640.

Judgment for tort.—A party is released from such a judgment by a discharge. *Hayden v. Palmer* (1840), 24 Wend. 364.

§ 133. Petitioner's property still liable.—Notwithstanding such a discharge, the judgment creditor in the execution has the same remedies, against the property of the petitioner, for any sum due upon his judgment,

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which he had before the execution was issued; but the petitioner shall not, except as is otherwise specially prescribed in the next section, be again imprisoned by virtue of an execution upon the same judgment, or arrested in an action thereupon.

Source.—Code Civ. Pro. § 2213, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 12.

§ 134. **When creditor may issue new execution against person.**—If the petitioner is convicted of perjury, committed in any of the proceedings upon his petition, any judgment creditor, by virtue of whose execution he was imprisoned, may issue a new execution against his person.

Source.—Code Civ. Pro. § 2214, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 13.

§ 135. **Powers and duties of trustee.**—The trustee must collect the demands, and sell the other property assigned to him. He must apply the proceeds thereof, after deducting his commissions and expenses allowed by law, as follows:

1. To the payment of the jail fees, upon the imprisonment and discharge of the petitioner.

2. If any surplus remains, to the payment of the creditors by virtue of whose executions the petitioner was imprisoned, when he presented his petition; or, if there is not enough to pay them in full, to the payment, to each, of a proportionate part of the sum due upon his execution.

3. If any surplus remains, he must pay it over to the petitioner, or his executor or administrator.

Personal service upon a creditor, or his attorney, of written notice of the time and place of making a distribution, as prescribed in subdivision second of this section, has the same effect as publishing a notice thereof, in a case prescribed by law.

Source.—Code Civ. Pro. § 2215, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 15.

§ 136. **Creditor may notify debtor to apply for discharge.**—Where a person has been imprisoned by virtue of an execution, for the space of three months after he was entitled, by the provisions of this article, to apply for a discharge; and has neither made such an application, nor applied for his discharge under the provisions of article third of this chapter; the judgment creditor, by virtue of whose execution he is imprisoned, may serve upon the prisoner a written notice, requiring him to apply for his discharge, according to the provisions of this article.

Source.—Code Civ. Pro. § 2216, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 16.

§ 137. **Effect of failure so to apply.**—If the prisoner does not, within thirty days after personal service of such a notice, either present a petition

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to the proper court, as prescribed in article third of this chapter; or serve, upon the creditor giving the notice, a copy of a petition and schedule, with a notice of his intention to apply for his discharge, as prescribed in this article; or if, after such a presentation or service, he does not diligently proceed thereupon to a decision, he shall be forever barred from obtaining his discharge under the provisions of this article, or of article third of this chapter.

Source.—Code Civ. Pro. § 2217, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 6, § 17.

§ 138. Debtors to state or United States not to be discharged.—Neither of the following named persons shall be discharged from imprisonment, under the provisions of this article:

1. A person owing a debt or duty to the United States.
2. A person owing a debt or duty to the state, for taxes or for money received or collected by any person, as a public officer or in a fiduciary capacity, or a cause of action specified in section nineteen hundred sixty-nine of the code of civil procedure or a judgment recovered upon such a cause of action.

Source.—Code Civ. Pro. § 2218, as added by L. 1880, ch. 178; derived from R. S. pt. 2, ch. 5, tit. 1, Article 7, parts of §§ 29 and 30, as amended by L. 1859, ch. 2.

§ 139. Discharge on application of taxpayer.—Where a person has been arrested by virtue of an execution issued upon a judgment of fifty dollars or under, and has been kept imprisoned at the expense of the county for six months or over, the court out of which the execution issued may, on the application of a taxpayer of the county to which the support is chargeable, and upon due proof of the service upon the person in whose favor such execution was issued, of a notice in writing of the time when and the place where such application is to be made, at least eight days before the making thereof discharge the prisoner, and it shall be the duty of the sheriff to forthwith release him from custody.

Source.—L. 1884, ch. 228.

ARTICLE VI.

DISCHARGE OF BANKRUPT FROM JUDGMENT.

Section 150. Discharge of bankrupt from judgment.

§ 150. Discharge of bankrupt from judgment.—At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof,

for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is canceled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the same manner as prescribed in section seven hundred and ninety-six and seven hundred and ninety-seven of the code of civil procedure, if the residence or place of business of such creditor, or his attorney, is known, but if unknown and cannot be ascertained after due diligence, or if such creditor is a non-resident of this state, and his attorney is dead, removed from, or cannot be found within the state, upon proof of said facts by affidavit a judge of the court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication shown by the affidavit of the publisher shall be sufficient service upon such judgment creditor, of the application.

Source.—Code Civ. Pro. § 1268, as amended by L. 1899, ch. 602; originally derived from L. 1875, ch. 52.

References.—Discharges in bankruptcy, when granted, Federal Bankruptcy Act of 1898, § 14 (Collier on Bankruptcy, 11th ed. pp. 339–405). Debts dischargeable in bankruptcy, *Id.* § 17. Debts not dischargeable, *Id.* § 17 (Collier on Bankruptcy, 11th ed. pp. 422–439).

Application.—Section applies to judgments entered against bankrupt in favor of the people. *Matter of Brandreth* (1878), 14 Hun 585. It must appear that the judgment sought to be canceled is one dischargeable in bankruptcy. *Disler v. McCauley* (1901), 66 App. Div. 42, 73 N. Y. Supp. 270.

Purpose and effect of section.—Where a testator, prior to his death, had been granted a discharge in bankruptcy, his judgment creditors are not entitled to participate in the distribution of his estate for the reason that he failed to obtain an order as provided in this section and have judgments against him cancelled and discharged as herein provided. The United States courts have exclusive jurisdiction of bankruptcy proceedings and having made a definite and official decree therein, it is unreasonable to contend that such decree is ineffective and inoperative until supplemented by the decree of a state court, or that the Legislature of this state has any authority to limit the provisions of the judgment of the Federal Court. The judgments still remain apparently in full force and effect upon the records; this section provides a method whereby the public records may

be made to conform to and set forth the actual facts. *Matter of Peterson* (1909), 64 Misc. 217, 118 N. Y. Supp. 1077, *affd.* 137 App. Div. 435, 121 N. Y. Supp. 738.

Provision mandatory.—This section is imperative and absolutely entitles defendant to an order canceling the judgment from the docket. *Arnold v. Oliver* (1883), 64 How. Pr. 452, 2 Civ. Pro. Rep. 457; *Fellows v. Kittredge* (1879), 56 How. Pr. 498. A judgment obtained before the debtor's discharge has been granted must be canceled if covered by the discharge. *American Exchange Bank v. Brandreth* (1877), 12 Hun 384.

In the absence of evidence that the statement in the bankrupt's schedule, that the judgment creditor's address was unknown to the bankrupt, was fraudulently inserted, an order must be entered canceling the judgment. *Matter of Mollner* (1902), 75 App. Div. 441, 78 N. Y. Supp. 281. A bankrupt after recovery of judgment against him and the expiration of one year after his discharge is entitled as a matter of right to an order canceling the record of judgment. *Hussey v. Judson* (1904), 43 Misc. 370, 87 N. Y. Supp. 499.

When judgment discharged.—A judgment will be discharged of record, although the notice required by the bankruptcy law was addressed to a judgment creditor who died prior to the proceedings in bankruptcy and whose name appeared in the schedule of creditors. *Lent v. Farnsworth* (1904), 94 App. Div. 99, 87 N. Y. Supp. 1112, *affd.* 180 N. Y. 503, 72 N. E. 1144. It is no objection that the judgment was not specified in the schedules in bankruptcy, if the debt was specified. *West Philadelphia Bank v. Gerry* (1887), 106 N. Y. 467, 13 N. E. 453.

Motion; by whom made.—Motion may be made not only by the bankrupt but by any person who has succeeded to the bankrupt's right, as for instance, a grantee of real property formerly owned by the bankrupt, and upon which the judgment is an apparent lien. *Graber v. Gault* (1905), 103 App. Div. 511, 93 N. Y. Supp. 76.

Sufficiency of order.—An order discharging the lien of a judgment may properly provide "but such cancellation of record is not to impair any rights or lien which the receiver may have acquired in the property of said judgment debtor." *Pickert v. Eaton* (1903), 81 App. Div. 423, 81 N. Y. Supp. 50.

Delay in applying for a discharge in bankruptcy proceedings will not prevent a party from obtaining a discharge under this section. *Eberspacher v. Boehm* (1890), 33 N. Y. St. Rep. 792, 11 N. Y. Supp. 404, *affd.* 126 N. Y. 678, 28 N. E. 248.

Laches on the part of bankrupt in making such application is a question for the court below and its decision will not be reviewed upon appeal. *West Philadelphia Bank v. Gerry* (1887), 106 N. Y. 467, 13 N. E. 453. The failure of the bankrupt to avail himself of the provisions of this section does not revive the judgment; it prevents the judgment debtor from availing himself of the summary remedy for the cancellation of the judgment of record, but it does not authorize the enforcement of the judgment discharged by bankruptcy proceedings. *Leo v. Joseph* (1890), 31 N. Y. St. Rep. 152, 9 N. Y. Supp. 612. A failure of a bankrupt to secure a stay of proceedings in an action upon a judgment against him, does not deprive him of the benefit of this section. *West Philadelphia Bank v. Gerry* (1887), 106 N. Y. 467, 13 N. E. 453.

Where a motion to open a default and grant leave to serve a supplemental answer setting up a discharge in bankruptcy after service of the answer, was filed six months after such discharge, but within one year therefrom it was proper to grant such motion, on imposition of terms, notwithstanding such delay, since such motion set up a seemingly complete defense which came into existence after service of the answer, though it did not entitle defendant to a cancellation of the judgment under this section. *Kahn v. Casper* (1900), 51 App. Div. 540, 64 N. Y. Supp. 838.

Time of recovery of judgment.—Only judgments entered before a discharge in bankruptcy may be canceled. *Howe v. Noyes* (1905), 47 Misc. 338, 93 N. Y. Supp. 475.

Where an action was begun before defendant's discharge in bankruptcy, but the judgment of default was entered thereafter, the judgment was not extinguished by the discharge; and defendant is not entitled to an order canceling the judgment, his proper remedy being to move to open the default and interpose the discharge as a defense to the action. *Sands v. Perry* (1885), 38 Hun 268. See also *Crouse v. Whittlesey* (1891), 40 N. Y. St. Rep. 133, 15 N. Y. Supp. 851.

Where a judgment in an action based upon false representations was entered subsequently to the discharge in bankruptcy on a stipulation withdrawing the allegations of fraud, cancellation was refused. *Stevens v. Meyers* (1902), 72 App. Div. 128, 76 N. Y. Supp. 332.

Judgment against several.—A discharge will not be allowed under this section where it appears that the judgment was recovered against the defendant jointly with another and that such judgment is not the judgment covered by the discharge of the bankrupt. *Seaman v. MacReynolds* (1883), 65 How. Pr. 521. The cancellation and discharge will not relieve a judgment debtor from partnership debts, where such discharge was granted in a proceeding begun, carried on, and ended by such debtor individually. *Trimble v. More* (1881), 47 Super. Ct. 340.

Claim not properly scheduled.—Cancellation of a judgment will be denied where it appears from the bankrupt's schedules in bankruptcy that the claim from which he seeks to be discharged was not properly scheduled in that it stated that the residence of the claimant was "unknown" when the bankrupt had actual notice thereof. *Guasti v. Miller* (1911), 203 N. Y. 259, 96 N. E. 416, *affd.* 226 U. S. 170, 57 L. ed. 173, 33 Sup. Ct. 49.

Cancellation will be refused where the judgment creditor's address was included in schedules as "unknown" and it appeared that no effort was made to ascertain such address. *Feldmark v. Weinstein* (1904), 45 Misc. 329, 90 N. Y. Supp. 478.

Failure to serve notice of application for discharge in bankruptcy.—Where a judgment creditor has successfully opposed his debtor's application for discharge in bankruptcy, and the debtor makes a second application for discharge in which he schedules the judgment but fails to serve notice of the application upon the judgment creditor, such failure is a valid defense to a motion to discharge the creditor's judgment. *Matter of Quackenbush* (1907), 122 App. Div. 456, 106 N. Y. Supp. 773.

Judgment on forfeited bail bond.—A bankrupt is not entitled under this section to have a judgment on a forfeited bail bond discharged of record. *Matter of Weber* (1914), 212 N. Y. 290, 106 N. E. 58.

Judgment for personal injuries.—A judgment recovered in an action for personal injuries to the plaintiff who on asking for a solution of carbolic acid diluted two per cent. was given pure carbolic acid by the defendant's agent is not a dischargeable debt in bankruptcy and a motion under this section to cancel the same of record will be denied though the defendant listed said judgment in his schedules in bankruptcy. *Matter of Halper* (1913), 82 Misc. 205, 143 N. Y. Supp. 1005.

A judgment in an action for criminal conversation, necessarily involving malice against the plaintiff, is not released by a discharge in bankruptcy. *Colwell v. Tinker* (1902), 169 N. Y. 531, 62 N. E. 668, 58 L. R. A. 765, 98 Am. St. Rep. 587, *affd.* 193 U. S. 473, 48 L. ed. 754, 24 Sup. Ct. 505.

Fraud.—The remedy given by the United States Revised Statutes providing for contesting the validity of a discharge in bankruptcy for fraud is exclusive only when the validity is based upon the ground specified; and when the fraud is based

on any other ground; or it is claimed that the court which granted it is without jurisdiction, the discharge may be attacked by a judgment creditor of the debtor by a motion under this section. *Crouse v. Whittlesey* (1891), 40 N. Y. St. Rep. 133, 15 N. Y. Supp. 851.

Where the debt was contracted for sales and loans induced by the false and fraudulent representations of the judgment debtor, it was held that the debt was not discharged by proceedings in bankruptcy and the motion under this section should be denied on the ground that the debts were fraudulently contracted; and judgment did not merge the alleged fraud, and the court can for the purpose of the bankruptcy statute go behind the judgment to see whether the claim upon which it was recovered was created by fraud. *Kaufman v. Lindner* (1884), 6 Civ. Pro. R. 148, 67 How. Pr. 322.

A settlement of a judgment in favor of one of the parties having been set aside by reason of debts being in fraud of the attorneys of the defendant, the parties stand as they stood before the attempted settlement; and the judgment is subject like other debts to the bankruptcy law and the bankruptcy is entitled to have the judgment canceled. *Blumenthal v. Anderson* (1883), 91 N. Y. 171.

Where judgment has been obtained in an action to recover personal property and defendant has been arrested for concealing such property, the defendant is entitled to have judgment discharged, the debt not having been created by fraud. *Bergen v. Patterson* (1881), 24 Hun 250.

On a motion to cancel a judgment under this section the judgment creditor cannot be allowed to show by proof *affunde* that there was fraud in contracting the debt sued for, where the complaint in the action in which the judgment was obtained contained no allegation of fraud, no order of arrest was granted in the action, and the judgment was a simple money judgment, and more than six years have passed since the recovery thereof. *Stern v. Meyer* (1894), 9 Misc. 102, 29 N. Y. Supp. 34.

Lien.—A creditor's suit to set aside fraudulent conveyances creates a specific lien upon the property, which is, within the meaning of the saving clause contained in this section preserving certain liens on real property, owned by the bankrupt prior to the time he was adjudged a bankrupt. *Arnold v. Treviranus* (1903), 78 App. Div. 589, 79 N. Y. Supp. 732. But when the judgment creditor does not attack the conveyance until after the bankrupt's discharge he has no lien upon the real property within the meaning of the saving clause. *Matter of David* (1904), 44 Misc. 516, 90 N. Y. Supp. 85.

Lien of judgment.—The right to have a judgment canceled is not affected by the fact that it is a lien on real estate conveyed by the bankrupt; the defendant is entitled to an unconditional order discharging the judgment, there being nothing in the statute which authorizes a partial or conditional discharge of the judgment creditors upon any specified property, real or personal. *Fellows v. Kittredge* (1879), 56 How. Pr. 498.

Plaintiff recovered judgment against defendant; it was docketed at 10 o'clock on the following morning; at that time defendant was seized in fee of land in said county; at 4 P. M. of that day a deed was placed on record purporting to have been executed the year before, conveying defendant's interest to another. Subsequently plaintiff brought an action to have the conveyance set aside as fraudulent. While the action was pending, defendant having procured a discharge in bankruptcy moved to have the judgment canceled. *Held*, that the judgment should be allowed to stay so far as was necessary for the purpose of enabling plaintiff to enforce any lien created by it upon any real estate owned by the defendant at the time it was docketed. *Popham v. Barretto* (1880), 20 Hun 299.

The lien of a judgment, recovered within four months before the adjudication of the debtor as a bankrupt, survives his subsequent discharge, although the debt upon which it was recovered was proven in the bankruptcy proceedings, where the trustee in bankruptcy elected not to take the property upon which the judgment was a lien and the interest of the bankrupt therein was not sold in the bankruptcy proceedings. *McCarty v. Light* (1913), 155 App. Div. 36, 139 N. Y. Supp. 853.

Equitable liens on lands, existing at the time of a discharge in bankruptcy, no action having been commenced thereon or *lis pendens* filed, are not protected from the operation of the discharge. *American Exchange Bank v. Brandreth* (1877), 12 Hun 384.

A discharge in bankruptcy operates as soon as granted as against a judgment under which a debtor is imprisoned and therefore the sheriff is not liable for an escape although a year has not expired since the discharge was granted. *Walker v. Harder* (1903), 39 Misc. 749, 80 N. Y. Supp. 943, 96 App. Div. 631, 89 N. Y. Supp. 1118.

Res adjudicata.—On a motion to set up such cancellation of the judgment, a denial of a former motion to set up a discharge in bankruptcy is not *res adjudicata*, as the application is not the same. *Townsend v. Simpson* (1882), 13 Wk. Dig. 450.

Section cited.—*Thomas v. Roddy* (1907), 122 App. Div. 851, 107 N. Y. Supp. 473.

ARTICLE VII.

TRUSTEES FOR INSOLVENT AND IMPRISONED DEBTORS.

Section 160. Trustees for creditors.

161. Sole trustee.
162. Two or more trustees.
163. Death of trustee; survivor or successor.
164. Trustees' oath.
165. Vesting of property in trustees.
166. Powers of trustees.
167. Notice to debtors, bailees and creditors.
168. Power to sue notwithstanding notice.
169. Forfeiture for failure to comply with notice.
170. Warrant on withholding account or property.
171. Examination of person arrested.
172. Imprisonment for contumacy.
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215. Recording order and filing papers.
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§ 160. Trustees for creditors.—All trustees, appointed under any authority, conferred by articles three, four and five of this chapter, in the several cases therein contemplated, are hereby declared to be trustees of the estate of the debtor, in relation to whose property they shall be appointed, for the benefit of his creditors; and shall be vested with all the powers and authority hereinafter specified, and shall be subject to the control, obligations and responsibilities hereinafter declared.

Source.—R. S. pt. 2, ch. 5, tit. 1, Article 8, § 1.

Consolidators' note.—This article consists of the provisions of R. S. pt. 2, ch. 5, tit. 1, Article 8, unaltered except in such slight degree as existing practice may require. The numerous references relating to assignees, trustees of the estates of non-resident, absconding and absent debtors and officers before whom a proceeding might be taken, have been omitted as unnecessary and obsolete, as explained hereafter. References in this article to articles of the Revised Statutes have been changed to agree with the distribution of these articles subsequent to

* So in original. See titles of section, post.

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their enactment. Part 2, ch. 5, tit. 1, of Revised Statutes originally contained eight articles.

- Article 1. Related to "attachments against absconding, concealed and non-resident debtors." This article was repealed by L. 1877, ch. 417.
2. Related to "attachments against debtors confined for crimes." This article was also repealed by L. 1877, ch. 417.
3. Related to insolvents discharge from debts inserted in Code Civ. Pro. ch. 17, tit. 1, Article 1, by L. 1880, ch. 178. This article becomes Article 3 of the Debtor and Creditor Law.
4. Related to proceedings by creditors to compel assignments by debtors imprisoned on execution in civil causes. Repealed by L. 1880, ch. 245.
5. Related to insolvent's exemption from arrest and imprisonment. Inserted in Code, ch. 17, tit. 1, Article 2, by L. 1880, ch. 178. This article becomes Article 4 of the Debtor and Creditor Law.
6. Related to judgment debtors discharge from imprisonment, inserted in Code, ch. 17, tit. 1, Article 3, by L. 1880, ch. 178. This article becomes Article 5 of the Debtor and Creditor Law.
7. Contained certain general provisions which were inserted, so far as alive, in Code, ch. 17, tit. 1, Article 1, by L. 1880, ch. 178. These provisions are now in Article 3 of the Debtor and Creditor Law.
8. Originally contained provisions defining the powers, duties and obligations of trustees and assignees under all of the preceding articles of the title. The provisions of this article still remain but the only existing matter to which they apply are the original Articles 3, 5, 6 and 7, which are consolidated in Debtor and Creditor Law as follows:

Original Article 3 is in Debtor and Creditor Law, Article 3.

Article 5 is in Debtor and Creditor Law, Article 4.

Article 6 is in Debtor and Creditor Law, Article 5.

Article 7 is in Debtor and Creditor Law, Article 3.

References in Article 7 of the Debtor and Creditor Law to original Articles 1, 2 and 4 have been omitted inasmuch as these articles are entirely out of existence. References to original Articles 3, 5, 6 and 7 have been changed to correspond with the articles of the Debtor and Creditor Law in which they are consolidated.

The words "in respect to trustees" are omitted from this section because the provisions of Article 7 now relate only to trustees. The article originally related to trustees and assignees but since the repeal of the articles of the Revised Statutes providing for the appointment of assignees all references in this article to "assignees" have been omitted.

The reference in this section to the "officer" appointing a trustee has been omitted inasmuch as such reference is now obsolete. The officers who are here referred to were supreme court commissioners, recorders of cities and, in Schenectady, the mayor. Supreme court commissioners have long been abolished. The power of appointment formerly possessed by the officers named now rests entirely with the court or judge.

Construction of various sections of this article, see *Herring v. N. Y.*, L. E. & W. R. R. Co. (1887), 105 N. Y. 340, 12 N. E. 763.

§ 161. **Sole trustee.**—When one trustee only shall be appointed, all the provisions herein contained, in reference to several trustees, shall apply to him.

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Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 2.

§ 162. Two or more trustees.—When there are more trustees than one appointed, the debts and property of the debtor may be collected and received by any one of them; and when there are more than two trustees appointed, every power and authority conferred by this chapter on the trustees, may be exercised by any two of them.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 3.

§ 163. Death of trustee; survivor or successor.—The survivor or survivors of any trustee, shall have all the powers and rights given by this chapter to trustees. All property in the hands of any trustee at the time of his death, removal or incapacity, shall be delivered to the remaining trustee or trustees, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 4.

§ 164. Trustees' oath.—Before proceeding to the discharge of any of their duties, all such trustees shall take and subscribe an oath, that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the court that appointed them.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 5.

Oath by trustee; necessity for.—The taking of an oath by the trustee was not required at common law. 19 Abb. N. C. 361, note. If the assignee does not take the oath he cannot enter upon the execution of the trust; it is a prerequisite to the complete vesting of the title in the assignee; it would be absurd to consider the title in the assignee before he is qualified to take upon himself the execution of the trust. *Hoag v. Hoag* (1886), 35 N. Y. 469, 474.

§ 165. Vesting of property in trustees.—The trustees taking such oath, shall be deemed vested with all the estate, real and personal, of such debtor, except such as is exempted by articles three, four and five from the execution of the assignment, in said articles directed.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 6.

If the trustee does not take possession of the property assigned, and the same continues in the possession of the insolvent, or his lessee, for thirty years thereafter, the presumption is that the purposes of the trust have been satisfied and is against an outstanding title in the trustee. *Hoag v. Hoag* (1886), 35 N. Y. 469.

§ 166. Powers of trustees.—The said trustees shall have power:

1. To sue in their own names or otherwise, and recover all the estate, debts and things in action, belonging or due to such debtor, in the same manner and with the like effect as such debtor might or could have done if no trustees had been appointed, and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor, by such debtor, before presenting the petition of the insolvent under said articles. But no suit in equity shall be brought by assignees of insolvents under the

third or fourth articles, without the consent of the creditors having a major part of the debts which shall have been exhibited and allowed, unless the sum in controversy exceeds five hundred dollars;

2. To take into their hands, all the estate of such debtor, whether delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same;

3. From time to time, to sell at public auction, all the estate, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper, printed in the county, where the sale shall be made, if there be one;

4. To allow such credit on the sale of real property by them, as they shall deem reasonable, not exceeding eighteen months, for not more than three-fourths of the purchase money; which credit shall be secured by a bond of the purchaser, and a mortgage on the property sold;

5. On such sales, to execute the necessary conveyances and bills of sale;

6. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property so sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments;

7. To settle all matters and accounts between such debtor, and his debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them;

8. Under the order of the court appointing them, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 7.

Powers and duties of trustees generally.—Trustees represent the assignor only as to his estate for the purpose of effecting a transfer of the title to his property, and paying his debts. They are not ex-officio his attorneys to appear and answer suits brought against him, with a view to conclude him personally by the judgments that may be rendered therein, any further than to protect them in and appropriate any of his estate that may be necessary to satisfy the debts, and to sell it to make satisfaction. *Davis v. Duffie* (1861), 21 Super. (8 Bos.) 617, 625. An assignee is a representative of the creditors and is in no sense a representative of the assignors, except as to a surplus when there is one. *Martin v. Kunzmüller* (1862), 10 Bos. 16, *affd.* 37 N. Y. 396.

Power to sue.—The receiver under this section may maintain *trover* for the conversion of the personal property of the corporation before he was appointed receiver. *Gillet v. Fairchild* (1847), 4 Den. 80.

Formerly an attachment was treated as a suit, and the trustees appointed in it were by the statute vested with the estate of the debtor with the power to sue, etc., as under this section. *Burtis v. Dickinson* (1894), 81 Hun 343, 63 N. Y. St. Rep. 133, 30 N. Y. Supp. 836.

Setting aside a sale.—Where the proceedings taken by the receiver under subd. 3 are irregular, a stockholder may apply to the court before whom proceedings were had to set them aside; and if the receiver fails in his duty or lends himself

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to the creditors, to the unnecessary prejudice of the stockholders, the court will intervene and set the proceedings aside. *Libby v. Rosekrans* (1869), 55 Barb. 202.

Liability for neglecting to recover property fraudulently transferred.—*Matter of Cornell* (1888), 110 N. Y. 351, 18 N. E. 142; *Matter of Carpenter* (1887), 45 Hun 552.

As to extent of qualification of § 168 post by the foregoing section. *Jones v. Robinson* (1857), 26 Barb. 310.

Section cited.—*Herring v. N. Y., E. L. & W. R. R. Co.* (1887), 105 N. Y. 340, 382, 12 N. E. 763; *Matter of Coates* (1856), 3 Abb. App. Dec. 231, 12 How. Pr. 344.

§ 167. Notice to debtors, bailees and creditors.—The trustees, immediately upon their appointment, shall give notice thereof for at least three weeks in a newspaper published in the county where application was made and therein shall require:

1. All persons indebted to such debtor, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such trustees, and to pay the same;

2. All persons having in their possession any property or effects of such debtor, to deliver the same to the said trustees by the day so appointed;

3. All the creditors of such debtor to deliver their respective accounts and demands to the trustees or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, §§ 8, 9.

§ 168. Power to sue notwithstanding notice.—Notwithstanding any such notice, the trustees may sue for and recover, any property or effects of the debtor, and any debts due to him, at any time, before the day appointed for the delivery or payment thereof.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 10.

Application.—The provision providing that trustees may sue an insolvent debtor, notwithstanding notice has not been published, does not apply to receiver of an insolvent corporation. *Matter of Stonebridge* (1890), 57 Hun 441, 10 N. Y. Supp. 727.

§ 169. Forfeiture for failure to comply with notice.—Every person indebted to such debtor, or having the possession or custody of any property or thing in action, belonging to him, who shall conceal the same, and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the trustees or one of them, by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the value of such property so concealed; which penalties may be recovered by the trustees.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 11.

§ 170. Warrant on withholding account or property.—Whenever the trustees shall show by their own oath, or other competent proof, to the satisfaction of any judge of a county court, or in the county of New York any justice of the supreme court, that there is good reason to believe that

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the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in the said trustees; or that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such judge or justice shall issue a warrant, commanding any sheriff or constable, to cause such debtor, his wife, or other person, to be brought before him at such time and place as he shall appoint, for the purpose of being examined.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 12.

Consolidators' note.—The words "or in the city of New York a justice of the supreme court" have been inserted as there exists in the city of New York no county judge. Likewise wherever the word "judge" occurs the word "justice" has been inserted so that wherever there is a provision relating to a county judge provision may be made for the city of New York where such judge does not exist.

Information and belief.—It is sufficient that the application for the warrant states the facts upon information and belief. *Noble v. Halliday* (1848), 1 N. Y. 330, 4 How. Pr. 447, rev. 1 Barb. 137; compare *Matter of Stonebridge* (1889), 53 Hun 545, 6 N. Y. Supp. 311.

Witness; proceeding may be instituted against.—Such a proceeding may be instituted even against a witness, who can testify concerning the concealment or embezzlement of property by any other person. The warrant is nothing more in substance than a subpoena, obedience to which is insured in the first instance. *Matter of Stonebridge* (1890), 57 Hun 441, 10 N. Y. Supp. 727; dissenting opinion.

Receivers of corporation; proceedings by.—The provisions of this section are applicable to the receivers of corporations. *Langdon v. New York Book Co* (1891), 39 N. Y. St. Rep. 167, 14 N. Y. Supp. 308, 59 Super. (27 J. & S.) 296. A temporary receiver of a corporation may maintain a proceeding to examine a person alleged to have in his possession property of the corporation. *Rich v. Sargent Granite Co.* (1894), 23 Civ. Pro. Rep. 359, 61 N. Y. St. Rep. 852, 30 N. Y. Supp. 139.

Examination of officer of corporation.—Proof that early in the year the president of a corporation had made statements and reports showing that the corporation had more property than was required to pay its debts; that in September executions against the corporation were returned unsatisfied; that the receiver obtained only the books of the concern, from which it appeared that large transfers of property had been made prior to the obtaining of such judgments, and that the president was active in making such transfers, is sufficient to sustain a warrant for the examination of the president. *Matter of Stonebridge* (1891), 37 N. Y. St. Rep. 617, 13 N. Y. Supp. 770, affd. 128 N. Y. 618, 28 N. E. 253.

Notice of the application must be served upon the attorney general, under Laws of 1893, ch. 378, § 8, in case of the receiver of a corporation. *Langdon v. N. Y. Book Co.* (1891), 39 N. Y. St. Rep. 167, 14 N. Y. Supp. 308, 59 Super. (27 J. & S.) 296; *Matter of Stonebridge* (1890), 57 Hun 441, 10 N. Y. Supp. 727.

§ 171. **Examination of person arrested.**—The judge or justice issuing such warrant, shall examine every person so brought before him, on oath, in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of

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any person to such debtor; and shall reduce the examination to writing; which the person so examined is hereby required to sign, and which shall be attested by the judge or justice.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 13.

Termination of proceeding.—The proceeding under the statute is terminated by the signature of the person examined to his deposition and the attestation thereof by the officer conducting the inquiry. *Matter of Stonebridge* (1890), 57 Hun 441, 10 N. Y. Supp. 727, dissenting opinion.

Section cited.—*Rich v. Sargent Granite Co.* (1894), 23 Civ. Pro. Rep. 359, 30 N. Y. Supp. 139.

§ 172. Imprisonment for contumacy.—If any person so brought before such judge or justice, shall refuse to be sworn, or to answer satisfactorily, all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such judge or justice, the judge or justice shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn or to answer as required, or to sign such examination; in which warrant the particular default of the person committed shall be specified; and if it be in not answering any question, such question shall also be specified therein.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 14.

§ 173. No discharge for defects of form.—If any person so committed, shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court before whom such person shall be brought, shall re-commit such person, unless it shall be made to appear that he has answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer, on oath, the questions so put to him.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 15.

§ 174. Penalties for connivance at escape.—Any sheriff, constable or jailer wilfully suffering any person so committed or re-committed, pursuant to the foregoing sections, to escape, on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 16.

§ 175. Effect of answers on examination.—The person so examined, and answering to the satisfaction of the court, shall not be liable to any penalty imposed for concealing and not delivering any property, or paying any debt; but his answers on such examination, may be given in evidence in the same manner, and with the like effect, as if he had been examined by such trustees in an action brought by them against him for the recovery of such property or debt.

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Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 17.

Consolidators' note.—In adapting the provisions of the revised statutes to present conditions changes are necessary to make the statute apply to the present courts. In this section reference is made to an "answer to a bill in equity." The change made in this section is a substitute for the provisions in the old section to take the place of practice which no longer exists.

Section cited.—Rich v. Sargent Granite Co. (1894), 23 Civ. Pro. Rep. 359, 30 N. Y. Supp. 139.

§ 176. Reward to informers.—Any person who shall discover to the trustees any secreted effects, property or things in action, belonging to such debtor, so that they shall be recovered by them, shall be entitled to ten dollars on the hundred dollars, and at that rate, on the value of the effects so discovered, to be paid by the trustees, out of the estate of such debtor; but this section shall not extend to persons who have such property, effects or things, in their own possession.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 18.

§ 177. Reference of disputed claims.—If any controversy shall arise between the trustees and any other person in the settlement of any demands against such debtor, or of debts due his estate, the same may be referred to one or more indifferent persons, who may be agreed upon by the trustees and the party with whom such controversy shall exist, by a writing to that effect signed by them.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 19, as amended by L. 1862, ch. 373, § 1.

Constitutionality.—The provisions for a reference to settle such controversies, originated in equity, are not obnoxious, as being in conflict with the constitutional provision providing for right of trial by jury. *Sands v. Kimbark* (1863), 27 N. Y. 147.

Derivation.—This and the following sections are taken substantially from the revised Laws of 1813, vol. 1, p. 166, and will be found also, in substance, in an act passed in April, 1786. *Sands v. Kimbark* (1863), 27 N. Y. 147.

The jurisdiction of the court does not depend upon the nature of the defense or the claim. *Matter of Crosby v. Day* (1880), 81 N. Y. 242.

The object of the statute is to enable a speedy settlement of the effects and property of the insolvent. Final judgment may be entered upon the report of the referees. *Austin v. Rawdon* (1870), 42 N. Y. 155; compare *Matter of Austin* (1865), 44 Barb. 434. Applies to demands in favor of or against insolvent corporation. *Matter of Crosby v. Day* (1880), 81 N. Y. 242.

The term "demands" is broader than what are commonly called debts, being a term of very extensive import; hence not only are debts in the ordinary legal acceptance of the word included, but also claims that amount to or rights or titles to certain species of property, as for instance stock in an incorporated company, *Matter of Denny* (1842), 2 Hill 220.

An action at law by a receiver does not preclude him from afterwards applying for a reference under this section. *Matter of Crosby v. Day* (1880), 81 N. Y. 242.

Review of order of reference.—An order entered upon the report of a referee so appointed is not one finally determining a special proceeding within the provision of the statutes, and hence is reviewable in the court of appeals, only when certified

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by the appellate division. *People v. St. Nicholas Bank of N. Y.* (1896), 150 N. Y. 563, 44 N. E. 1127.

Stockholders of an insolvent corporation who omit to object to a determination upon reference of a claim against them in favor of the receiver, cannot afterwards complain of the irregularity of such judgment. *People v. Hydrostatic Paper Co.* (1882), 88 N. Y. 623.

§ 178. **Application for appointment of referee.**—If such referee or referees be not selected by agreement, then the trustees or the other party to the controversy, provided no action at law is pending arising out of any such debts or demands, may serve a notice of their intention to apply to a judge of the court which appointed said trustees, or to any justice of the supreme court at chambers, residing in the same district with said trustees, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 20, as amended by L. 1862, ch. 373, § 2, L. 1907, ch. 476.

Insolvent corporation; reference in favor of or against authorized.—Such compulsory reference is authorized in the case of a debt in favor of or against an insolvent corporation. *Matter of Crosby v. Day* (1880), 81 N. Y. 242.

Time of application.—A motion by the debtor for mandamus to compel the trustees to nominate and have referees appointed under the statute will be denied with costs, where it appears that evidence has been gone into before the trustees, and afterwards on request of the debtor, and on a written stipulation signed by the attorney for him, the hearing was adjourned. *Matter of Belknap* (1846), 2 How. Pr. 199.

A non resident debtor may compel trustees to appoint referees in order to contest the validity of the debts presented and claimed against him by attaching creditors. *Titus v. Kent* (1845), 1 How. Pr. 80.

Section cited.—*Matter of Denny* (1842), 2 Hill 220; *Austin v. Rawdon* (1865), 42 N. Y. 155.

§ 179. **Appointment of referee.**—On the day so specified, upon due proof of the service of such notice, the judge or justice before whom the application is made may in his discretion proceed to select one or more referees, the same in all respects as they are now selected according to the rules and practice of the supreme court.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 21, as amended by L. 1862, ch. 373, § 3, L. 1907, ch. 476.

§ 180. **Entry of order of reference.**—The judge or justice by whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the trustees in the office of the clerk where the order appointing the trustees is entered; and an order shall thereupon be entered by such clerk appointing the persons so selected referees to determine the controversy.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 23.

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§ 181. **Powers, duties and compensation of referees.**—Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the supreme court, in actions pending therein.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 24.

Report of referee; sufficiency.—Referee appointed in these proceedings must state conclusions of law and findings of fact separately, and if they do not the court will direct them to do so. *Matter of Harmony Fire & Marine Insurance Co.* (1873), 14 Abb. Pr. N. S. 292, note.

Section cited.—*Paddock v. Kirkham* (1886), 102 N. Y. 597, 8 N. E. 214; *People v. St. Nicholas Bank of N. Y.* (1896), 150 N. Y. 563, 44 N. E. 1127; *Herring v. N. Y. L. E. & W. R. R. Co.* (1887), 105 N. Y. 340, 383, 12 N. E. 763; 19 Abb. N. C. 361 (1887) note.

§ 182. **Filing and effect of referees' report.**—The report of the referees shall be filed in the same office where the order for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 25.

§ 183. **Commission to take testimony out of county.**—When any witness to such controversy shall reside out of the county where the said trustees resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to said referee or referees in the same manner, and be read before them on a hearing, in like manner as testimony taken on commission before justices of the peace.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 22, as amended by L. 1862, ch. 373, § 4.

§ 184. **Sale of property and accounts of trustees.**—The trustees shall, as speedily as possible, convert the estate, real and personal, of such debtor, into money. They shall keep a regular account of all moneys received by them as trustees; to which, every creditor, or other person interested therein, shall be at liberty, at all reasonable times, to have recourse.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 26.

§ 185. **Meeting of creditors and notice thereof.**—The trustees, within fifteen months from the time of their appointment, shall call a general meeting of the creditors of such debtor, by a notice to be published in the same manner, as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting.

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Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 27.

§ 186. **Proceedings at creditors' meetings.**—At such meeting, or other adjourned meeting thereafter, all accounts and demands, for and against the estate of such debtor, shall be fairly adjusted, as far as the same can be ascertained, and the amount of moneys in the hands of the trustees declared.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 28.

§ 187. **Payment of disbursements and commission of trustees.**—Out of the moneys in their hands, the trustees may first deduct all the necessary disbursements made by them in the discharge of their duty, and a commission at the rate of five per centum on the whole sum which shall have come into their hands.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 29.

Compensation of trustees.—The trustee is entitled to the compensation formerly awarded to trustees for like services; viz., necessary disbursements and a commission of five per cent. on all moneys handled. *Mayhew v. Duncan* (1860), 31 Barb. 87; *Muller v. Santler* (1864), 28 How. Pr. 87, 18 Abb. Pr. 450.

Trustees under this act are entitled to their commissions upon such sum as, on compromise, is paid by the debtor to the attaching creditor, although such money does not actually come into the hands of the trustees; they are also entitled to costs accrued in the prosecution of a certiorari, although the decision of the commissioner be confirmed by the court; and to counsel fees paid by them to a reasonable amount. *Matter of Bunch* (1835), 12 Wend. 280.

§ 188. **Preferred debts.**—They shall pay all debts due by such debtor to the United States, and all debts due by him to persons who, by the laws of the United States, have a preference in consequence of having paid money as sureties of such debtor.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 32.

§ 189. **Distribution of moneys.**—They shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows:

1. In proceedings under the third and fourth articles of this chapter, among those who were creditors at the time of the execution of the assignment by the insolvent;

2. In proceedings under the fifth article, among those creditors, at whose suit the debtor was imprisoned on execution at the time of his discharge. (*Amended by L. 1909, ch. 240.*)

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 33.

Review of decisions of trustees.—Decisions of the trustees in determining the amounts due the several creditors will be reviewed by the supreme court; if the trustees err in the application of a principle of law, the court will correct the error, but if they err on a question of fact or opinion, as in the assessment of unliquidated

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damages, their decisions will not be set aside, unless clearly against the weight of evidence. *Matter of Negus* (1832), 7 Wend. 499.

Section cited.—*Matter of Coates* (1856), 3 Abb. App. Dec. 231, 235, 12 How. Pr. 344; *Matter of Prime* (1847), 1 Barb. 296, 301, 1 Edm. Sel. Cas. 749, 5 Leg. Obs. 409.

§ 190. Preference of debts owing by debtor as trustee.—In making such distribution, the trustees shall first pay all debts that may be owing by the debtor as guardian, executor, administrator or trustee; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 34.

Debts to be paid in full.—Debts owed by the debtor as guardian, executor, administrator or trustee are to be paid in full if there are sufficient assets. *Matter of Coates* (1856), 3 Abb. App. Div. Dec. 231, 12 How. Pr. 344.

Executor; liability for moneys received.—The authority of an executor, when duly perfected, relates back and legalizes payments made to him before he qualified; and the moneys received will thus become a debt owing by him as executor within the meaning of this section. *Matter of Faulkner* (1845), 7 Hill 181, 1 How. Pr. 207.

§ 191. Payment of debts before maturity.—Every person to whom a debtor, except one proceeding under the fifth article, shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 35.

§ 192. Set-off of mutual debts or credits.—Where mutual credit has been given by any debtor, except a debtor proceeding under the fifth article of this chapter, and any other person, or mutual debts have subsisted between such debtor and any other person, the trustees may set off such credits or debts, and pay the proportion or receive the balance due. But no set-off shall be allowed of any claim or debt, which would not have been entitled to a dividend as hereinbefore directed.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 36.

Unmatured claim in favor of assignor.—Where the debt owing to the insolvents is not due at the time of the assignment but the debt owing by the insolvents is due there is a right of set-off. *Richards v. La Tourette* (1890), 119 N. Y. 54, 23 N. E. 531; *Smith v. Fox* (1872), 48 N. Y. 674; *Lindsay v. Jackson* (1831), 2 Paige 580. See also *Maas v. Goodman* (1859), 2 Hill 275. Thus it was held that the amount of a partnership deposit with an insolvent banker was a proper subject of set-off in an action brought by the assignee of such banker, on a note held by the banker, made by one of the partners and endorsed by the other for partnership purposes, although such note was not due at the time of the assignment. *Smith v. Felton* (1871), 43 N. Y. 419.

Where a bank at the time of its failure was indebted to plaintiff in the sum of \$924, which was then due, and plaintiff owed the bank a much smaller sum upon a

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note not then due, it was held that this was a case of mutual credit within the meaning of this section. *Jones v. Robinson* (1857), 26 Barb. 310.

Unmatured claim against assignor.—Since the enactment of section 13, ante, providing that debts of the assignor may be proved and allowed against his estate "whether due or not due," unmatured claims against the debtor are subject to the right of set-off by a creditor. *Matter of Bluestone* (1915), 169 App. Div. 462, 155 N. Y. Supp. 161. See also *In re Dickinson* (1915), 190 N. Y. St. Rep. 238, 156 N. Y. Supp. 238.

Prior to this enactment it was the rule that a set-off would not be allowed where the debt owing by the assignor was not due at the time of the assignment. *Myers v. Davis* (1860), 22 N. Y. 489; *Martin v. Kunzmüller* (1867), 37 N. Y. 396; *Fera v. Wickham* (1892), 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456; *Matter of Hatch* (1898), 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664. See also *Chance v. Isaacs* (1836), 5 Paige 591. Compare *Rothschild v. Mack* (1886), 42 Hun 72.

But where the assignors have obtained the money by means of fraud, they at once become liable to repay the same, and the fact that the indebtedness is not due when the assignment was made to defendant did not affect the right of set-off. *Rothschild v. Mack* (1889), 115 N. Y. 1, 21 N. E. 726; *Bradley v. Seaboard National Bank* (1901), 167 N. Y. 427, 60 N. E. 771, reargument denied, 168 N. Y. 635, 61 N. E. 1127; *Wolf v. National City Bank* (1915), 170 App. Div. 565, 156 N. Y. Supp. 575.

Set-off of reserve value under life policy.—Where defendant held two of insolvent insurance company's paid-up endowment policies, payable to defendant's wife in case of his death prior to a specified date, otherwise to defendant, the reserve value of which was \$2,779.95, defendant is not entitled to set off the said reserve value. *Newcomb v. Almy* (1884), 96 N. Y. 308.

Loss set off against premium.—A loss incurred by a solvent assured under a policy issued by insolvent underwriters, before the insolvency of the latter occurs, is a mutual debt to creditor, within the meaning of the statute, and is capable of being set off against the premium upon such policy. *Pardo v. Osgood* (1868), 28 Super. (5 Rob.) 348. Where a marine insurance company becomes insolvent a receiver can only recover the amount due on the premium notes after deducting losses, this being a case of mutual credit. *Osgood v. DeGroot* (1867), 36 N. Y. 348, 2 Transc. App. 86. See also, *Berry v. Brett* (1860), 19 Super. (6 Bos.) 627.

§ 193. **No set-off in certain cases.**—No set-off shall be allowed by such trustees, of any claim or debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set off by him, according to the provisions of this article, in a suit brought by such trustees.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 37.

§ 194. **Provision for pending actions.**—If, at the time any dividend is made, any action or proceeding be pending against the trustees, in which a demand against such debtor may be established, the trustees may retain in their hands, the proportion which would belong to such demand if established, and the necessary costs and expenses of such action or proceeding, to be applied according to the event of such proceeding or action, or to be distributed in a second or other dividend.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 38.

§ 195. **Penalties recovered.**—All penalties which shall be recovered by any trustees, pursuant to the provisions of this article, shall be deemed a part of the estate of the debtor, and shall be distributed as such among his creditors.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 39.

§ 196. **Subsequent dividends.**—If the whole of such debtor's estate be not distributed on the first dividend, the trustees shall, within one year thereafter, make a second dividend of all the moneys belonging to the estate of the debtor, then in their hands, among the creditors entitled thereto as hereinbefore specified; and in the same manner from year to year, so long as any moneys belonging to the estate of such debtor shall remain in the hands of the trustees, they shall make a dividend thereof among the creditors entitled thereto.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 40.

§ 197. **Provision for neglectful creditors.**—Any creditor who shall have neglected to deliver to the trustees an account of his demand, before the first, second, third or other dividend, and who shall deliver his account to them before the second, or other subsequent dividend, shall receive the sum he would have been entitled to, on any former dividend, before any distribution be made to other creditors.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 41.

§ 198. **Unclaimed dividends.**—If any dividend that shall have been declared, shall remain unclaimed by the person entitled thereto for one year after the same was declared, the trustees shall consider it as relinquished, and shall distribute it, on any subsequent dividend, among the other creditors.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 42.

§ 199. **Disposition of surplus.**—If after settling the estate of any debtor, and after discharging his debts, entitled to a dividend, any surplus shall remain in the hands of his trustees, the same shall be paid to such debtor or his legal representatives.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 43.

§ 200. **Allowance to debtor.**—Every debtor who shall be discharged under the third or fourth articles of this chapter shall be allowed the sum of five per centum on the net produce of all his estate, that shall be received by the assignees, to be paid to him by them, in case such net produce, after such allowance made, shall be sufficient to pay the creditors of such debtor, entitled to a dividend, the sum of seventy cents on the dollar, on the amount of their debts respectively, as the same shall have been ascertained; but the said allowance shall not exceed in the whole, the sum of five hundred dollars.

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Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 44.

§ 201. **Accounting by trustees.**—Within ten days after any dividend made by any trustees, they shall render on oath and file with the clerk of the court where the order appointing them was entered an account in writing of all their proceedings in the premises, stating:

1. Their disbursements, commissions and the dividends made by them;
2. The names and residences of the creditors to whom dividends were made, and the names of those actually receiving them;
3. The property, moneys and effects of the debtor remaining in their hands, and the value and situation of such property.

And such trustees may at any time be compelled by an order of the supreme court, or of the county court of the county in which they reside, to render such account on oath, on the application of the debtor, or of any creditor.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 45.

§ 202. **Trustees subject to order of court.**—Such trustees shall be subject to the order of the supreme court, and of the county court of the county in which they were appointed, upon the application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them; and they may be removed by such court, for cause shown.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 46.

§ 203. **Appointment of substitute trustee.**—Whenever any trustee shall be removed, or shall die, or become incapacitated to perform his duties, the court which originally appointed such trustee, after giving notice, and an opportunity to the creditors to propose proper persons, may appoint another in the place of such trustee, who shall, in all respects, have the like powers and authority, and be subject to the same control, obligations and responsibilities; and the said appointment shall be certified and recorded, as the original appointment was required to be recorded.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 48.

§ 204. **Application by trustee for leave to renounce.**—Any trustee appointed pursuant to the provisions of this chapter who shall be desirous of renouncing the trust vested in him may apply to the court from whom his appointment was received, for an order to all persons interested to show cause why such renunciation should not be accepted.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 49.

§ 205. **Account upon application.**—Such application shall be accompanied by a full, true and just account of all the transactions of such trustees, in that character, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise;

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and of the remaining effects and estate of the debtor, in respect to whom, or whose estate, he was appointed trustee, within his knowledge, and the situation of the same.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 51.

§ 206. **Verification of account.**—To such account shall be annexed the affidavit of the trustee, that the said account is in all respects just and true, according to the best of his knowledge and belief.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 52.

§ 207. **Order to show cause.**—The court shall thereupon grant an order, directing notice to be given to all persons interested in the estate of the debtor, in respect to whom or whose estate such trustee was appointed, to show cause on a day, or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 53.

§ 208. **Publication of notice.**—Such notice shall be published, once in each week, for six weeks successively, in such newspapers, as such court shall direct.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 54.

§ 209. **Hearing.**—On the day appointed for such hearing, and on such other days as shall from time to time be appointed, if it shall appear that notice was duly published, the court shall proceed to hear the proofs and allegations of the parties.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 55.

§ 210. **Order permitting renunciation.**—If it shall appear that the proceedings of such trustee, in relation to his trust, have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court be satisfied, that for any reason, it is inexpedient for such trustee to continue in the execution of the duties of his appointment, and that such duties can be executed by another trustee, without injury to the estate of the debtor, or to the creditors; and if no good cause to the contrary appear, the court shall grant an order, allowing such trustee to renounce his appointment, and to assign the property and effects of the debtor.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 56.

§ 211. **Assignment by renouncing trustee.**—Such assignment shall be executed by such trustee, to such person, or persons, as the court shall appoint for that purpose; and in the appointment, such persons as shall have been named to be assignees by the creditors of such debtor, or by the major part of them, shall be preferred, if approved by such court.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 57.

§ 212. **Effect of assignment.**—Such assignment shall transfer to the persons to whom it shall be made, all the remaining estate and effects, vested in the trustee so renouncing; and such new assignee shall have the same powers, be subject to the same duties, and be entitled to the same compensation, as the original trustee; and shall continue any suit that may have been commenced by such original trustee, in his name, or in that of such new assignee.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 58.

§ 213. **Order for discharge of trustee from trust.**—Upon producing to the court allowing such assignment, the certificate of the assignee, duly proved by the oath of a subscribing witness, that such assignment has been duly made, and the property capable of delivery, belonging to such debtor, together with all the books, vouchers and documents, relating to the estate of such debtor, has been duly delivered; and also a certificate of the county clerk, that such assignment has been recorded; such court shall grant to the trustee so applying, an order that he be discharged from his trust.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 59.

§ 214. **Effect of order.**—Upon such order being granted, such trustee shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 60.

§ 215. **Recording order and filing papers.**—Such new assignment, upon being duly proved or acknowledged, shall be recorded in the office of the clerk of the county where the order appointing the original trustee was entered; and the petition of the trustee, the affidavit and proceedings thereon, with the certificate of the new assignee, shall be filed in the same office.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 61.

§ 216. **Payment of expense of renunciation.**—The expense of all proceedings in effecting such renunciation and assignment, shall be paid by the trustee making the application.

Source.—R. S., pt. 2, ch. 5, tit. 1, Article 8, § 62.

§ 217. **New trustee in place of one absent.**—Whenever any trustee appointed under any authority conferred by any of the provisions of articles three, four or five of this chapter, shall remove from and continue to reside out of this state for one year, it shall be lawful for the court which originally appointed such trustee, after giving notice and an opportunity to the creditors to propose proper persons, to appoint another person in the place of such trustee.

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Source.—L. 1846, ch. 158, § 1.

Consolidators' note.—The words "have removed from and shall have continued to reside out of this state for one year, or shall hereafter" have been omitted as referring to time prior to the passage of the amending act, L. 1846, ch. 158. The words "so removed or to remove as aforesaid" have also been omitted as unnecessary.

§ 218. Powers and duties of new trustee.—The trustee appointed in the place of the trustee so removed shall in all respects have the like powers and authority, and be subject to the same control, obligations and responsibilities as the trustee originally appointed; and the appointment of such trustee shall be certified and recorded as the original appointment was required to be recorded.

Source.—L. 1846, ch. 158, § 2.

ARTICLE VIII.

COMPOSITIONS BY JOINT DEBTORS.

Section 230. Compositions by joint debtors.

231. Right of action against joint debtor where there has been a composition.

232. Defenses by joint debtor who has not compounded.

233. Action by joint debtor against compounding debtor.

§ 230. Compositions by joint debtors.—A joint debtor may make a separate composition with his creditor. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt, until the partnership has been dissolved by consent or otherwise. In that case the instrument must release or exonerate him, from all liability incurred by reason of his connection with the partnership.

Source.—Code Civ. Pro. § 1942, as added by L. 1880, ch. 178; derived from L. 1838, ch. 257, §§ 1, 2 (in part), 5.

Object and application.—This statute is in the main a re-enactment of an earlier one. The object seems to have been to provide for a separate composition of any one of several debtors of either of the classes mentioned, without discharging the others. At common law the release of one joint debtor discharged the debt as to all. It is questionable as to whether the statute applies at all to debtors whose liability is several as well as joint. It may also be questioned whether the statute was intended to change the established rule in respect to requisites of a binding accord and satisfaction between debtors and creditors, of whatever class. *Abbott v. Royce* (1885), 20 N. Y. St. Rep. 694, 3 N. Y. Supp. 503.

This section does not apply where several persons jointly agree to purchase personal property within a certain time, and before such time expires, the vendor delivers part of the property to one of the buyers, and releases him from all liability, the relation of debtor and creditor not then existing. *VanDam v. Tapscott* (1899), 40 App. Div. 36, 57 N. Y. Supp. 534.

Where a grantee assumes a mortgage and on foreclosure pays the deficiency judgment, he cannot enforce the same as against the estate of the mortgager, as a compromise of a joint obligation, as the obligation is not joint. In *re Browne* (1901), 35 Misc. 362, 71 N. Y. Supp. 1034.

Form of release.—The release need not necessarily follow the precise language of the statute. An omission to state that the compounding debtor is thereby released from the liability, where it appears by such release that it was executed pursuant to this section, and there was no other partnership debt owing to the creditor, does not invalidate the release. *Harbeck v. Pupin* (1890), 123 N. Y. 115, 25 N. E. 311. A strict common-law release is not required but any instrument which exonerates the compounding debtor alone from the liability is sufficient. *Marx v. Jones* (1885), 36 Hun 290, 8 Civ. Pro. Rep. 49.

An instrument not under seal, and for which no consideration is in fact given, releasing one of several joint debtors, will not discharge the others, especially where the creditors reserve their rights against the others. *Honegger v. Wettstein* (1881), 47 Super. (15 J. & S.) 125, *revd. on other grounds*, 94 N. Y. 252, 13 Abb. N. C. 393.

Where a receipt given to one of two joint debtors, upon payment of part of the debt, stated that the payment, with one previously made, constituted "her one-half of our account" it was held that the payer was not released from the balance of the account. *Abbott v. Royce* (1889), 3 N. Y. Supp. 503.

Where thirteen persons gave a joint and several promissory notes in payment for a horse and at the time of the delivery of the note one of the makers made a payment equal to his share of the note which payment was indorsed generally upon the note but a receipt was given stating that the amount received was in full payment of one share in the horse it was held that there was no release of the other joint makers. *Hillas v. Fuller* (1913), 143 N. Y. Supp. 15.

By the use of the word "release" some refinements are escaped. See *Bank of Poughkeepsie v. Ibbotson* (1843), 5 Hill 461; *Hoffman v. Dunlop* (1847), 1 Barb. 185; *Cornell v. Masten* (1861), 35 Barb. 157; *Matthews v. Chicopee Mfg. Co.* (1865), 26 Super. (3 Rob.) 711. As to what constitutes a release, see *Cornell v. Masten* (1861), 35 Barb. 157. Intent to release other joint-debtors by discharge of one, see *Booth Bros. v. Baird* (1903), 83 App. Div. 495, 502, 82 N. Y. Supp. 432.

A parol release of one joint debtor will not operate as a discharge to the others, and can only be pleaded by the one to whom it is given. Distinction between the English and American rules pointed out. *Morgan v. Smith* (1877), 70 N. Y. 537.

Validity of compromise; payment from partnership funds.—The fact that the money paid on the compromise came from partnership funds, does not effect its validity. *Stitt v. Cass* (1848), 4 Barb. 92.

Dissolution of partnership.—If by any act of the partners the legal authority of the members to bind the firm has ceased, there is a dissolution within the statute. *Stitt v. Cass* (1848), 4 Barb. 92.

The effect of the release of one partner by a person who has acquired judgment against all the members of the firm is to prevent the subsequent appointment of a receiver of the firm assets upon the application of an assignee of the judgment. *Hunter v. Hunter* (1902), 67 App. Div. 470, 73 N. Y. Supp. 886. See *Matthews v. Chicopee Mfg. Co.* (1865), 26 Super. (3 Rob.) 711.

Where plaintiff became a partner in a firm composed of defendant and H., the firm agreed to permit his withdrawal on five months' notice, and to return to him the amount he contributed. Subsequently and according to an agreement H. withdrew, after transferring his interest to the remaining partners. Held, that defendant was bound to fulfill the contract with plaintiff in view of the provision

providing that after dissolution of a firm, a firm creditor may release one member and still hold the others. *Guccione v. Scott* (1897), 21 Misc. 410, 47 N. Y. Supp. 475, *affd.* 33 App. Div. 214, 53 N. Y. Supp. 462. As to the release of one partner from firm obligations while the partnership was in existence, see *Everett v. Mitchell* (1897), 23 App. Div. 332, 48 N. Y. Supp. 303.

A release by the lessor of premises "of and from all claims against" a partner "individual and as copartner" for rent of certain premises occupied by the partnership, such partnership not having been dissolved, will release the partnership. *Finch v. Simon* (1901), 61 App. Div. 139, 70 N. Y. Supp. 361.

The liability of one of two partners for a firm debt is not determined by a judgment in his favor rendered in an action brought against him alone, though he pleaded accord and satisfaction, and testified that he had paid plaintiff a certain sum in full of plaintiff's claim against him, but did not show a release as required by this section. *McCormack v. Barton* (1897), 19 Misc. 625, 44 N. Y. Supp. 393.

Release of dormant partner.—Where the release does not in terms run to the benefit of any particular individuals, but releases and discharges the members of the firm other than the one member excepted, it will release the individual liability of a dormant partner, although the creditor did not know of the existence of such dormant partner and did not intend to release him. *Harbeck v. Pupin* (1890), 123 N. Y. 115, 25 N. E. 311.

Release of directors.—Directors of an insolvent corporation are not released from liability by a release granted by them to a codirector. *Gilbert v. Finch* (1903), 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623. Effect of the release of one director in an action to enforce the liability of directors of a loan and trust company. See *Bauer v. Parker* (1903), 82 App. Div. 289, 81 N. Y. Supp. 995.

Release of cosurety.—Where a cosurety has by the conduct of the creditor been released from liability, another cosurety will be held exonerated only as to so much of the original debt as the one so discharged could have been compelled to pay. *Morgan v. Smith* (1877), 70 N. Y. 537. Where one surety was released by instruments which plainly show that it was the intent to preserve the claim against the other for one-half of the amount, it was held that to carry out the intent of the parties the instruments should be construed as covenants not to sue. *Hood v. Hayward* (1891), 124 N. Y. 1, 26 N. E. 331, *affg.* 48 Hun. 330, 1 N. Y. Supp. 566 (1888). See note on releases, 23 Abb. N. C. 194 (1889).

Release of joint tortfeasors.—A release of the incorporators by a receiver of an insurance company, executed upon a compromise by which he obtained a portion of his claim, which release provided that no cause of action against others than those mentioned should be affected thereby, does not relieve the directors of the company from liability, where such directors have been joint tortfeasors in relation to the funds of such company. *Gilbert v. Finch* (1903), 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623. As to effect of release in favor of one of several tortfeasors, see *Irvine v. Milbank* (1874), 56 N. Y. 635, 15 Abb. Pr. N. S. 373.

Where suit is brought for a definite amount for property converted by several copartners, a release of one after a dissolution of the partnership, with a reservation of liability against others, is not a bar to the action, although sounding in tort for conversion, since the release is not that of joint tortfeasors, but of joint debtors. *Commercial Nat'l Bank v. Taylor* (1892), 64 Hun. 499, 19 N. Y. Supp. 533.

A release, containing no reservation, operates to discharge all the joint tortfeasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not

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discharged. *Walsh v. N. Y. C. & H. R. R. Co.* (1912), 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137.

A release under seal of certain defendants from liability under a judgment for fraud and deceit, expressly reserving the plaintiff's rights against the other defendants, does not discharge the latter. A release with such a reservation will be construed as a covenant not to further pursue the party who has been released. *It seems*, that upon the rendition of the judgment defendants' obligation to plaintiff was transferred technically into a contract liability to which sections 230 to 233 of the Debtor and Creditor Law apply. *Mecum v. Becker* (1914), 164 App. Div. 352, 149 N. Y. Supp. 974, *affd.* 215 N. Y. 691, 109 N. E. 1084.

Where the indorsers of a promissory note before it became due entered into a composition agreement with their creditors, and the bank holding the note, with knowledge of the composition, received, retained and receipted for checks in part payment from the committee of the creditors, from which it was only entitled to share in assets upon becoming bound by the composition agreement, the indorsers may, under section 230 of the Debtor and Creditor Law, compel the bank to release them from liability on the note, as by sharing in the assets it became subject to the provisions of the statute. *Matter of Samra* (1915), 169 App. Div. 604, 155 N. Y. Supp. 411.

§ 231. Right of action against joint debtor where there has been a composition.—An instrument making a composition with a creditor does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him, appears affirmatively upon the face thereof.

Source.—Code Civ. Pro. § 1942, as added by L. 1880, ch. 178; derived from L. 1838, ch. 257, §§ 1, 2, 5.

Release of right of action against joint debtor.—Plaintiff entered into a contract with L., W., and defendant to erect an improvement on land owned by them jointly, one-third of the contract to be paid on completion of the work, and the balance one year thereafter. Soon after the work was completed, L. and W., without waiting for the expiration of the year, each paid plaintiff one-third of the whole contract price, in consideration of a release of the other claims against them. *Held*, that defendant's liability to pay forthwith her proportionate part of the cash payment stipulated for by the contract, was not thereby affected, since the payment made by L. and W. was a composition between them and plaintiff, which this section provides shall not affect a creditor's right of action against any joint debtor not a party to the composition. *Pearsall v. Van Zandt* (1896), 9 App. Div. 625, 41 N. Y. Supp. 5.

Section cited.—*Siefke v. Minden*, (1903), 40 Misc. 631, 83 N. Y. Supp. 71.

See also cases cited under § 230, *ante*.

§ 232. Defenses by joint debtor who has not compounded.—Where a joint debtor including a partner has compounded, a joint debtor who has not compounded, may make any defense or counterclaim, or have any other relief, as against the creditor, to which he would have been entitled, if the composition had not been made.

Source.—Code Civ. Pro. § 1944, as added by L. 1880, ch. 178; derived from L. 1838, ch. 257, §§ 3, 4.

Release containing no reservations operates to discharge all the joint tort feasons; but where the instrument expressly reserves the right to pursue the others it is

L. 1909, ch. 17. Payments of debts of incompetent persons. §§ 233, 250.

not technically a release, but a covenant not to sue, and they are not discharged. *Gilbert v. Finch* (1903), 173 N. Y. 455, 66 N. E. 133, affg. 72 App. Div. 38, 76 N. Y. Supp. 143.

§ 233. Action by joint debtor against compounding debtor.—A joint debtor, including a partner, who has not compounded may require the compounding debtor to contribute his ratable proportion of the joint debt, or of the partnership debts, as the case may be, as if the latter had not been discharged.

Source.—Code Civ. Pro. § 1944, as added by L. 1880, ch. 178; derived from L. 1838, ch. 257, §§ 3, 4.

ARTICLE IX.

PAYMENT OF DEBTS OF INCOMPETENT PERSON.

Section 250. Notice to creditors of incompetent person.

251. Authority for committee to compromise claims.

252. Payment by committee of claims.

253. Citation to attend judicial settlement of accounts of committee.

254. Service of citation.

255. Proceedings on return of citation.

§ 250. Notice to creditors of incompetent person.—A court exercising jurisdiction over the property of a lunatic, idiot or habitual drunkard may, upon the petition of a committee of the property of such incompetent person, authorize him to advertise for creditors and other persons interested in such estate, to present to him their claims with the vouchers thereof, duly verified, and naming a post-office address at which papers may be served on them by mail, as hereinafter provided, on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers to be designated by the court as most likely to give notice to the persons to be served, not less than once a week for six successive weeks, and a copy of such notice securely inclosed in a post-paid wrapper, shall be deposited in the post-office in the village or city where such committee resides, addressed to each person interested in the estate of such incompetent person who shall appear from the books or papers of such incompetent person to be interested in said estate, or who shall be known to said committee to be so interested, at the proper post-office address of such interested person, so far as said committee shall be able to ascertain the same, at least thirty days prior to the time limited in such notice for presentation of such claims.

Source.—L. 1893, ch. 697, § 1.

After the discharge of the committee, the court has no further jurisdiction over the property of the former incompetent person, except to pass the accounts of the committee, and cannot compel a retransfer of such property by persons to whom

§§ 251-253.

Payments of debts of incompetent persons.

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such former incompetent person had transferred it subsequent to the committee's discharge. *Matter of Dowd* (1897), 19 Misc. 688, 44 N. Y. Supp. 1094.

§ 251. **Authority for committee to compromise claims.**—A court exercising jurisdiction over the property of a lunatic, idiot or habitual drunkard may upon the application of the committee of the property of such incompetent person, and for good and sufficient cause shown, and upon such terms as it may direct, authorize the committee to sell, compromise or compound any claim or debt belonging to the estate of the incompetent person. But such authority shall not prevent any party interested in the trust estate, from showing upon the final accounting of such committee that such debt or claim was fraudulently or negligently sold, compounded or compromised. The sale of any debt or claim heretofore made in good faith by any such committee, shall be valid, subject, however, to the approval of the court, and the committee shall be charged with and liable for, as a part of the trust fund, any sum which might or ought to have been collected by him.

Source.—L. 1893, ch. 697, § 2.

§ 252. **Payment by committee of claims.**—A committee of the property of a person, incompetent by reason of lunacy, idiocy or habitual drunkenness, to manage his affairs may, under direction of the court exercising jurisdiction of such estate, after payment of the expenses, disbursements and commissions of such trust, apply so much of the funds and property of said estate remaining in his hands as such committee, as may be necessary to pay and discharge the proper claims of creditors who have presented claims pursuant to the notice in this article provided for, to the payment of such claims, and if the property so remaining be insufficient to pay such claims in full, then the committee may distribute the same according to law among the creditors who have presented and proved their claims as in this article provided, and such payment, when so made in good faith and under direction of such court, shall relieve such committee and his sureties from liability to creditors who have failed to present their claims as in this article provided.

Source.—L. 1893, ch. 697, § 3.

§ 253. **Citation to attend judicial settlement of accounts of committee.**—A citation may be issued by the court to all parties interested in the estate of such incompetent person, as creditors or otherwise, requiring them to appear in court on some day therein to be specified, to make proof of their several claims if they be creditors, and to show cause why a settlement of accounts and proceedings of the committee up to the date of such hearing should not be had, and if no cause be shown, to attend the settlement of such account. All such citations must be returnable in court, and said court when not otherwise engaged shall always be open for proceedings under this article. Such citations may be issued on petition of such com-

mittee, or of one or more of his sureties, or of a creditor of such incompetent person, or other person interested in said estate; and when issued on a petition of a committee or his surety, it may be issued at any time after the appointment of such committee, in any other case, after lapse of one year from the appointment of such committee, or upon his removal or resignation. A citation issued on petition of a creditor may be addressed to and served on the committee alone, but on or after the return of such citation, the committee may have a general citation issued to all parties interested.

Source.—L. 1893, ch. 697, § 4.

§ 254. **Service of citation.**—A citation to the persons interested must be served on all parties, other than the petitioner, who are interested in the fund, including sureties of the committee; but the court may, in its discretion, dispense with the service on such incompetent person, and, if the time limited by due advertisement for presentation of claims has expired before the issue of citation, creditors who have not duly presented their claims need not be served. The court may, by order, direct such citation to be served on creditors who have presented claims accompanied by post-office address, as provided in section two hundred and fifty, by depositing a copy of the same at least twenty days prior to the return day thereof in the post-office at the place where such committee resides, duly inclosed and directed to each of such creditors at the post-office address specified by him as provided in section two hundred and fifty, with the postage prepaid, and publishing such citation once in each week for at least four weeks prior to such return day in one or more newspapers to be designated by the court as most likely to give notice to such creditors. A citation personally served within the county where such incompetent person resided at the time of his becoming incompetent, or an adjoining county, must be served at least eight days before the return thereof; if in any other county, at least fifteen days before the return thereof. The court may direct service to be made by publication, when it is satisfied by affidavit or verified petition, either that the person to be served is unknown or that his residence can not, after diligent inquiry, be ascertained, or that he can not, after due diligence, be found within the state. The order for such service must direct service of the citation upon such person to be made by publication thereof in one newspaper to be designated by the court as most likely to give notice to the person to be served, and also, if it appear that any such person resides without the state, then in such other paper as the court may deem most likely to give notice to the person to be served, for such length of time as it may deem reasonable, not less than once a week for six weeks, and that a copy of the citation be forthwith deposited in the post-office duly inclosed and directed to each person so served at his last known place of residence or post-office address, and the postage paid thereon, at least thirty days before the return day thereof.

§§ 255, 280, 281.

Laws repealed.

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When publication has been ordered, personal service without the state made, if within the United States, at least thirty days, or without the United States, at least forty days before the return day, is equivalent to publication and mailing. Personal service on minors and incompetent persons shall be made as prescribed by law for service of citations issued by surrogates for final accounting, and personal service on one or two or more creditors, claiming as co-partners or otherwise as joint creditors shall be equivalent to personal service on all, and voluntary appearance either in person or by attorney shall be equivalent to personal service, and such appearance may be made by any one claiming an interest, though not served, and such person shall thereupon become a party to the proceeding.

Source.—L. 1893, ch. 697, § 5.

§ 255. Proceedings on return of citation.—Upon the return of such citation properly served, such court shall have the powers in relation to such estates, claims, property and committee, which devolve on courts, by virtue of section twenty-one, in relation to assignments and assignees for benefit of creditors and such assigned estates.

Source.—L. 1893, ch. 697, § 6.

ARTICLE X.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 280. Laws repealed.

281. When to take effect.

§ 280. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Source.—New.

§ 281. When to take effect.—This chapter shall take effect immediately.

Source.—New.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part 2, chapter 5, title 1, article 3.....	All
Revised Statutes.....	Part 2, chapter 5, title 1, article 4.....	All
Revised Statutes.....	Part 2, chapter 5, title 1, article 5.....	All
Revised Statutes.....	Part 2, chapter 5, title 1, article 6.....	All
Revised Statutes.....	Part 2, chapter 5, title 1, article 7.....	All
Revised Statutes.....	Part 2, chapter 5, title 1, article 8.....	All

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1784	34	All	1788	29	All
(7th sess.)			1788	92	All
1784	14	All	1788	94	5-8
(8th sess.)			1789	10	All
1786	22	All	1789	24	All
1786	34	All	1790	40	All
1787	67	All	1791	29	All
1787	98	All	1799	85	All

L. 1909, ch. 17.

Consolidators' notes.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1801	66	All	1846	158	All
1801	131	All	1846	243	All
1805	17	1	1847	366	All
1808	163	1-8	1847	390	1
1809	10	All	1849	176	All
1809	151	All	1850	210	All
1809	159	All	1854	147	All
1809	164	12, 13	1857	427	All
1810	193	17	1859	2	All
1811	123	All	1860	348	All
1811	248	3	1862	373	All
1812	8	All	1866	116	All
1812	41	All	1867	860	All
1812	239	13	1870	92	All
R. L. 1813	81	All	1872	838	All
R. L. 1813	98	All	1873	363	All
1813	203	49	1874	600	All
1817	55	All	1875	52	All
1818	14	All	1875	56	All
1818	26	All	1877	466	1-26, 28, 29
1818	239	All	1878	318	All
1818	258	All	1884	228	All
1819	101	All	1884	328	All
1819	106	All	1885	380	All
1820	71	All	1885	464	All
1822	226	All	1886	283	All
1823	17	All	1887	503	All
1823	42	All	1888	294	All
1823	117	All	1891	34	1,
1827	11	All	pt. relating to appraisal by assignee.		
1828	20	15,	1893	697	All
¶ 32-34 (2d meet.)			1894	134	All
1828	21	1,	1897	266	All
¶ 91, 115, 276, 361, 375, 377, 386 (2d meet.)			1897	624	All
1830	258	1, 2	1907	476	All
1833	52	All	Code Civil Procedure §§ 1268, 1942, 1944, 2149-2218.		

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Statutes repealed which are temporary or obsolete or which have been consolidated in the "Consolidated Laws" are given with an explanatory note as follows:—

L. 8, pt. 2, ch. 5, tit. 1, Article 8.—Relates to the powers, duties and obligations of trustees and assignees of debtors. Consists of sixty-two sections. §§ 19-21 were amended so as to read as follows by L. 1862, ch. 373, §§ 1-3; § 22 was repealed by L. 1862, ch. 373, § 4; §§ 9 pt., 30, 31, 47, 50 are obsolete. The omitted portion of § 9 and §§ 30, 31 relate to non-resident, absconding or concealed debtors, and refer to R. S., pt. 2, ch. 5, tit. 1, Article 1, which was repealed by L. 1877, § 1, ¶ 2, subd. 3; § 47 is omitted because covered by the Code of Civil Procedure; § 50 is omitted because the application mentioned therein would now be made to the court and not to the particular officers named in said section. The remainder of the article being §§ 1-8; 9 pt., 10-18; 23-29; 32-46; 48, 49, 51-62 are consolidated in Debtor and Creditor Law, Article 7, §§ 160-176, 180-182, 184-216.

L. 1784, ch. 34 (7th sess.).—Relief of insolvent debtors. Comes within the purview of Revised Acts, ch. 66. L. 1801, ch. 193 repeals all acts coming within the purview of the Revised Acts.

L. 1784, ch. 14 (8th sess.).—Relief of insolvent debtors. Revises and amends L. 1784, ch. 34 (7th sess.). Comes within the purview of Revised Acts, ch. 66. L. 1801, ch. 193, repeals all acts coming within the purview of the Revised Acts.

L. 1786, ch. 22.—Relief of insolvent debtors with respect to their imprisonment, and provides for discharge of persons now imprisoned for debts not exceeding fifteen pounds. Obsolete and inoperative.

L. 1787, ch. 67.—Relates to powers of assignees of insolvent debtors, and comes

within the purview of Revised Acts, ch. 66. L. 1801, ch. 193 repeals all acts coming within the purview of the Revised Acts.

L. 1787, ch. 98.—Relief of insolvent debtors with respect to their imprisonment and provides for discharge of persons *now* imprisoned for debts not exceeding fifteen pounds. Obsolete and inoperative.

As the statutes covered by express repealing acts have been repealed by the Consolidated Laws, these repealing statutes have been recommended for repeal.

L. 1788, ch. 92.—An act for giving relief in cases of insolvency. This is the original "Two-Thirds" Act, and comes within the purview of Revised Acts, ch. 131. L. 1801, ch. 193, repeals all acts coming within the purview of the Revised Acts.

L. 1788, ch. 94, §§ 5-8.—These sections provide for the discharge of persons *now* imprisoned for debts not exceeding ten pounds. Obsolete and inoperative. Remainder of statute is special.

L. 1789, ch. 10.—Supplements L. 1788, ch. 92, and gives authority for executors and administrators to be petitioning creditors. It comes within the purview of Revised Acts, ch. 131. L. 1801, ch. 193, repeals all acts coming within the purview of the Revised Acts.

L. 1789, ch. 24.—An act for the relief of debtors with respect to the imprisonment of their persons. Comes within the purview of Revised Acts, ch. 66. L. 1801, ch. 193, repeals all acts coming within the purview of the Revised Acts.

L. 1790, ch. 40.—Relates to relief of debtors with respect to the imprisonment of their persons. § 1 repeals L. 1789, ch. 24, §§ 1, 2, so far as they retrospect and relate to debts owing previous to passage of last named act. Remainder of act is within the purview of Revised Acts, ch. 66. L. 1801, ch. 193, repeals all acts coming within the purview of the Revised Acts.

L. 1791, ch. 29.—An act supplementing an act giving relief in cases of insolvency, and an act for the relief of debtors in respect to the imprisonment of their persons. § 1 comes within the purview of Revised Acts, ch. 131; § 2 is within the purview of Revised Acts, ch. 66. L. 1801, ch. 193, repeals all acts coming within the purview of the Revised Acts.

L. 1799, ch. 85.—Relates to relief of debtors with respect to the imprisonment of their persons. Section 1 is a repealing clause; § 2 is within the purview of Revised Acts, ch. 66. L. 1801, ch. 193, repeals all acts which come within the purview of the Revised Acts.

L. 1801, ch. 66.—An act for the relief of debtors with respect to the imprisonment of their persons. This act comes within the purview of Revised Laws, ch. 81. L. 1813, ch. 202, repeals all acts coming within the purview of the Revised Laws.

L. 1806, ch. 163, § 7.—Relates to relief of debtors with respect to the imprisonment of their persons. Subject of § 7 comes within the purview of Revised Laws, ch. 81. L. 1813, ch. 202, repeals all acts which come within the purview of the Revised Laws.

L. 1809, ch. 10.—Relates to discharge of persons imprisoned under the act for the recovery of debts to the value of twenty-five dollars. Comes within the purview of Revised Laws, ch. 53, § 12. L. 1813, ch. 202, repeals all acts coming within the purview of the Revised Laws.

L. 1809, ch. 159.—Relates to the replication in cases where one or more discharges are pleaded in an action. Comes within the purview of Revised Laws, ch. 98, § 29. L. 1813, ch. 202, repeals all acts which come within the purview of the Revised Laws.

L. 1812, ch. 41.—Provides that the repeal of L. 1811, ch. 123, by L. 1812, ch. 8, shall not affect proceedings under the former act which were pending at the time of the repeal. Temporary and obsolete.

R. L. (1813), ch. 98.—An act for giving relief in cases of insolvency. Consisted of thirty sections. Sections, 9, 10, were repealed by L. 1817, ch. 55, § 9. L. 1828, ch. 21, § 1, ¶ 115 (2d meeting), repeals so much of the statute as was not consolidated and re-enacted in the Revised Statutes, and L. 1828, ch. 21, § 1, ¶ 549 (2d meeting), repealed all statutes consolidated and re-enacted in the Revised Statutes, or repugnant to the provisions contained therein. The sections of R. L. (1813), ch. 98, consolidated and re-enacted in the Revised Statutes are, §§ 1-8, 10-16, 18-30; the sections not re-enacted in the Revised Statutes, being §§ 9, 17, are repealed by L. 1828, ch. 21, § 1, ¶ 115 (2d meeting).

L. 1818, ch. 26.—Amends "an act to amend an act entitled, 'an act for giving relief in cases of insolvency.'" The act for giving relief in cases of insolvency is R. L. 1813, ch. 98, and the amendatory statute is L. 1817, ch. 5. L. 1818, ch. 26, consists of five sections. Section 5 is a repeal of L. 1817, ch. 5, § 5; §§ 1-4 are consolidated in

L. 1909, ch. 17.

Consolidators' notes.

2 R. S., ch. 5. L. 1828, ch. 21, § 1, ¶ 549, repeals all acts consolidated and re-enacted in the Revised Statutes.

L. 1818, ch. 239.—Construes L. 1818, ch. 26, and provides for matters pending at the time last named statute took effect. Temporary and obsolete.

L. 1818, ch. 258.—Amends "act for giving relief in cases of insolvency," and relates to jurisdiction of officers, and to practice. Consists of two sections. Section 1, consolidated in 2 R. S., ch. 5, tit. 1, Article 7, § 4; § 2, consolidated in 2 R. S., ch. 5, tit. 1, Article 3, § 4, and Article 4, § 7. L. 1828, ch. 21, § 1, ¶ 549 (2d meeting), repeals all acts consolidated and re-enacted in the Revised Statutes.

L. 1819, ch. 101.—An act to abolish imprisonment for debt. Consists of thirteen sections. Section 2 amended by L. 1820, ch. 71. Section 9, repealed by L. 1824, ch. 238, § 43 (47th session). Remainder of statute consolidated and re-enacted by R. S., pt. 2, ch. 5, tit. 1. L. 1828, ch. 21, § 1, ¶ 549 (2d meeting), repeals all acts consolidated and re-enacted in the Revised Statutes.

L. 1820, ch. 71.—Provides before whom oaths may be taken under R. L., ch. 98, and under L. 1819, ch. 101. The part relating to L. 1819, ch. 101, was repealed by L. 1828, ch. 21, § 1, ¶ 276 (2d meeting); and all was consolidated in the Revised Statutes and covered by L. 1828, ch. 21, § 1, ¶ 549 (2d meeting), which repeals all acts consolidated and re-enacted by the Revised Statutes.

L. 1827, ch. 11.—Amends L. 1819, ch. 101. L. 1828, ch. 21, § 1, ¶ 276 (2d meeting), repeals L. 1819, ch. 101, and all statutes amending the same.

L. 1828, ch. 20, § 15, ¶¶ 32-34.—Amending Revised Statutes in relation to insolvent debtors. The revisers of the Revised Statutes were directed to incorporate these amendments in the Revised Statutes. This was done and the statute cited was published in the 1st edition of the Revised Statutes as a part thereof.

L. 1830, ch. 258.—Consists of three sections. Sections 1, 2, provide for filling vacancy caused by death of an assignee appointed under any of the insolvent laws in force on January 1, 1830. Section 3 provides a penalty for failure of a juror to attend when summoned on an insolvency case. Sections 1, 2, are obsolete as all the insolvency laws in force on January 1, 1830, have been repealed or superseded or revised. Section 3 is covered by the provisions of the Code of Civil Procedure relating to failure of jurors to attend. Recommended for repeal.

L. 1846, ch. 158.—Provides for filling a vacancy caused by an assignee removing from the state. Consolidated in Debtor and Creditor Law, §§ 217, 218.

L. 1854, ch. 147.—Amends R. S., pt. 2, ch. 5, tit. 1, Article 3, § 24. The section of the Revised Statutes so amended was repealed by L. 1880, ch. 245, § 1, and § 2 of the repealing act repeals all laws which amend statutes repealed by § 1.

L. 1859, ch. 2.—Amends R. S., pt. 2, ch. 5, tit. 1, Article 7, § 30. This section of the Revised Statutes was repealed by L. 1880, ch. 245, § 1, and § 2 of the repealing act repeals all laws which amend statutes repealed by § 1.

L. 1863, ch. 373.—Amending R. S., pt. 2, ch. 5, tit. 1, Article 8, §§ 19, 20, 21, 22, and relating to controversies between trustees and other persons in the settlement of claims. Consists of four sections. Sections 1, 4, consolidated in Debtor and Creditor Law, §§ 177, 183. Sections 2, 3, amended so as to read as follows by L. 1907, ch. 476, § 1.

L. 1866, ch. 116.—Amends R. S., pt. 2, ch. 5, tit. 1, Article 7, § 19, and relates to the filing of papers in insolvency proceedings. The section of the Revised Statutes so amended was repealed by L. 1880, ch. 245, § 1, and § 2, of the repealing act repeals all laws which amend statutes repealed by § 1.

L. 1873, ch. 363.—Amends L. 1860, ch. 348, § 5. L. 1877, ch. 466, § 28, repeals L. 1860, ch. 348, and all acts amending the same.

L. 1874, ch. 600.—Amends L. 1860, ch. 348, § 2, by adding matter. L. 1877, ch. 466, § 28, repeals L. 1860, ch. 348, and all acts amending the same.

L. 1875, ch. 56.—Amends L. 1872, ch. 838, which amends L. 1870, ch. 92, which was an amendment of L. 1867, ch. 860, which, in turn, amended L. 1860, ch. 348, § 4. L. 1877, ch. 466, § 28, repeals L. 1860, ch. 348, and all acts amending the same.

L. 1877, ch. 466.—"The General Assignment Act of eighteen hundred and seventy-seven." The live provisions of this law being § 3, except subd. 5; §§ 4, 5, 7-10, 12, 14-19, 20, except first paragraph and subd. 6; §§ 21, 25, 28, are consolidated in Debtor and Creditor Law, §§ 4-7, 9-11, 13, 15-20, 22, 25. Section 1 is the short title, 24 does not apply, the court of common pleas having been abolished by Constitution of 1894 and supreme court succeeding, and § 23 is a repeal of L. 1860, ch. 348.

L. 1878, ch. 318.—Amends L. 1877, ch. 466, § 3, subd. 5; §§ 6, 11, 13, 20, first paragraph and subd. 6; §§ 22, 26. Consists of seven sections. Section 6 amended so

as to read as follows by L. 1894, ch. 134, § 1. Remainder of act consolidated in Debtor and Creditor Law, § 4, subd. 5; §§ 8, 12, 14, 21, subd. 6; § 26.

L. 1884, ch. 228.—Provides that taxpayers may make application for the discharge of certain judgment-debtors from imprisonment. Consolidated in Debtor and Creditor Law, § 139.

L. 1885, ch. 380.—Confers additional powers upon the supreme court and judges thereof in the matter of assignments for benefit of creditors. Consolidated in Debtor and Creditor Law, § 2.

L. 1885, ch. 464.—Amends L. 1877, ch. 466, § 23 (General Assignment Act). Consolidated in Debtor and Creditor Law, § 24.

L. 1887, ch. 503.—Adds § 30 to L. 1877, ch. 466. Consolidated in Debtor and Creditor Law, § 28.

L. 1888, ch. 294.—Amends L. 1877, ch. 466, § 2 (General Assignment Act). Consolidated in Debtor and Creditor Law, § 3.

L. 1891, ch. 34, 1 part relating to appraisal by assignee. Consolidated in Debtor and Creditor Law, § 29.

L. 1893, ch. 697.—Claims against estates of lunatics, idiots and habitual drunkards. Consolidated in Debtor and Creditor Law, §§ 250-255.

L. 1894, ch. 134.—Amends L. 1877, ch. 466, § 22 (General Assignment Act). Consolidated in Debtor and Creditor Law, § 23.

L. 1897, ch. 624.—Consolidated in Debtor and Creditor Law, § 27. See note 3.

L. 1907, ch. 476.—Amends R. S., pt. 2, ch. 5, tit. 1, Article 8, §§ 20, 21, as amended by L. 1862, ch. 373, §§ 2, 3. Consolidated in Debtor and Creditor Law, §§ 178, 179.

Code Civil Procedure, §§ 1268, 1942, 1944, 2149-2218.—Section 1268 is consolidated in Debtor and Creditor Law, § 150; section 1942, in §§ 230, 231; section 1944, in §§ 232, 233; and sections 2149-2218, in articles 3-5, §§ 50-139.

DECEDENT ESTATE LAW.

L. 1909, ch. 18.—“An act relating to estates of deceased persons, constituting chapter thirteen of the consolidated laws.

[In effect February 17, 1909.]

CHAPTER XIII OF THE CONSOLIDATED LAWS.**DECEDENT ESTATE LAW.**

- Article 1. Short title and definitions (§§ 1, 2).
 2. Wills (§§ 10-48).
 3. Descent and distribution (§§ 80-103).
 4. Executors, administrators and testamentary trustees (§§ 110-120).
 5. Laws repealed; when to take effect (§§ 130, 131).

ARTICLE I.**SHORT TITLE AND DEFINITIONS.**

- Section 1. Short title.
 2. Definitions.

§ 1. Short title.—This chapter shall be known as the “Decedent Estate Law.”

Source.—New.

Consolidators' note.—The Decedent Estate Law was made necessary by reason of the existence in the Revised Statutes of substantive matter relating to wills which had not been consolidated in any general law and which could not be assigned appropriately to any of the present “General Laws.” The term “Decedent Estate Law” was selected in order to make the title of the law broad enough to cover substantive matter in the Code of Civil Procedure relating to descent and distribution, executors and administrators, trustees, appraisers, public administrators and kindred subjects connected with the estate of a decedent.

Upon examining the Revised Statutes it was found that there were certain provisions relating to wills that had never been consolidated in any “General Law.” They could not be assigned appropriately to any of the present general laws. They were substantive in character and there was an obvious objection to inserting them in the Code which was already overburdened with provisions of a substantive nature. Some new “Consolidated Law” was therefore necessary. A “Wills Law” had been suggested, but this term, while adequate for the matter coming from the revised statutes, was not broad enough to cover substantive provisions of a related character that should be removed from the Code. The term “Decedent Estate Law” was selected therefore both as suggestive of the contents of the new law and general enough in its terms to include matter relating to wills as well as executors and administrators and kindred topics of a substantive character here assembled.

Throughout this chapter references in sections have been changed where neces-

sary to preserve the original application of the sections as they existed in the Revised Statutes, the Code of Civil Procedure or in other statutes. The reason for every such change is seen at a glance and hence a separate note is not made in each instance.

§ 2. Definitions.—The term “will,” as used in this chapter, shall include all codicils, as well as wills.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 71.

Consolidators' note.—Substantially the same definition of the word “will” is given in the Code of Civil Procedure § 2514, subd. 4, but that is only for the purpose of construing the provisions of the Code.

Construction.—The declaration in this section is not that the term “will” shall be synonymous with that of “codicil,” and hence that whenever used in this chapter it can be replaced by the term “codicil” and the meaning preserved, but it simply provides that in the term “will,” shall be embraced all codicils to a will, so that wherever the word “will” is used it shall have the same effect as if it had been written “a will and all codicils to it” to avoid the necessity of a repetition. *Matter of Simpson* (1878), 56 How. Pr. 125, 131.

Any writing may be a will if executed pursuant to the statute *animo testanti*. *Matter of Francis* (1911), 73 Misc. 148, 161, 132 N. Y. Supp. 695.

A codicil is intended to add to, modify, or revoke, the prior will in the respects which may appear, and it cannot have any other operation than may be necessary to give effect to its provisions as the later expression of the testator's will. *Hard v. Achley* (1890), 117 N. Y. 606, 613, 23 N. E. 177.

A “codicil” may, under some circumstances, be separately probated as an independent testamentary instrument. *Matter of Francis* (1911), 73 Misc. 148, 161, 132 N. Y. Supp. 695.

A will and codicil must be taken and construed together as parts of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil. *Hard v. Achley* (1890), 117 N. Y. 606, N. E.; *Herzog v. Title Guarantee & Trust Co.* (1903), 177 N. Y. 86, 91, 67 L. R. A. 146, 69 N. E. 283, revg. 85 App. Div. 549, which modifies 82 N. Y. Supp. 355. *Underwood v. Curtis* (1889), 1 Silv. 280, 5 N. Y. Supp. 487. Thus, where deceased canceled his signature to the codicil it was held that he intended to cancel the entire instrument. *Matter of Brookman* (1895), 11 Misc. 675, 33 N. Y. Supp. 575.

Both instruments taken together are the will of the testator; the republication of a will and codicil makes the will speak from the date of the codicil. *Canfield v. Crandall* (1885), 4 Dem. 111.

ARTICLE II.

WILLS.

Section 10. Who may devise.

11. What real property may be devised.
12. Who may take real property by devise.
13. Devises of real property to aliens.
14. Wills of real estate, how construed.
15. Who may make wills of personal estate.
16. Unwritten wills of personal property, when allowed.
17. Devise or bequest to certain societies, associations and corporations.

18. Devise or bequest to certain corporations.
19. Devise or bequest to certain benevolent, charitable and scientific corporations.
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23. What wills may be proved.
24. Effect of change of residence since execution of will.
25. Application of certain provisions to wills previously made.
26. Child born after making of will.
27. Devise or bequest to subscribing witness.
28. Action by child born after making of will, or by subscribing witness.
29. Devise or bequest to child or descendant not to lapse.
30. Reception of wills for safe keeping.
31. Sealing and indorsing wills received for safe keeping.
32. Delivery of wills received for safe keeping.
33. Opening wills received by surrogate for safe keeping.
34. Revocation and cancellation of written wills.
35. Revocation by marriage and birth of issue.
36. Will of unmarried woman.
37. Bond or agreement to convey property devised or bequeathed not a revocation.
38. Charge or incumbrance not a revocation.
39. Conveyance, when not to be deemed a revocation.
40. Conveyance, when to be deemed a revocation.
41. Canceling or revocation of second will not to revive first.
42. Record of wills in county clerk's office.
43. County clerk's index of recorded wills.
44. Recording will proved in another state or foreign country.
45. Authentication of papers from another state or foreign country for use in this state.
46. Validity of purchase notwithstanding devise.
47. Validity and effect of testamentary dispositions.
48. Application of certain sections in this article.

(Schedule amended by L. 1909, ch. 240.)

§ 10. Who may devise.—All persons, except idiots, persons of unsound mind and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 1, § 1, as amended by L. 1867, ch. 782, § 3.

Consolidators' note.—Most of the provisions of this article come from the Revised Statutes with such provisions from the Code as were found applicable. So far as possible the language of the Revised Statutes has been followed in incorporating its provisions in the Decedent Estate Law, so that the force of decisions of the courts upon any provision abstracted from the Revised Statutes might not be impaired. In some cases more apt language might be suggested, but for the reasons stated, no improvement in expression has been attempted. These remarks are also applicable to sections taken from the Code of Civil Procedure and inserted in this chapter.

References.—Action to establish or impeach a will, Code Civil Procedure, §§ 1861-1867. Probate of will and grant of letters thereupon, Code Civil Procedure (Sur-

* So in original. See title to section, post.

rogates' Code), §§ 2607-2641. Foreign wills and ancillary letters testamentary, Id. §§ 2629-2636.

Record of wills in county clerk's office, Decedent Estate Law, §§ 42, 43. Recording will found in another state or county, Id. § 44.

Rights as to transfer of real property, Real Property Law, § 11; conveyance does not include will, Id. § 240.

The term "unsound mind" is of the same significance as *non compos mentis*, and anyone, otherwise competent, to whom these terms do not apply may make a valid will. *Blanchard v. Nestle* (1846), 3 Dem. 37; *Stewart's Executor v. Lispenard* (1841), 26 Wend. 255; *Stanton v. Wethernax* (1853), 16 Barb. 259.

Within the meaning of the term "unsoundness of mind," as mentioned in the statutes, the various phases of mental condition defined by the terms "insanity," "mental derangement," "unsoundness" and "monomania" are within the range of an inquiry to determine whether or not a person, at the time of the execution of an alleged will, was of "unsound mind." *Cheney v. Price* (1895), 90 Hun 238, 37 N. Y. Supp. 117.

"The expression 'sound mind' does not mean, in the execution of a will, that one must possess a perfect intelligence. It is the degree of intelligence that determines and controls." *Matter of Halbert* (1895), 15 Misc. 308, 310, 37 N. Y. Supp. 757.

A sound mind, within the meaning of the statute, does not mean a mind which is perfectly balanced and free from all prejudice and passion. *Phillips v. Chater* (1882), 1 Dem. 533.

"The right of a testator to dispose of his estate, depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust." *Clapp v. Fullerton* (1866), 34 N. Y. 190, 197, 90 Am. Dec. 681.

A testator is entitled to dispose of his property as he pleases down to the last hour of conscious, intelligent existence. *Hollis v. Drew Theological Seminary* (1884), 95 N. Y. 166, 172.

That a testator who has been for many years upon bad terms with his sister, because of her having contested the will of their father, makes but a slight provision for his sister, and a much larger provision for a half-brother with whom he resided for a long period, affords no reason for rejecting the will. *Matter of McGraw* (1896), 9 App. Div. 372, 41 N. Y. Supp. 481.

Deaf and dumb person may make a will.—*Matter of Perego* (1892), 65 Hun 478, 20 N. Y. Supp. 394.

Infants.—Devises made by a will of an infant are ineffectual, and property passes by statute of descents. *Wells v. Seeley* (1888), 47 Hun 109, 116.

An infant cannot dispose of real property by will until twenty-one years of age. *Horton v. McCoy* (1871), 47 N. Y. 21, 28.

Objection as to age of testatrix must state specific defect with certainty. *Matter of Freeman* (1887), 46 Hun 458. A married woman may not make testamentary disposition of her real estate while she is an infant. *Zimmerman v. Schoenfeldt*, (1875), 3 Hun 692.

Testamentary capacity in general.—A testator should be capable of comprehending the condition of his property, and his relations to the persons who are or might have been the objects of his bounty. *Van Guyssing v. Van Kuren* (1866), 35 N. Y. 70; *Delafield v. Parish* (1862), 25 N. Y. 9; *Swenarton v. Hancock* (1830), 9 Abb. N. C. 326; *Watson v. Donnelly* (1859), 28 Barb. 653; *Kinne v. Johnson* (1869), 60 Barb. 69; *Crollius v. Stark* (1872), 64 Barb. 112, 7 Lans. 311; *Reynolds v. Root* (1862), 62 Barb. 250; *Cornwell v. Riker* (1884), 2 Dem. 354; *Children's*

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Ald Society v. Loveridge (1877), 70 N. Y. 387; *Clark v. Fisher* (1828), 1 Paige 171, 19 Am. Dec. 402; *Newhouse v. Godwin* (1853), 17 Barb. 236.

Mere imbecility or weakness of mind does not incapacitate, if there be sufficient understanding to satisfy the foregoing rule. *Wade v. Holbrook* (1876), 2 Redf. 378.

A testator should be able to collect in his mind, without prompting, the elements of the business to be transacted, and hold them there until their relations to each other can be perceived, and a rational judgment in respect thereto be formed. *Van Gysling v. Van Kuren* (1866), 35 N. Y. 70; *DeLafield v. Parish* (1862), 25 N. Y. 9; *Matter of Richardson* (1900), 51 App. Div. 637, 64 N. Y. Supp. 944; *Iverson v. Iverson* (1903), 80 App. Div. 599, 80 N. Y. Supp. 1011.

The test of ability to dispose of property by will depends upon the testator's conception of his obligations to those who naturally are the objects of his bounty and upon his adequate comprehension of the conditions and nature of his property and of the scope and import of the testamentary provisions. *Lavin v. Thomas* (1908), 123 App. Div. 113, 108 N. Y. Supp. 112; *Matter of McGraw* (1896), 9 App. Div. 372, 41 N. Y. Supp. 481; *Matter of Murphy* (1899), 41 App. Div. 153, 58 N. Y. Supp. 450; *Matter of Iredale* (1900), 53 App. Div. 45, 65 N. Y. Supp. 533; *Iverson v. Iverson* (1903), 80 App. Div. 599, 80 N. Y. Supp. 1011; *Matter of McCusker* (1915), 89 Misc. 652, 153 N. Y. Supp. 1086.

"The law does not, of course, attempt to define any particular grade of mental ability or acumen necessary to qualify one to make a will. Wills are made by all classes of people in every station of life and under almost every conceivable set of circumstances, by persons of weak intellect and by those of magnificent ability, sometimes in the midst of life and business prosperity, at other times in *extremis* or while overwhelmed with adversity; hence it is impossible to formulate any precise rules applicable to any particular case. The most that the courts have attempted to do is to dispose of each individual case as it arises upon its own peculiar facts and circumstances, and in so doing, establish certain very general propositions bearing upon this subject." *Matter of Carver's Estate* (1893), 3 Misc. 567, 573, 23 N. Y. Supp. 753.

Forgetfulness and slight delusions do not establish lack of testamentary capacity. *In re Carpenter* (1913), 145 N. Y. Supp. 365.

A person who has sufficient capacity to make the simplest will, who is *compos mentis*, can make any will, even the most complicated. *Matter of Soule* (1888), 22 Abb. N. C. 236, 253.

Peculiarities and absurd conduct.—"A man may be peculiar; he may even be insane upon some special topic, and yet have capacity to dispose of his property; the question is not whether a man says or does absurd things at times, but whether at the particular time of executing his will he knows what his duties and obligations are, and what he desires to do in respect to them." *Calligan v. Haskell* (1911), 143 App. Div. 574, 576, 128 N. Y. Supp. 293.

Unjust disposition of property.—"A man's testamentary disposition of his property is not invalidated, because its provisions are unequal, or unjust, or the result of passion, or of other unworthy or unjustifiable sentiments." *Doble v. Armstrong* (1899), 160 N. Y. 584, 593, 55 N. E. 302, modified 161 N. Y. 641, 57 N. E. 1108.

Ability to transact ordinary business properly is strong evidence of testamentary capacity. *In re Carpenter* (1913), 145 N. Y. Supp. 365.

Effect of old age, feebleness of mind and body.—"There is no presumption against a will because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body." *Horn v. Pullman* (1878), 72 N. Y. 269; *Doble v. Armstrong* (1899), 160 N. Y. 584, 55 N. E. 302, modified 161 N. Y. 641, 57 N. E. 1108; *Matter of Dixon* (1899), 42 App. Div. 481, 59 N. Y. Supp. 421; *Matter*

of Donohue (1904), 97 App. Div. 205, 89 N. Y. Supp. 871; *Matter of Brower* (1906), 112 App. Div. 370, 98 N. Y. Supp. 438; *Matter of Duffy* (1908), 127 App. Div. 174, 111 N. Y. Supp. 491, revg. 51 Misc. 543, 101 N. Y. Supp. 974; *Seaman v. McLaury* (1909), 134 App. Div. 180, 118 N. Y. Supp. 809; *Matter of Otis' Will* (1892), 1 Misc. 258, 22 N. Y. Supp. 1060; *Matter of Wheeler* (1893), 5 Misc. 279, 25 N. Y. Supp. 313; *Matter of Halpert* (1895), 15 Misc. 308, 37 N. Y. Supp. 757; *Matter of Metcalf* (1896), 16 Misc. 180, 38 N. Y. Supp. 1131; *Matter of Henry* (1896), 18 Misc. 149, 41 N. Y. Supp. 1096; *Matter of Hawley* (1904), 44 Misc. 186, 89 N. Y. Supp. 803; *Matter of McCabe*, 75 Misc. 35, 36, 134 N. Y. Supp. 682; *Matter of Crockett* (1914), 86 Misc. 631, 149 N. Y. Supp. 427; *Clarke v. Davis* (1863), 1 Redf. 249; *Weir v. Fitzgerald* (1851), 2 Bradf. 42.

Advanced age is of itself no disqualification to the making of a will, but in such a case the court will more closely scrutinize the circumstances surrounding the preparation and execution of the paper. *Matter of Hurlburt* (1809), 26 Misc. 461, 57 N. Y. Supp. 648, affd. 48 App. Div. 91, 62 N. Y. Supp. 698; *Maverick v. Reynolds* (1853), 2 Bradf. 360, 384.

That the decedent was old, slovenly in dress and given to peculiarities of speech and habit which at times were such as to impress others that they were irrational, is not sufficient to render a testamentary disposition of his property invalid. *Matter of McDermott* (1915), 90 Misc. 526, 154 N. Y. Supp. 923.

Proofs of physical weakness followed by a will made near death are insufficient in themselves to establish testamentary incapacity. *Matter of Knight* (1914), 87 Misc. 577, 150 N. Y. Supp. 137.

Mental impairment alone is not sufficient to defeat a will, if the person who made it appears to have had sufficient understanding to appreciate its effect. *Matter of Soule* (1888), 22 Abb. N. C. 236, 253.

"The motives which induce a man in making a testamentary disposition of his property to prefer one relative to another may not always be disclosed, but if he is free from improper influence and possesses the requisite capacity, what controlled his preference is unimportant." *Lavin v. Thomas* (1908), 123 App. Div. 113, 108 N. Y. Supp. 112.

Discrimination by a testator in favor of a son, as against other children, is evidence of lack of testamentary capacity. *La Bau v. Vanderbilt* (1879), 3 Redf. 384.

The fact that a testator disinherits his relatives in favor of a stranger is evidence of testamentary incapacity. *Colhoun v. Jones* (1870), 2 Redf. 34.

It is not a peculiar thing that a testatrix gave her property to persons not related to her where her nearest relatives were cousins and second cousins who lived at a distance from her and were not intimate with her. *Matter of Bolles* (1902), 37 Misc. 562, 75 N. Y. Supp. 1062.

The omission of a grandchild from a will is not, in itself, sufficient to cast, in the first instance, an additional burden on the proponents of a will. *Matter of McCabe*, 75 Misc. 35, 134 N. Y. Supp. 682.

The fact that the lawyer who drew the will was bequeathed, out of an estate of at least \$225,000, legacies aggregating \$11,200, is utterly insufficient to warrant the inference that the will was the result of undue influence exercised by the lawyer. *Haughian v. Conlan* (1903), 86 App. Div. 290, 83 N. Y. Supp. 830.

Apparent injustice of testator to members of his family is not sufficient alone to establish testamentary incapacity. *Gamble v. Gamble* (1803), 39 Barb. 373.

Will by testatrix who had no children, made while ill and about a week before her death in favor of a woman who had cared for her and her mother, evidence insufficient to establish undue influence or lack of testamentary capacity. *Matter of*

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Shaul (1913), 158 App. Div. 348, 143 N. Y. Supp. 433; Rintelen v. Schaefer (1913), 158 App. Div. 477, 143 N. Y. Supp. 631.

The presumption of the validity of a will is not affected by the failure of a testator to provide for his only child, a son. *Dobie v. Armstrong* (1899), 160 N. Y. 584.

The fact that a will was executed by a woman of advanced age, somewhat enfeebled in body and mind, and that instead of giving her property to collateral relatives she gave it to strangers, from motives of gratitude or affection, does not show testamentary incapacity to execute the will. *Matter of Snelling* (1893), 136 N. Y. 515, 32 N. E. 1006.

Where it appears that the husband of a testatrix had left substantial legacies to adult sons and daughters and had aided them upon marriage, the fact that the testatrix leaving an estate of \$11,000 made specific bequests of \$4,500 to servants and others and left the residue to an infant son without providing for her married children raises no presumption of undue influence. *Matter of O'Gorman* (1908), 127 App. Div. 159, 111 N. Y. Supp. 274.

Widow, without children, seventy-two years of age, and sick, made a will two or three days before her death in favor of a girl about fifteen years of age who had lived with her for two years, facts not establishing testamentary incapacity. *Matter of Donnelly* (1910), 140 App. Div. 859, 125 N. Y. Supp. 585, *affd.* 201 N. Y. 596, 95 N. E. 1127.

Will by testator in favor of his mistress not obtained by fraud and undue influence. *Matter of Livingston* (1913), 158 App. Div. 69, 142 N. Y. Supp. 829.

The fact that a man leaves his property by will to his mistress is not *per se* ground for declaring the disposition invalid, especially so where the meretricious relation was changed to a legitimate one when the obstacle to marriage was removed. *Scott v. Barker* (1908), 129 App. Div. 241, 113 N. Y. Supp. 695.

Testator, having a wife and adult children left all his property to another woman with whom he had lived for twenty-five years and held out as his wife, facts not showing testamentary incapacity. *Heyzer v. Morris* (1905), 110 App. Div. 313, 97 N. Y. Supp. 131.

Bequest to paramour to exclusion of relatives held valid. *Matter of Evans* (1902), 37 Misc. 337, 75 N. Y. Supp. 491, *affd.* 81 App. Div. 636, 81 N. Y. Supp. 1125.

Eccentricities, perversity of temperament, peculiarities in daily life and the enfeeblement of old age are not in themselves sufficient evidence of incapacity to overthrow the will of a testatrix. *Matter of Murphy* (1899), 41 App. Div. 153, 58 N. Y. Supp. 450.

Eccentricities, religious beliefs, peculiarities, and even impairment of mind, do not render a person incompetent to execute a will. *Matter of Halbert* (1895), 15 Misc. 308, 37 N. Y. Supp. 757.

Erroneous, foolish, and even absurd opinions on certain subjects, do not show insanity, when the person entertaining them still continues in the possession of his faculties, discreetly conducting not only his own affairs, but the business of others. *Thompson v. Thompson* (1855), 21 Barb. 107, 113.

A person having capacity sufficient to acquire a large fortune by personal industry and intelligence, who successfully conducts a large business, whose business correspondence shows a clear comprehension of the subjects upon which he writes, and who is pronounced by his intimate friends of sound mind, and of more than ordinary intelligence and firmness, will not be considered as incompetent to make a will simply because he exhibits eccentricities of character in regard to himself, is subject to fits of melancholy in regard to his health, even amounting to hypochondria. *Brick v. Brick* (1876), 66 N. Y. 144.

Mere eccentricity of a testator and his disbelief in any specific religious doctrines do not establish lack of testamentary capacity. *Hartwell v. McMaster* (1880), 4 Redf. 389.

Proof that a testator, who lived alone and suffered much from paralysis and Bright's disease, was selfish, morose, ungrateful, changeable, and had become estranged from his next of kin without their fault, does not necessarily indicate that he lacked testamentary capacity. *Matter of McKean* (1900), 31 Misc. 703, 66 N. Y. Supp. 44.

Evidence of testamentary capacity and undue influence in general.—The testimony of a single witness to the effect that a testator, on an occasion subsequent to the execution of his will, and about a year and a half previous to his death did not seem to recognize his brother when he met him in the street, relates to an isolated circumstance too insignificant to support the inference that the testator lacked testamentary capacity at the time of the execution of the will. *Haughian v. Conlan* (1903), 86 App. Div. 290, 83 N. Y. Supp. 830; *Matter of Goodwin* (1904), 95 App. Div. 183, 88 N. Y. Supp. 734; *Matter of Tuttle* (1908), 123 App. Div. 167, 108 N. Y. Supp. 133; *Matter of Rounds* (1898), 25 Misc. 101, 54 N. Y. Supp. 710; *Matter of Ehminne* (1899), 30 Misc. 21, 62 N. Y. Supp. 1006; *Matter of Mooney* (1911), 73 Misc. 315, 132 N. Y. Supp. 705; *Matter of King* (1915), 89 Misc. 638, 154 N. Y. Supp. 238; *In re Liddington* (1889), 4 N. Y. Supp. 646; *In re McCarthy* (1892), 20 N. Y. Supp. 581; *Dumond v. Kiff* (1872), 7 Lans. 465.

Facts not showing lack of testamentary capacity. *Matter of Stapleton* (1902), 71 App. Div. 1, 75 N. Y. Supp. 657; *Lavin v. Thomas* (1908), 123 App. Div. 113, 108 N. Y. Supp. 112; *Matter of Powers* (1917), 176 App. Div. 455; *Matter of Carver's Estate* (1893), 3 Misc. 567, 23 N. Y. Supp. 753, *affd.* 75 Hun 612, 28 N. Y. Supp. 1126; *Matter of Otis' Will* (1892), 1 Misc. 258, 22 N. Y. Supp. 1060; *Matter of Hall* (1893), 5 Misc. 461, 24 N. Y. Supp. 864; *Matter of Wilde* (1902), 38 Misc. 149, 77 N. Y. Supp. 164; *Matter of Munger* (1902), 38 Misc. 268, 77 N. Y. Supp. 648; *Matter of Winne* (1906), 50 Misc. 113, 100 N. Y. Supp. 376; *Matter of Johnson* (1908), 60 Misc. 277, 113 N. Y. Supp. 283; *Cheney v. Price* (1895), 90 Hun 238, 37 N. Y. Supp. 117; *Matter of Davis* (1895), 91 Hun 209, 36 N. Y. Supp. 344; *Brown v. Torrey* (1857), 24 Barb. 583; *Pilling v. Pilling* (1865), 45 Barb. 86; *Mairs v. Freeman* (1877), 3 Redf. 181; *Legg v. Myer* (1879), 5 Redf. 628; *Kinne v. Johnson* (1869), 60 Barb. 69.

Evidence as *senile dementia* insufficient to show lack of testamentary capacity. *Matter of Wendel* (1904), 43 Misc. 571, 89 N. Y. Supp. 543.

Facts not showing testamentary incapacity or undue influence. *Matter of Tobin* (1908), 127 App. Div. 373, 111 N. Y. Supp. 555; *Miller v. Miller* (1912), 150 App. Div. 604, 135 N. Y. Supp. 773; *Matter of Clark* (1893), 5 Misc. 681, 25 N. Y. Supp. 712; *Matter of Mable* (1893), 5 Misc. 179, 24 N. Y. Supp. 855; *Matter of Armstrong* (1907), 55 Misc. 487, 106 N. Y. Supp. 671; *Matter of Gihou's Will* (1899), 60 N. Y. Supp. 65; *Matter of Ross* (1892), 20 N. Y. Supp. 520; *Matter of Gray* (1889), 1 Silv. 338.

Facts showing undue influence. *Matter of Nolte* (1894), 10 Misc. 608, 32 N. Y. Supp. 226; *Newhouse v. Godwin* (1853), 17 Barb. 236. Will, made by an invalid within a few hours of her death, under the controlling influence of the principal beneficiary, and involving a complete change in intention, held to have been procured by undue influence. *Tyler v. Gardner* (1866), 35 N. Y. 559. Evidence justifying inference of undue influence upon the testator, 80 years of age by a daughter. *Ledwith v. Claffey* (1897), 18 App. Div. 115, 45 N. Y. Supp. 612. Facts not showing undue influence. *Matter of Rohe* (1898), 22 Misc. 415, 50 N. Y. Supp. 392; *Matter of Fleischmann* (1917), 176 App. Div. 785; *In re Crumb's Estate* (1911), 127 N. Y. Supp. 269.

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Burden of proving testamentary capacity is on proponent.—"The statute thus makes a condition precedent to the execution of a will, that the testatrix be of sound mind, and hence the burden of proving that fact is upon the proponent just as it is incumbent on her to prove the formal steps taken in the execution of the instrument. This, I think, constitutes an important distinction between the issue of undue influence and that of testamentary capacity." *Matter of King* (1915), 89 Misc. 638, 650, 154 N. Y. Supp. 238.

The burden of establishing the testamentary incapacity of the testator, over the *prima facie* evidence of the validity of the will afforded by its probate, rests upon the party contestant. *Dobie v. Armstrong* (1899), 160 N. Y. 584, 55 N. E. 302, modified 161 N. Y. 641, 57 N. E. 1108.

The sanity of every man, and his capacity to make a will, are to be presumed until the contrary appears, and the burden of proving mental disability is on him who asserts it. *Potter v. McAlpine* (1885), 3 Dem. 108.

The burden of proving that a testator was *non compos mentis* rests on the party alleging it from the beginning to the end of the inquiry. *Matter of Preston* (1906), 113 App. Div. 732, 99 N. Y. Supp. 312.

"The general rule is that when it once appears that a person, prior to the making of an alleged will, has been adjudged by a court having jurisdiction, to be insane or of unsound mind, a presumption prevails to the effect that the same mental condition continued until it is overcome by satisfactory evidence." *Matter of Widmayer* (1902), 74 App. Div. 336, 337, 77 N. Y. Supp. 663.

Where a testator was declared a lunatic a month before the execution of the will, although the findings in the inquisition were not confirmed until some months after, the legal presumption is that his insanity continued, and the burden of proof is upon the proponents to show that he had recovered his reason or that the will was executed during a lucid interval. *Matter of Lapham* (1896), 19 Misc. 71, 44 N. Y. Supp. 90.

Where the insanity of testatrix is once established, the burden is on the proponent to show that the will was made in a lucid interval. *Matter of Van Den Heuvel* (1912), 76 Misc. 137, 136 N. Y. Supp. 1109.

The fact that a will was made after a jury, appointed under a commission *de lunatico inquirendo*, had found the testatrix to be incompetent, but before such findings, which were concurred in by the commissioners, had been confirmed, is not only presumptive evidence of the testamentary incapacity of the testatrix, but is conclusive upon that point until overcome by satisfactory evidence. *Matter of Widmayer* (1902), 74 App. Div. 336, 77 N. Y. Supp. 663. A jury *de lunatico inquirendo* must confine itself to the mental condition of the alleged incompetent at the time of the hearing, and when without authority the inquisition finds lunacy prior to the time of hearing the same is not admissible in evidence to show that a testator whose will was made before the hearing lacked testamentary capacity. *Matter of Preston* (1906), 113 App. Div. 732, 99 N. Y. Supp. 312.

Undue influence; what constitutes.—The undue influence which will invalidate a will is such as deprives the testator of the free exercise of his intellectual powers; it must be a present constraint operating upon the mind of the testator at the time of the testamentary act. *Ivison v. Ivison* (1903), 80 App. Div. 599, 80 N. Y. Supp. 1011; *Buchanan v. Belsey* (1901), 65 App. Div. 58, 72 N. Y. Supp. 601; *Rollwagen v. Rollwagen* (1876), 63 N. Y. 504.

"Undue influence is of two kinds, one of coercion or threats of injury; the other in which the mind of the person is wrought upon through constant persuasion, continued until the victim, for the sake of peace, is compelled to surrender." *Matter of McGraw* (1896, 9 App. Div. 372, 380, 41 N. Y. Supp. 481.

What the law terms undue influence must be such as overpowers the will of a testator and subjects it to the will and control of another; it is not established by proof simply tending to show that the testator, acting from motives of affection or gratitude, gave his property to strangers to his blood. *Matter of Snelling* (1893), 136 N. Y. 515, 32 N. E. 1006; *Ledwith v. Claffey* (1897), 18 App. Div. 115, 119, 45 N. Y. Supp. 612.

Undue influence must amount "to coercion and duress." There must appear a moral coercion destructive of free agency or an importunity irresistible that causes the testator to act against his actual will. *Matter of Powers* (1917), 176 App. Div. 455.

The fact that a will is the result of affection or gratitude or legitimate persuasion does not establish undue influence. *Scott v. Barker* (1908), 129 App. Div. 241, 113 N. Y. Supp. 695; *Kinne v. Johnson* (1869), 60 Barb. 69.

The amount of influence which will be held sufficient to invalidate a will is dependent upon the strength or weakness of the mind of the testator; however little, if sufficient in the particular case to destroy free agency, it is undue and vitiates the act instigated by it. So, also, where one takes advantage of the affection or gratitude of another to subdue and control his mind so as substantially to deprive him of free agency, and thus obtains an unjust will in his favor, it is undue influence. *Rollwagen v. Rollwagen* (1876), 63 N. Y. 504.

The exercise of the influence springing from the family relation, or from considerations of service, affection or gratitude, is not undue, even though it be pressed to the extent of unreasonable importunity; but it is otherwise, when unfair and material testamentary changes are procured by a party for his own special benefit, from one in a helpless and dying condition, and when the transaction is attended with all the usual *indicia* of imposition and contrivance. *Tyler v. Gardiner* (1866), 35 N. Y. 559.

"Undue influence is influence which subordinates the will of the testatrix to the will of another, so that the testament no longer speaks the mind and purpose of the testatrix, but the wish and purpose of another." *Matter of Crockett* (1914), 86 Misc. 631, 632, 149 N. Y. Supp. 477.

Influence is not undue if it is a reasonable argument, suggestion, advice, persuasion or urging one's personal claims upon the bounty of another. *Matter of Halbert* (1895), 15 Misc. 308, 37 N. Y. Supp. 757.

In order to avoid a will fraud or undue influence must amount to moral coercion of independent action. *Matter of Bolles* (1902), 37 Misc. 562, 75 N. Y. Supp. 1062.

Where a will is attacked upon the ground of undue influence, it must be shown that the influence exercised was sufficient to destroy free agency, or that because of importunity, which the testator was unable to resist, he was constrained to do that which was against his free will and desire. *Matter of McGraw* (1896), 9 App. Div. 372, 41 N. Y. Supp. 481.

The presumption of undue influence, which arises where a beneficiary of a will is a stranger and occupies a position confidential to the testatrix, is one of fact only and therefore may be overcome by evidence. *Matter of Brush* (1901), 35 Misc. 639, 72 N. Y. Supp. 421.

A presumption of fraud and undue influence is raised, where a will executed by an old man differs from his previously expressed intentions, and is made in favor of those standing in a confidential relationship. *Forman v. Smith* (1872), 7 Lans. 443, 450.

Where a will has been executed by an aged person, weak in mind and body, at the house of the chief beneficiary, and it is not in harmony with previous expressed intentions, and was not communicated to the children of the decedent, the

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ordinary presumption as to validity does not obtain, and the burden is thrown on the party seeking to establish the instruments. *Mowry v. Seiber* (1851), 2 Bradf. 133.

There is a presumption that undue influence has been used where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser, or where other close confidential relationships exist. *Matter of Skaats* (1893), 74 Hun 462, 26 N. Y. Supp. 494. A will by a patient in favor of his physician, in whose house he resided, is presumptively open to the charge of undue influence. *Colhoun v. Jones* (1870), 2 Redf. 34.

The mere fact that the will of a testator, aged eighty-nine, was more beneficial to a son with whom he had sustained confidential relations than to another son who had been divorced from his wife, does not of itself cast upon the principal beneficiary the burden of showing affirmatively that he had not abused the confidential relation. *Matter of Hurlbut* (1809), 26 Misc. 461, 57 N. Y. Supp. 648.

Affirmative evidence of undue influence.—There must be "affirmative evidence" of the facts from which such influence is to be inferred, and it will not be inferred from motive and opportunity. The exercise thereof upon the very testamentary act must be proved. *Matter of Powers* (1917), 176 App. Div. 455.

Although direct proof of fraud or undue influence is not essential, there must be affirmative evidence of facts to indicate the exercise of the will of another, and it must be shown that such coercion, duress or domination was exercised over the very testamentary act itself. But this rule should not be carried too far. *Matter of Fleischmann* (1917), 176 App. Div. 785.

Undue influence must be established affirmatively, and its existence will not be inferred from the mere presence of opportunities for its exercise. *Matter of Murphy* (1899), 41 App. Div. 153, 58 N. Y. Supp. 450; *Tyler v. Gardiner* (1866), 35 N. Y. 559; *Cudney v. Cudney* (1877), 68 N. Y. 148; *Rintelen v. Schaefer* (1913), 158 App. Div. 477, 482, 143 N. Y. Supp. 631; *Matter of Skaats* (1893), 74 Hun 462, 26 N. Y. Supp. 494; *Matter of Bolles* (1902), 37 Misc. 562, 75 N. Y. Supp. 1062; *Matter of Munger* (1902), 38 Misc. 268, 77 N. Y. Supp. 648; *Matter of Hawley* (1904), 44 Misc. 186, 89 N. Y. Supp. 803; *Matter of McCabe* (1911), 75 Misc. 35, 134 N. Y. Supp. 682; *Matter of McDermott* (1915), 90 Misc. 526, 154 N. Y. Supp. 923; *Carroll v. Norton* (1855), 3 Bradf. 291.

To establish fraud and undue influence it is not necessary that the precise mode of committing the fraud should be proved. *McLaughlin v. McDevitt* (1875), 63 N. Y. 213.

Burden of proof.—In a proceeding for the probate of a will, the validity of which is contested upon the ground of fraud or undue influence, the burden of proof is upon the contestants and cannot shift. They are bound to produce proof of facts showing coercion or duress—a moral coercion destructive of the testator's free agency or an irresistible importunity that forced the testator to act against her actual will. *Matter of Fleischmann* (1917), 176 App. Div. 785.

Sufficiency of evidence to show undue influence.—"It is not sufficient to show that a party benefited by a will had the motive and opportunity to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist or by deception, fraud or other improper means, that the instrument is not really the will of the testator. *Cudney v. Cudney* (1877), 68 N. Y. 148, 152.

Where it is found upon evidence justifying it that a beneficiary under the will had an intent to defraud the testator in order to procure a personal advantage to himself in the will, that he had opportunity to practice deception and employed

some of the means usually resorted to for that purpose, that a result was produced in his favor contrary to the known wishes and fixed purpose of the testator, and that no satisfactory explanation of the change was furnished, the legitimate result of the findings is that the will is vitiated by fraud. *McLaughlin v. McDevitt* (1875), 63 N. Y. 213.

To avoid a will on the ground of undue influence, it must be made to appear that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity, which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse or too weak to resist. *Brick v. Brick* (1876), 66 N. Y. 144.

The fact that the principal beneficiary is also the chief actor in preparing or procuring a will, raises no presumption against its fairness or validity; but, if the person from whom it is obtained be, at the time, *in extremis*, it may, in connection with other circumstances, have a legitimate and important bearing on the question of undue influence. *Tyler v. Gardiner* (1866), 35 N. Y. 559.

The fact that the chief beneficiary under a will procured its execution to be witnessed by specialists in mental diseases, for the purpose of perpetuating testimony which might be used upon an anticipated contest over the will, is not a suspicious circumstance. *Matter of Journeay* (1897), 15 App. Div. 567, 44 N. Y. Supp. 548, *affd.* 162 N. Y. 611, 57 N. E. 1113.

The declarations of a testator, alone, are not competent evidence to prove acts of others amounting to undue influence; but when acts are proved, such declarations may be given in evidence to show the operation they had upon the mind of the testator. *Cudney v. Cudney* (1877), 68 N. Y. 148.

Undue influence not amounting to physical duress may be shown by circumstantial evidence.—*Scott v. Barker* (1908), 129 App. Div. 241, 113 N. Y. Supp. 695.

The exercise of undue influence need not be shown by direct proof; it may be inferred from circumstances, but the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator. *Brick v. Brick* (1876), 66 N. Y. 144.

A change of testamentary intention is sometimes an important circumstance bearing upon the question of undue influence in procuring the will, but the force thereof depends mainly upon its connection with associated facts; if made upon a reason satisfactory to the testator, although such reason may seem inadequate to a court investigating the question of undue influence, it furnishes of itself no ground for setting aside a will. *Matter of Donohue* (1904), 97 App. Div. 205, 89 N. Y. Supp. 871.

The fact that a will executed by an old and feeble man, differs from his previously expressed intentions, and is in favor of those who stand in confidential relations with him, may be evidence of fraud and undue influence. *Lee v. Dill* (1860), 11 Abb. Pr. 214.

Evidence of the testamentary wishes of the testator are of great weight upon the question of undue influence. *Ewen v. Perrine* (1881), 5 Redf. 640.

Where a change is made in the will of a sick man which, judging from the ordinary motives actuating men, is unnatural and is apparently contrary to his previously fixed and determined purpose, it is the duty of the courts to scrutinize closely with a view of ascertaining whether the act was free, voluntary and intelligent. *McLaughlin v. McDevitt* (1875), 63 N. Y. 213.

Where an unnatural change has been made in a sick man's will, and one apparently contrary to his previously fixed purpose, courts will scrutinize closely the circumstances. *Swenarton v. Hancock* (1880), 9 Abb. N. C. 326.

The fact that a will differs from testator's prior intentions may be evidence of

undue influence, but taken alone is of no importance. *Wood v. Bishop* (1883), 1 Dem. 512.

Where it is sought to establish a later will and overthrow a prior one, which was made when the testator was in health and with deliberation and care, the later will having been made when in feeble health and in hostility to the provisions of the prior one, the prior will must prevail unless the later one is so fully proven to speak the testator's intention as to leave no doubt in the mind of the court on the subject. *Matter of Way* (1894), 6 Misc. 484, 27 N. Y. Supp. 235; *Matter of Barbineau* (1899), 27 Misc. 417, 59 N. Y. Supp. 375.

Insanity.—The legal test of insanity is delusion and hallucination. Moral insanity is a disorder of the feelings and propensities. Legal insanity is a disorder of the intellect. *Matter of Forman's Will* (1869), 54 Barb. 274, 286.

A person judicially declared to be insane may make a valid will during a lucid interval. *Matter of Coe* (1900), 47 App. Div. 177, 62 N. Y. Supp. 376.

The true test of insanity affecting testamentary capacity, etc., aside from cases of dementia, or loss of mind and intellect, is mental delusion. *American Seamen's Friend Soc. v. Hopper* (1865), 33 N. Y. 619.

Questions presented by evidence of a progressive mental disease of a testator which required some months to develop, and which resulted in his death. *Matter of Lawrence* (1900), 48 App. Div. 83, 62 N. Y. Supp. 673.

Insane delusions.—An insane delusion is the persistent belief in certain supposed facts which plainly do not exist, and of the nonexistence of which the person laboring under the delusion cannot be convinced, but continues acting thereunder against all evidence and probability. *Matter of White's Will*, 121 N. Y. 406, 413, 24 N. E. 935; *Matter of McKean* (1900), 31 Misc. 703, 705, 66 N. Y. Supp. 44; *In re Smith* (1893), 24 N. Y. Supp. 928; *Matter of Jenkins* (1903), 39 Misc. 618, 80 N. Y. Supp. 664; *Matter of Lapham* (1896), 19 Misc. 71, 44 N. Y. Supp. 90; *Matter of Egan* (1905), 46 Misc. 375, 94 N. Y. Supp. 1064; *Riggs v. American Tract Society* (1884), 95 N. Y. 503.

Where, however, there are facts, insufficient although they may be in reality, from which a prejudiced, narrow or bigoted mind might derive a particular idea or belief, it cannot be said that the mind is diseased, in that respect. The fact that the belief is illogical or preposterous is not evidence of insanity. *Matter of White* (1890), 121 N. Y. 406, 24 N. E. 935.

An insane delusion is not only one which is founded in error, but one in favor of the truth of which there is no evidence, but the clearest evidence often to the contrary. *Merrill v. Rolston* (1881), 5 Redf. 220, 252; *Leslie v. Leslie* (1882), 15 Wk. Dig. 56.

A man under an insane delusion is incompetent to make a will relating to the subject of his delusion and affected by it, although rational and competent to transact business upon other subjects. *Matter of Dorman* (1887), 5 Dem. 112; *Matter of Loewenstine* (1893), 2 Misc. 323, 21 N. Y. Supp. 931; *Matter of Lapham* (1896), 19 Misc. 71, 44 N. Y. Supp. 90; *Matter of Soden* (1902), 38 Misc. 25, 76 N. Y. Supp. 877; *Matter of Long* (1904), 43 Misc. 560, 89 N. Y. Supp. 555; *Morse v. Scott* (1885), 4 Dem. 507; *Matter of Lockwood* (1889), 2 Connolly 118; *Matter of McCue* (1883), 17 Wk. Dig. 501.

Insane delusions do not incapacitate a man from making a valid will, unless the will be the result of such insane delusions. *Matter of Donohue* (1904), 97 App. Div. 205, 89 N. Y. Supp. 871; *American Seamen's Friend Soc. v. Hopper* (1865), 33 N. Y. 619; *Matter of Iredale* (1900), 53 App. Div. 45, 65 N. Y. Supp. 533; *In re Carpenter* (1913), 145 N. Y. Supp. 365.

actuated him in making his will, does not warrant us in calling it a delusion. A man may even have an insane delusion and yet be able to make a valid will; for the will to be invalid must be the result itself of the delusion, and it is not a delusion which incapacitates, if the proof of its existence depends upon external and observable facts, giving rise to impressions which, upon investigation, might be proved to be unjust." *Doble v. Armstrong* (1899), 160 N. Y. 584, 594, 55 N. E. 302.

Mistaken beliefs or judgments are not delusions. *Matter of Lang* (1894), 9 Misc. 521, 30 N. Y. Supp. 388; *Phillips v. Flagler* (1913), 82 Misc. 500, 143 N. Y. Supp. 798. Belief by testator that souls of men after death pass into animals is not evidence of insanity or insane delusion. *Matter of Bonard's Will* (1872), 16 Abb. Pr. U. S. 128.

The fact that a testator believed that a "ring" existed which was organized to ruin his business, is not such a delusion as to incapacitate him from making a will, where it does not appear that the provisions of the will were influenced by the delusion. *Matter of Henry* (1896), 18 Misc. 149, 41 N. Y. Supp. 1096.

An insane delusion which existed on the part of the testator and can be traced into his will, will invalidate the instrument, but the fact that the provisions of the will are unjust or are the result of passion or of unworthy or unjustifiable sentiments or of false information, is not sufficient to invalidate it. *Buchanan v. Belsey* (1901), 65 App. Div. 58, 72 N. Y. Supp. 601.

It is not sufficient to justify the rejection of a will, that a testator, in other respects competent, entertained the mistaken idea that one of his daughters was illegitimate, if it was not the effect of insane delusion, but of slight and inadequate evidence acting upon a jealous and suspicious mind. *Clapp v. Fullerton* (1866), 34 N. Y. 190.

Insane delusions by a testator as to his relatives may be sufficient to establish lack of testamentary capacity. *Crandall v. Shaw* (1874), 2 Redf. 107.

Evidence of insanity.—"It is doubtless the general and well-established rule that where the mental soundness of an individual is in question, the sanity of the blood relations in the ancestral line may be shown as tending to establish the fact in issue (*Walsh v. People*, 88 N. Y. 458), but that rule does not permit indiscriminate and unexplained evidence of diseases afflicting such relations and affecting their mental faculties. There must be evidence tending to show at least that such diseases are hereditary or transmissible." *Matter of Myer* (1906), 184 N. Y. 54, 59, 76 N. E. 920.

Proof that insanity had been manifested in the ancestry of decedent will not support an inference of mental unsoundness in the absence of evidence tending to show any manifestation of mental derangement during his life. *Roche v. Nason* (1906), 185 N. Y. 128, 77 N. E. 1007.

Where a testatrix aged eighty-two years had, one week before execution of her will, been duly found incompetent to manage herself or her affairs and the minutes of her testimony in the lunacy proceeding indicated to the surrogate that her memory was then greatly weakened by age, probate was refused. *Matter of Widmayer* (1901), 34 Misc. 439, 69 N. Y. Supp. 1014.

Testamentary capacity of testator, subsequently adjudged a lunatic, held to have been sufficient. *Dickie v. Van Vleck* (1881), 5 Redf. 284; *Bristed v. Weeks* (1882), 5 Redf. 529; *Van Guysling v. Van Kuren* (1866), 35 N. Y. 70; *Morrison v. Smith* (1855), 3 Bradf. 209.

Testator held to have had sufficient testamentary capacity four months prior to commitment to state hospital for insane. *Matter of Browning* (1913), 80 Misc. 619, 142 N. Y. Supp. 683.

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Testator under control of commission of lunacy held to have sufficient testamentary capacity. *Matter of Pendleton* (1889), 1 Connoly 480.

In considering insane delusions regard must be had to the temperament and other personal peculiarities of the testator. *Bull v. Wheeler* (1888), 6 Dem. 123.

Where it appears that six years before testatrix made her last will she was confined for several months in an institution for the insane, and the whole evidence leaves the question of her sanity in doubt, probate will be denied. *Matter of Glanque* (1914), 83 Misc. 684, 145 N. Y. Supp. 364.

Insane delusion of testator that his wife and children had conspired against him, held to invalidate his will. *Matter of Kahn* (1889), 1 Connoly 510.

A monomaniac cannot make a valid will if the delusion, which affects the general soundness of his mind, relates to the subjects or objects of the will, or to the persons who would otherwise be likely ordinarily, to be the recipients of his bounty, or where the provisions of the will are connected with, and influenced by, the particular delusion. *Lathrop v. Borden* (1875), 5 Hun 560; *Lathrop v. Am. Bd. of Foreign Missions* (1876), 67 Barb. 590; *Merrill v. Rolston* (1881), 5 Redf. 220; *Colt v. Patchen* (1879), 77 N. Y. 533; *Children's Aid Society v. Loveridge* (1877), 70 N. Y. 387.

Paranoia.—Evidence establishing paranoia, rendering testator incompetent to make will. *Matter of Long* (1904), 43 Misc. 560, 89 N. Y. Supp. 555.

Insanity of consumption.—Although a testator may be suffering from the insanity of consumption, a progressive disease, a will, made by him during a lucid interval and which seems to be the work of a rational man who understood his position, the membership of his family and the extent of his property, will be sustained. *Matter of Cornelius* (1898), 23 Misc. 434, 51 N. Y. Supp. 877.

Progressive paresis.—Evidence establishing progressive paresis, rendering testator incompetent to make will. *Matter of Loewenstine* (1893), 2 Misc. 323, 21 N. Y. Supp. 931.

Suicide.—The fact that the testator committed suicide, of itself, in the absence of any other evidence as to his mental condition, does not warrant the deduction that his mind was unsound at the time or prior thereto, or that he lacked testamentary capacity. *Roche v. Nason* (1906), 185 N. Y. 128, 77 N. E. Supp. 1007.

Attempt to commit suicide.—The fact that testatrix had taken bichloride of mercury with suicidal intent did not of itself warrant the deduction that her mind was unsound, or that she lacked testamentary capacity at the time of making her will. *Matter of Holmberg* (1913), 83 Misc. 245, 145 N. Y. Supp. 846.

Testator ill with typhoid fever held to have sufficient testamentary capacity. *Matter of Buch* (1889), 1 Connoly 330.

Spiritualist.—The mere fact that an aged woman is a spiritualist does not render her incapable of making a will, where there is no proof that it was the result of such influences. *Matter of Rohe* (1898), 22 Misc. 415, 50 N. Y. Supp. 392.

Belief in spiritualism is not evidence of lack of testamentary capacity, unless the will was the result thereof. *La Ban v. Vanderbilt* (1879), 3 Redf. 384.

A belief in Christian Science, when founded on religious convictions, is consistent with testamentary capacity and beyond the scope of judicial inquiry. A belief, in certain miraculous powers ascribed to Christian Science, not acted upon by testatrix and her belief that that science had cured her of disease, cannot be deemed insane delusions, avoiding the will. *Matter of Brush* (1901), 35 Misc. 689, 72 N. Y. Supp. 421.

A drunkard is not incompetent like an idiot or one generally insane. He is simply incompetent upon proof that at the time of the act challenged his under-

standing was clouded or his reason dethroned by actual intoxication. *Van Wyck v. Bracher* (1880), 81 N. Y. 260, 262.

An intemperate person may make a valid will unless it be proved that he was excited by liquor, or so conducted himself during the particular act as to be at the time legally disqualified. *Matter of Jones* (1893), 5 Misc. 199, 203, 25 N. Y. Supp. 109; *Lewis v. Jones* (1868), 50 Barb. 645; *Peck v. Cary* (1863), 27 N. Y. 9, 84 Am. Dec. 220; *Cook v. White* (1899), 43 App. Div. 388, 60 N. Y. Supp. 153, *affd.* 167 N. Y. 588, 60 N. E. 1109; *Matter of Tift* (1907), 57 Misc. 151, 106 N. Y. Supp. 363; *In re Peck* (1891), 42 N. Y. St. Rep. 898, 17 N. Y. Supp. 248; *Lewis v. Jones* (1868), 50 Barb. 645; *Matter of McLaughlin's Will* (1877), 2 Redf. 504; *Julke v. Adam* (1863), 1 Redf. 454; *Waters v. Cullen* (1853), 2 Bradf. 354; *Matter of Reed* (1890), 2 Connolly 403, 405; *Matter of Hatten* (1886), 3 N. Y. St. Rep. 213.

"The cases have gone to an extreme point in sustaining testamentary dispositions of property made by chronic victims of the excessive use of alcohol, where it is shown that at the time of the execution of the will the testator was not so overcome by drunkenness as to be unable to comprehend the nature and effect of the instrument and its provisions, or to exercise his volition with adequate freedom and strength." *Matter of Evans* (1902), 37 Misc. 337, 340, 75 N. Y. Supp. 491, *affd.* 81 App. Div. 636, 81 N. Y. Supp. 1125.

To show incapacity on the ground of intoxication the contestants must prove not only that the testator was usually intoxicated, but that he was so at the very time of executing the will, or that his mind was so clouded by drink that he was incompetent to give expression to his real testamentary intentions. *Matter of Halbert* (1895), 15 Misc. 308, 37 N. Y. Supp. 757; *Matter of Woolsey* (1896), 17 Misc. 547, 41 N. Y. Supp. 263.

Proof that a testatrix used alcoholic stimulants freely, at times was largely under their influence, and that her death resulted largely from ailments produced by them, does not of itself show her to have lacked testamentary capacity, and in order to preclude the probate of her will there must be further proof that, when she executed it, her understanding was clouded or her reason dethroned. *Matter of Sutherland* (1899), 28 Misc. 424, 59 N. Y. Supp. 989.

Evidence held to establish that testator was of sufficiently sane mind and sober at the time of executing his will, although when he had been drinking he was often delirious. *Matter of Levingston* (1913), 158 App. Div. 69, 142 N. Y. Supp. 829.

In *Matter of Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649, testator had been addicted to the use of intoxicating liquors for many years, had suffered delirium tremens, was an inmate of an inebriate asylum and, shortly before the execution of his will, had fallen into an epileptic fit; yet it was held that he had testamentary capacity, and his will was admitted to probate.

Testator, suffering from alcoholic insanity, held incompetent to make will. *Matter of Ely* (1896), 16 Misc. 228, 39 N. Y. Supp. 177.

Use of morphine.—A person addicted to the drug or liquor habit, if lucid and sober when her last will is made, does not lack testamentary capacity by reason of such habit. *Matter of Robinson* (1914), 87 Misc. 164, 150 N. Y. Supp. 1115.

§ 11. What real property may be devised.—Every estate and interest in real property descendible to heirs, may be so devised.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 1, § 2.

References.—Real property defined, General Construction Law, § 40; Real Property Law, § 12. Expectant estates descendible and devisable, *Id.* § 59. Term "heirs" not required to create estate, *Id.* § 240. Estate which passes by devise,

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Id. § 245. Married woman may devise real property as if unmarried, Domestic Relations Law, § 51.

Construction.—Either under the general term of "real estate" or the phrase "every estate and interest in real property," every interest which before the statute was devisable, remains so; and every interest which was before descendible, becomes so.

"Although the statute has made every descendible interest devisable, yet it has not restricted the power to devise to such interests as are descendible. The provision was intended to terminate a question then in litigation in our highest courts as to the devisability of a right of entry, and the general question whether all descendible interests might not be devised." *Wright v. Trustees of M. E. Church* (1839), 1 Hoffm. 201, 223, 224.

Lands.—The term lands in a will is synonymous with real estate; and unless restrained by something else embraces future and contingent as well as present freehold estates in land. *Pond v. Bergh* (1843), 10 Paige 140, 142. Interests in lands of every kind are devisable. *Upington v. Corrigan* (1894), 79 Hun 488, 29 N. Y. Supp. 1002, *affd.* 151 N. Y. 148, 45 N. E. 359, 37 L. R. A. 794.

Crops.—The devise of a farm, in the absence of any modifying words, carries with it the crops growing thereon. *Bradner v. Faulkner* (1866), 34 N. Y. 347.

A power to sell lands may be devised. *Wright v. Trustees of M. E. Church* (1839), 1 Hoffm. 201, 225.

Rights to rents under perpetual lease.—A devise in general terms, of all the testator's lands in a particular county, passes his right to rents under perpetual leases on lands lying in such county. *Hunter v. Hunter* (1853), 17 Barb. 25; *Main v. Green* (1860), 32 Barb. 448.

A lease for years will pass to a devisee under a general devise of lands and tenements, where there are no lands in fee simple upon which the devise can operate. *Wright v. Trustees of M. E. Church* (1839), 1 Hoffm. 201, 224.

A right of entry in land, is devisable, though at the time of the devise, and of the devisor's death, the land be in the adverse possession of another. *Jackson v. Varick* (1827), 7 Cow. 238, *affd.* 2 Wend. 166; *Nicoll v. N. Y. & Erie R. R. Co.* (1854), 12 N. Y. 121.

A right of re-entry for the breach of a condition contained in a grant in fee reserving rent, does not pass by a devise of the premises as *land*. *Herrington v. Budd* (1848), 5 Den. 321.

§ 12. Who may take real property by devise.—Such a devise of real property may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 1, § 3.

References.—Devises or bequests to certain specified corporations, Decedent Estate Law, §§ 17–20. Powers of corporations generally to take by devise or bequest, General Corporations Law, § 11; limitation as to amount, Id. § 12. Devise to witness of will void, Decedent Estate Law, § 27. Devise to educational institutions, Education Law, § 68, subd. 5. Devises in trust for benefit of public schools, Id. § 520. Devise of land for cemetery purposes, Membership Corporations Law, § 78. Restrictions as to devises to certain membership corporations, Membership Corporations Law, §§ 18, 19; devises to incorporated fire companies, Id. §§ 102, 103. Devise to married woman, Domestic Relations Law, § 51. Devises to second class cities, Second Class Cities Law, § 3. Devises in trust for parks and libraries

in villages and towns, General Municipal Law, § 146. Devises in trust for religious, educational, charitable or benevolent purposes, Real Property Law, § 113; to cities and colleges for certain purposes, *Id.* § 114.

Illegitimate children cannot take under devise to children, unless there is something in the will itself indicating a different intention on the part of the testator. *Collins v. Hoxie* (1841), 9 Paige 81; *Gardner v. Heyer* (1829), 2 Paige 11.

Devises to heirs.—A general devise to the heirs of a person who is then living, but is not referred to as living, is void; but a devise to the heirs of one who is stated in the will to be living is a valid disposition in favor of those who would be his heirs if he should then die. *Heard v. Horton* (1845), 1 Den. 165. The reason for a special or peculiar interpretation of the word "heirs" fails altogether where the limitation is of a future estate. *Campbell v. Rawdon* (1858), 18 N. Y. 412, 417.

Devises to corporations.—Words "authorized by its charter, or by statute" refer to a charter or statute of this state. *White v. Howard* (1871), 46 N. Y. 144; *Matter of Prime* (1893), 136 N. Y. 347, 361, 32 N. E. 1091, 18 L. R. A. 713; *McCaughal v. Ryan* (1857), 27 Barb. 376, 408. The right of a corporation to take by devise or bequest is subject to the general laws of the state in regard thereto passed subsequent to its incorporation. *Kerr v. Dougherty* (1880), 79 N. Y. 327.

Devise must be authorized at the time of its taking effect. *White v. Howard*, (1868), 52 Barb. 294, *affd.* 46 N. Y. 144.

The prohibition in the statute of devises to corporations not expressly authorized to take by the legislature, renders void a power so far as it would operate to give the rents and profits of land for the benefit of the corporations not thus authorized. They can take no interest in land under a power created by law. *Downing v. Marshall* (1861), 23 N. Y. 366, 386, 30 Am. Dec. 290.

No devise to or any trust for a corporation is valid, either at law or in equity, unless such corporation is expressly authorized by a charter, or by some other statutory provision, to take by devise. *Theo. Sem. of Auburn v. Childs* (1834), 4 Paige 419, 423.

Corporation cannot have the benefit of a use in property created by will, which it could not take directly by devise. *Holmes v. Mead* (1873), 52 N. Y. 332, 340. The right to take by purchase does not authorize taking by devise. *McCartee v. Orphan Asylum* (1827, 9 Cow. 437, 18 Am. Dec. 516.

The right to take and grant property, was and is of the essence of every corporation, whether created by license, or prescription, or legislative act, and in the absence of any statutory prohibition, they may take by all the usual modes of acquiring property. *Sherwood v. Am. Bible Society* (1864), 4 Abb. App. Div. 227, 231.

An act, enabling a corporation to take by devise, cannot have a retroactive effect, to make valid a devise of a testator who died before the act was in force. *Bonard's Will* (1872), 16 Abb. Pr. N. S. 128; *Leslie v. Marshall* (1862), 31 Barb. 560.

Devise to corporation in excess of limit imposed by its charter.—In order to render unmarketable the title to a piece of real estate included in a devise to a corporation, where it is contended that the amount of the devise was in excess of the sum which the corporation was entitled to take under the provisions of its charter, it must appear that the value of the said piece of real estate, added to that of all property received under such devise which the corporation has already conveyed or disposed of and that of the property owned by the corporation, prior to the time of the taking effect of the devise, exceeds the amount which the corporation was authorized to take. *Hornberger v. Miller* (1898), 28 App. Div. 199, 50 N. Y. Supp. 1079, *affd.* 163 N. Y. 578, 57 N. E. 1112.

Devise to corporation to be formed after testator's death.—A person may by will

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devise and bequeath property to a corporation to be formed after his death, if it is therein provided that such corporation shall be so formed and the property vest in it within a period not longer than the lives of two persons in being at the time of the execution of the instrument. There is no distinction between a natural person thereafter to be born and an artificial person thereafter to be organized. *St. John v. Andrews Institute* (1908), 191 N. Y. 254, 83 N. E. 981, 14 Am. Cas. 708, modfg. 117 App. Div. 698, 102 N. Y. Supp. 808.

Where a devise is made to a charitable corporation, authorized to take it in trust for an association, then unincorporated, it is sufficient if the latter be incorporated before the money becomes payable. *Philson v. Moore* (1880), 23 Hun 152; *Shipman v. Rollins* (1885), 98 N. Y. 311.

Devises to the United States are invalid.—*In re Fox* (1873), 52 N. Y. 530, 533, 11 Am. Rep. 751, affd. 94 U. S. 315, 24 L. Ed. 192; *Levy v. Levy* (1865), 33 N. Y. 97 revg. 4 Barb. 585; *Burrill v. Boardman* (1871), 43 N. Y. 254 3 Am. Rep. 694.

Religious corporations were not authorized to take by devise under the act of 1913 (Incorporation Act). *Goddard v. Pomeroy* (1862), 36 Barb. 546; *Levy v. Levy* (1865), 33 N. Y. 97; *King v. Rundle* (1853), 15 Barb. 139.

A religious corporation, incorporated under the general act of 1784, could not, after the revised statutes of 1830, take lands by devise. *Ayres v. Trustees of M. E. Church* (1894), 5 Super. Ct. 351.

§ 13. **Devises of real property to aliens.**—(*Repealed by L. 1913, ch. 153, in effect Apr. 1, 1913.*)

Application.—An alien devisee of a citizen takes, upon acceptance of the devise, a conditional title absolute as against the heirs of the testator, but defeasible by the state, until he makes and files the deposition required by statute. *Hall v. Hall* (1880), 81 N. Y. 130.

This section did not apply to an alien devisee born after the death of the testator. *Wadsworth v. Wadsworth* (1855), 12 N. Y. 376; *Van Cortlandt v. Laidley* (1891), 59 Hun 161, 11 N. Y. Supp. 148.

Lands acquired by an alien, under the act of 1798, may be continued to be held by the alien heir and devisee of the grantee, until, by inheritance, devise or grant, the title comes to a citizen. *Duke of Cumberland v. Graves* (1852), 7 N. Y. 305; *Aldrich v. Manton* (1835), 13 Wend. 458; *Howard v. Moot* (1876), 64 N. Y. 262.

Devise of remainder to aliens.—*McGillis v. McGillis* (1896), 154 N. Y. 532, 49 N. E. 145, modfg. 11 App. Div. 359, 42 N. Y. Supp. 921.

Trusts for benefit of aliens; validity.—Direction to trustees to sell land and pay over money to an alien being a gift and not a devise, is valid. *Meakings v. Cromwell* (1851), 5 N. Y. 136; *Parker v. Linden* (1889), 113 N. Y. 28. A direction in a will that the executor receive the rents and profits of land and apply them to the use of the beneficiary, creates an implied trust, which is valid though the beneficiary be an alien, since he has no title to the land, which is in the trustee, but has only the right to enforce the trust in equity. *Marx v. McGlynn* (1882), 88 N. Y. 358.

A bequest of money with a direction to invest the same in lands for the benefit of aliens, who are to have the use and enjoyment thereof, is invalid. *Beekman v. Bonser* (1861), 23 N. Y. 298.

Adverse possession.—Although an alien may not acquire title to real estate, as against the true owner, by an adverse possession of twenty years, claiming title thereof in himself, yet the statute of limitations will furnish a perfect defense to an action of ejectment against him by the true owner. *Overing v. Russell* (1860), 32 Barb. 263.

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Personal property.—The disability of aliens to take real property does not extend to personal property. *Beck v. McGillis* (1850), 9 Barb. 35.

§ 14. **Wills of real estate, how construed.**—Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 2, § 5.

References.—Action to establish validity of will, Code Civil Procedure, §§ 1861-1867. Proceeding before surrogate for construction of will, Code Civil Procedure (Surrogates' Code), § 2615.

At common law a person could only devise such lands as he was seized and possessed of at the time of the making and publishing of his will. *Dodge v. Gallatin* (1891), 130 N. Y. 117, 124, 29 N. E. 107; *Ellison v. Miller* (1851), 11 Barb. 332. A will executed before the Revised Statutes took effect, though the testator died subsequently, does not pass after-acquired real estate by a general devise. *Parker v. Bogardus* (1851), 5 N. Y. 309; *Green v. Dikeman* (1854), 18 Barb. 535, 538.

The common-law rule that a will passes only such real property as a testator owns at the time of publication of the will was abolished by this section. Thus, when a testatrix gives and bequeaths to her husband "all my real estate and personal property of which I am now possessed" and the will contains no residuary clause, the devisee takes property acquired by the testatrix subsequent to the publication of the will notwithstanding the use of the word "now." *Hodgkins v. Hodgkins* (1907), 123 App. Div. 110, 106 N. Y. Supp. 173; *Lent v. Lent* (1881), 24 Hun 436.

Application.—By virtue of this section a will devising the real estate of the testator passes all that he was entitled to devise at the time of his death, and consequently operates upon land acquired after the making of the will. *Byrnes v. Baer* (1881), 86 N. Y. 210; *Heck v. Voltz* (1888), 14 St. Rep. 409, *affd.* 120 N. Y. 663, 24 N. E. 1104.

Effect of section.—In construing section 5 of the Statute of Wills (2 R. S. 57), which was the source of section 14 of the Decedent Estate Law in *Youngs v. Youngs* (45 N. Y. 254), the court said: "This changes the common law rule, that a will operates only upon real estate owned by the testator at the time of making the same, the title to which he retained to the time of his decease, and substitutes therefor a more reasonable rule, that when it appears from the will that it was the intention of the testator to dispose of all the real estate owned by him at the time of his death, his will should be effectual for that purpose. The residuary clause expressly disposes of all the testator's real estate not before specifically disposed of. This brings the case within the statute rule."

The statute removes disability and aids construction. *Carley v. Harper* (1915), 166 App. Div. 473, 476, 151 N. Y. Supp. 1056.

A general devise, of all the testator's real estate, will carry his real property of every description, and every estate or interest which he has therein, either in possession, reversion or remainder, and whether the same is absolute or contingent, unless such general devise is restrained by other words in the will. *Pond v. Bergh* (1843), 10 Paige 140.

A devise of all the testator's lands, together with "the appurtenances, rents, issues and profits thereof" is sufficient to transfer rents due upon leases in fee. *Main v. Green* (1860), 32 Barb. 448.

Execution by will of power of appointments conferred upon testator by the will of his mother. *Hirsch v. Bucki* (1914), 162 App. Div. 659, 148 N. Y. Supp. 214.

After acquired real estate.—A devise of real estate, universal in its terms, would carry after-acquired land without language pointing to the period of testator's death, but in the absence of unlimited terms in the will there must be language which will enable the court to see that the testator intended it to operate upon real estate which he should afterwards purchase. *Carley v. Harper* (1916), 219 N. Y. 295, affg. 166 App. Div. 473, 151 N. Y. Supp. 1056.

In the absence of an intention to the contrary a will speaks from the time of the death of the testator, and disposes of property acquired by him after the execution of the instrument itself. *Carley v. Harper* (1915), 166 App. Div. 473, 151 N. Y. Supp. 1056, affd. 219 N. Y. 295; *Lent v. Lent* (1881), 24 Hun 436.

A will whose introductory clause expresses a desire to make a suitable disposition of such property and estate as the testator shall leave behind him, the residuary clause expressly devising all his real estate not before specifically devised, carries all after-acquired lands belonging to the testator at the time of his death. *Youngs v. Youngs* (1871), 45 N. Y. 254.

Testatrix devised to her sister "all my right, title and interest" in certain parcels of land in which she at that time owned only a one-half interest. She subsequently acquired the other half interest. It was held on examination of the terms of the will, that the sister took under this clause all the interest which testatrix had in such lands at the time of her death. *Carley v. Harper* (1916), 219 N. Y. 295, affg. 166 App. Div. 473, 151 N. Y. Supp. 1056.

"The intention of a testator as disclosed by his will and in the light of the circumstances surrounding him at the time it was made should, so far as consistent with the rules of law, control the courts in construing it. It is, as has been said so many times, the cardinal rule in the construction of wills that the intention of the testator should be ascertained if possible. If the intention of the testator is ascertained with reasonable certainty and the provisions of the will are valid it is quite unnecessary to discuss the decisions made in other cases." *Matter of Pullis* (1917), 220 N. Y. 196, modfg. 175 App. Div. 884.

The intent of the testator is always the leading inquiry when searching after the meaning of the whole or any particular clause of his will, and no person can claim any interest or estate under it, unless he can, from the language employed, raise an intent, expressed or implied, to give him such interest. *Van Kleeck v. Reformed Dutch Church* (1838), 20 Wend. 457, 469; *McNaughton v. McNaughton* (1864), 41 Barb. 50, 52 affd. 34 N. Y. 201. When lands are devised without words of perpetuity, a fee simple will pass, provided it appears from the whole will taken together that such was the intention of the testator. *Spraker v. Van Alstyne* (1835), 18 Wend. 200, 211, revg. 13 Wend. 578.

The intent of the testator is to control, and that is to be gathered from the whole will. *Lent v. Lent* (1881), 24 Hun 436; *Schuck v. Shook* (1890), 24 Abb. N. C. 463.

In the absence of a general devise, in order that a will may pass the title to real estate subsequently acquired by the testator, it must contain words indicating the intent of the testator that it should operate upon such real estate. *Quinn v. Hardenbrook* (1873), 54 N. Y. 83; *Lynes v. Townsend* (1865), 33 N. Y. 558.

The intent of a testator as to whether his estate is to be distributed among his grandchildren *per stirpes* or *per capita* must be ascertained from the language of all the provisions of his will. *Matter of Title Guarantee & Trust Co.* (1913), 81 Misc. 106, 142 N. Y. Supp. 1070, mod. 159 App. Div. 803, 144 N. Y. Supp. 889, affd. 212 N. Y. 551, 106 N. E. 1043.

Lapsed devises and legacies both fall into the residue. *Cruikshank v. Home for the Friendless* (1889), 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140.

A holographic will reading: "I request all my belongings, moneys, bonds and insurance to be left to my wife," etc., is sufficient to pass real estate owned by testator at his death, and is entitled to probate as a will relating to both realty and personally. *Matter of Churchfield* (1917), 99 Misc. 682.

§ 15. Who may make wills of personal estate.—Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 2, § 21, as amended by L. 1867, ch. 782, § 4.

References.—Bequest under power to bequeath contained in a will, *Personal Property Law*, § 18. Validity of directed accumulation of income of personal property, *Id.* § 16.

The words "mind and memory," as used in the above section and as used at common law, are and were convertible terms. *Matter of Forman's Will* (1869), 54 Barb. 274, 286.

Married women could not make a will of personal property, prior to the amendment of 1867. *Wadhams v. Am. Home Miss. Soc.* (1855), 12 N. Y. 415; *Avery v. Everett* (1888), 110 N. Y. 317, 331, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368.

Proof of age.—An objection that proponents have not shown that the testatrix was of the class of persons capable of executing a will, does not point to the specific defect that it was not proven that she was of full age. *Matter of Freeman* (1887), 46 Hun 458.

§ 16. Unwritten wills of personal property, when allowed.—No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 2, § 22.

Effect of section.—The Revised Statutes abolished whatever remained of the law recognizing unwritten or nuncupative wills except in the cases provided by this section. *Matter of Kennedy* (1901), 167 N. Y. 163, 171, 60 N. E. 442.

The limits of the statute, within which nuncupative wills may be maintained, will not be enlarged by construction. *Matter of Gwin* (1865), 1 Tuck. 44.

Essentials of a nuncupative will.—A mariner at sea may, orally, make an effectual disposition of his personal estate which will have full testamentary effect; in addition to the general rules regarding testamentary capacity and freedom from restraint the only essentials are that the act shall be performed with a testamentary intent and shall be sufficiently implicit and intelligent to permit a finding of its purport and scope, and its execution must be proved by at least two witnesses. It seems clear therefore that the oral will of a soldier or sailor may be valid whether or not the same was made in the last sickness. Such a will may be proved when made at sea two days before landing, although the decedent survived until he reached port and died a few days later while proceeding to his home. *Matter of O'Connor* (1909), 65 Misc. 403, 121 N. Y. Supp. 903.

For common-law and statutory provisions relative to nuncupative wills, see *Ex parte Thompson* (1856), 4 Bradf. 154.

A nuncupative will made by a mariner on the Mississippi river, opposite Vicks-

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burg, was not made "at sea," within the meaning of this section. *Matter of Gwin* (1865), 1 Tuck. 44.

Wills of soldiers and sailors.—Wills of soldiers in actual service and mariners at sea are governed by the principles of the common law. *Hubbard v. Hubbard* (1853), 8 N. Y. 196. This case holds that a master of a coasting vessel, while on his voyage, though then lying at anchor, in an arm of the sea where the tide ebbs and flows, may make a nuncupative will.

The provision allowing a sailor at sea or a soldier in actual military service to make a nuncupative will of personal property extends to all ranks and grades; so held as to a will of a cook on board a steamship. *Ex parte Thompson* (1856), 4 Bradf. 154.

In fear of death.—A nuncupative will must be made in contemplation, fear or peril of death. *Prince v. Hazelton* (1822), 20 Johns. 502, 11 Am. Dec. 307.

The right of a soldier in actual military service, or of a mariner at sea, to make an unwritten will, is not an unqualified right which may be exercised under all circumstances. As the making of such wills can only be justified upon the plea of necessity, so they will only be tolerated when made *in extremis*. *Hubbard v. Hubbard* (1851), 12 Barb. 148, 155, *affd.* 8 N. Y. 196.

A letter written by a soldier in the army, during the period when there was almost daily fighting, expressing the wish that his sister have his property in case he was killed, held a valid will by a soldier. *Quare* as to whether such a testamentary disposition by a soldier in actual military service, but neither in last sickness or peril of death, is valid, in favor of the statutory wording. *Botsford v. Krake* (1866), 1 Abb. Pr. N. S. 112.

§ 17. Devise or bequest to certain societies, associations and corporations.—No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more.

Source.—L. 1860, ch. 360.

Intent and effect of section.—This section was neither conceived nor framed in a spirit of hostility to charitable societies. On the contrary, it enlarged the proportion of a testator's estate which he might dedicate to charitable uses in exclusion of the claims of his own immediate family. *Bascom v. Albertson* (1866), 34 N. Y. 584, 616; *Hollis v. Drew Theological Seminary* (1884), 95 N. Y. 166; *Canfield v. Crandall* (1885), 4 Dem. 111.

"The legislature intended to restrict a testator's gifts to charity under certain conditions, and the restrictions, continuing for over half a century, followed the changes in the law and applied to any gifts to charity in trust or otherwise, provided the charity was one of those mentioned in the restricting section." *Decker v. Vreeland* (1917), 220 N. Y. 326, 335, N. E. revg. 170 App. Div. 234, 156 N. Y. Supp. 442.

The design of the framers of the section was to place a limitation upon the power of a person who, moved by charitable impulse, has temporarily lost sight of the just demands of wife, child or parent, and disposed of more than one-half of his property to such organizations, to the end that he should have an opportunity to measure the claims of his kindred upon him unembarrassed by the importunities of those whose business it is to get money for such societies or corporations; and

it was thought this would be substantially accomplished by an act protecting him from giving more than one-half of his property to such societies or corporations. *Allen v. Stevens* (1899), 161 N. Y. 122, 148, 55 N. E. 568; *Stephenson v. Short* (1883), 92 N. Y. 433.

The section is a continuation of the mortmain policy and is intended to prevent languishing and dying persons from being imposed upon by false notions of duty prompting them to disregard the claims of family and kindred. *McKeown v. Officer* (1889), 2 Silv. 552, 6 N. Y. Supp. 201, appeal dismissed, 127 N. Y. 687, 28 N. E. 401.

This section is not inconsistent with the two months clause in section 19 (repealed by L. 1911, ch. 857). *Kerr v. Dougherty* (1880), 79 N. Y. 327; *Lefevre v. Lefevre* (1875), 59 N. Y. 434.

Effect of former law.—When L. 1860, ch. 360 was enacted, bequests and devises to unincorporated charitable associations could not be made directly or in trust, nor could they be sustained as a power. *Downing v. Marshall*, 23 N. Y. 366; *White v. Howard*, 46 N. Y. 144. Neither could a trust be created for an incorporated charity. *Adams v. Perry*, 43 N. Y. 487; *Cottman v. Grace*, 112 N. Y. 299, 3 L. R. A. 145, 19 N. E. 839; *Downing v. Marshall*, 23 N. Y. 366; *Bailey v. Bailey*, 97 N. Y. 460, 467; *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541; *Decker v. Vreeland* (1917), 220 N. Y. 326, 334, revg. 170 App. Div. 234, 156 N. Y. Supp. 442.

Application of section. *Matter of Stone* (1895), 15 Misc. 317, 37 N. Y. Supp. 583.

A resident of New Jersey who died leaving him surviving a widow, brother, sister and children, and grandchildren of deceased brothers and sisters gave all his property, except a small annuity to his wife, to his executors in trust to pay the income to a designated religious association for the maintenance of the churches, ministers and missionaries, and the erection of churches of a denomination therein named. It was held, that as to the real estate situated in New York state the gift to pay over the income was within the provisions of this section of the Decedent Estate Law and could not pass to the charity more than one-half of his estate. *Decker v. Vreeland* (1917), 220 N. Y. 326, revg. 170 App. Div. 234, 156 N. Y. Supp. 442, and distg. *Allen v. Stevens* (1899), 161 N. Y. 122, 55 N. E. 568, reargument denied 161 N. Y. 659, 57 N. E. 1103.

The prohibition of the statute is directed against the testator and not against the corporation, and applies regardless of the status of the corporation, either as to the provisions of its charter or as to the laws of the state of its domicile. *Scott v. Ives* (1898), 22 Misc. 749, 51 N. Y. Supp. 49.

This section only applies to a testamentary disposition of property, not to contract obligations. *Robb v. Washington & Jefferson College* (1906), 185 N. Y. 485, 78 N. E. 359, modfg. 103 App. Div. 327, 93 N. Y. Supp. 92 (1905).

The operation of the statute is not modified by the fact that the testamentary provisions are of a contingent nature, and only to be enjoyed in the event of the death of the relatives mentioned in the statute. *Prive v. Foucher* (1885), 3 Dem. 339.

This section relates not alone to bequests and devises made directly to charitable organizations, but also to express trusts created for their benefit. *Decker v. Vreeland* (1917), 220 N. Y. 326, revg. 170 App. Div. 234, 156 N. Y. Supp. 442.

This section is not an act for the benefit of the relatives therein mentioned. If by its provisions a testator has attempted gifts to corporate legatees, which must be cut down, the excess belongs to the legatees, next of kin or heirs at law in such manner and portion as if the statute were made part of the will. *Matter of Hamilton* (1917), 100 Misc. 72, N. Y. Supp.

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The section applies to devises and bequests to charitable corporations authorized by their charters to take by devise of bequest, "subject to provisions of law," etc. *Stephenson v. Short* (1883), 92 N. Y. 433, 445. And to a secret trust impressed upon a testamentary gift when the trust is a manifest evasion of the section, at least until the intervening rights derived from the section have been lawfully cleared away. *Amherst College v. Ritch* (1897), 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305.

One given a power of appointment has no estate in the property which he can convey within the meaning of this section. *Farmers' Loan & Trust Co. v. Shaw* (1908), 127 App. Div. 656, 662, 111 N. Y. Supp. 1118.

A testatrix leaving a husband surviving cannot give or devise over one-half of her estate to benevolent and charitable institutions as provided in this section of the Decedent Estate Law. *Barber v. Terry* (1916), 173 App. Div. 469, 159 N. Y. Supp. 720.

A will devising all of testator's real estate in trust to executors to sell and convert into cash, to be divided equally between two charitable institutions after the payment of testator's debts and several small legacies, and making no provision for testator's widow, is in contravention of the statute, and such devise is valid only to the extent of one-half part of testator's estate after the payment of his debts and the widow's dower, and the remaining one-half must pass to testator's heirs at law as if no will had been made. *Jones v. Kelly* (1902), 170 N. Y. 401, 53 N. E. 443, reargument denied, 171 N. Y. 651, 63 N. E. 1118.

Devise valid as to one-half.—A devise of the entire estate to such a society or corporation is valid as to one-half. *Chamberlain v. Taylor* (1887), 105 N. Y. 185, 11 N. E. 625; *Abbott v. James* (1889), 111 N. Y. 673; *Horton v. Cantwell* (1888), 108 N. Y. 255, 15 N. E. 546; *McKeown v. Officer* (1889), 2 Silv. 552, 6 N. Y. Supp. 201, appeal dismissed, 127 N. Y. 687, 28 N. E. 401; *Leary's Estate* (1867), 1 Tuck. 233; *Kearney v. Missionary Society* (1879), 10 Abb. N. C. 274. The entire will is not void but the bequest is good to the extent of one-half of the entire estate. *Garvey v. Union Trust Co.* (1898), 29 App. Div. 513, 52 N. Y. Supp. 260.

If the legacies to such societies and corporations exceed in the aggregate more than one-half the entire estate after the payment of just debts, they must be reduced by proper deductions. *Chamberlain v. Chamberlain* (1871), 43 N. Y. 424, 440; *Chamberlain v. Taylor* (1887), 105 N. Y. 185, 11 N. E. 625; *Fraser v. Trustees of U. P. Church* (1891), 124 N. Y. 479, 26 N. E. 1034.

The one-half of a legacy condemned by this statute is to be considered an asset of the estate and is to be distributed accordingly. *Matter of Counrod* (1891), 27 Misc. 475, 59 N. Y. Supp. 164.

Where the money value of an estate at the death of testatrix was \$20,842.14, the real estate being valued at \$5,200, and her debts amounted to \$96.18, and the will gave to each of two charitable corporations a legacy of \$250, and certain real estate was devised to another like corporation, and the residue was devised to said three corporations share and share alike, the provisions in their favor are impaired by the provisions of this section, that no person shall devise or bequeath to any charitable corporation more than one-half of his estate after payment of debts. The legatees are entitled to the one-half of the estate remaining after the payment of decedent's debts. The real estate passing by direct devise should not be considered in the calculation; the two general legacies should be paid and the remainder of one-half of the estate should be divided equally among said residuary legatees. *Matter of Johnston* (1912), 76 Misc. 391, 137 N. Y. Supp. 166.

Ascertaining value of estate.—Where a computation of the amount of a decedent's estate showed that the amount of bequests to charitable uses did not exceed one-

half of the estate or violate the provisions of chapter 360 of the Laws of 1860, from which this section was derived, it is proper for the court to make the same holding, as a matter of law, where the subsequent expiration of certain trusts in no way increased the amount of the bequests to charity. *It seems*, that chapter 360 of the Laws of 1860, limiting bequests to charitable uses, authorizes by implication the withholding of the distribution of an estate when necessary to determine whether the amount devised or bequeathed for such purposes is in excess of the amount authorized. *Hughes v. Stoutenburgh* (1915), 168 App. Div. 512, 154 N. Y. Supp. 65.

In determining the testator's estate all his property, both real and personal, wheresoever the same is situated, must be taken into consideration, and if the legal provisions for charity outside of the state amount to half or more than one-half the entire estate, the property in New York state will go to the heirs, and cannot be given to charity, under the will. If such provisions outside of New York state are less than one-half, so much of the New York state property may go to the charity devisees as will make up fifty per cent and no more. *Decker v. Vreeland* (1917), 220 N. Y. 326, revg. 170 App. Div. 234, 156 N. Y. Supp. 442.

In ascertaining whether a testamentary gift to a charitable organization exceeded one-half the estate, the whole estate must be treated as converted into money at the testator's death, and if the money value of the portion given does not exceed one-half the statute has not been violated. *Frost v. Emanuel* (1912), 152 App. Div. 687, 137 N. Y. Supp. 559.

To ascertain whether the sums bequeathed to such corporations exceed one-half the estate, if the sums so bequeathed are first given for life to other persons, the present value in money of the estate and the present value of the portion given must be estimated by the help of annuity tables; and such computation is to be made with reference to the value of the estate at the time of the death of the testator. *Hollis v. Drew Theological Seminary* (1884), 95 N. Y. 166; *Harris v. American Bible Society* (1867), 4 Abb. Pr. N. S. 421; *Rich v. Tiffany* (1896), 2 App. Div. 25, 37 N. Y. Supp. 330; *Betts v. Betts* (1878), 4 Abb. N. C. 317, 17 How. Pr. 355.

The value of a testator's estate and bequests should be computed as of the date of the testator's death; and it is proper to compute the value and amount of the life interest by tables based upon the probabilities of life, rather than on the lives as they were actually extended. *Matter of Durand* (1909), 194 N. Y. 477, 488, 86 N. E. 677, affg. 127 App. Div. 945, 111 N. Y. Supp. 1118.

The value of the estate should be ascertained at the time of the death of the person making such a will, and not at the time of the execution thereof. *St. John v. Andrews Institute* (1908), 191 N. Y. 254, 83 N. E. 981, 14 Am. Cas. 708, modfg. 117 App. Div. 698, 102 N. Y. Supp. 808. Motion to amend remittitur granted. 192 N. Y. 382 (1908), 85 N. E. 143. The determination should not be made until it is possible to ascertain the exact value of the estate. *Hasbrouck v. Knoblauch* (1908), 59 Misc. 99, 103, 112 N. Y. Supp. 159, mod. 130 App. Div. 378, 114 N. Y. Supp. 949.

The value of the whole estate owned by the testator at the time of his death is to be reckoned, including property of which the will expressly states that it omits to dispose of. *Matter of Moderno* (1886), 5 Dem. 288.

In the application of this section the rule of calculation adopted in *Matter of Johnston*, 76 Misc. 391, 137 N. Y. Supp. 166 to wit: "Ascertain the money value of the estate as it remained at death, subtract therefrom the amount of decedent's debts, pay one-half of the remainder to the corporate legatees, whose legacies were subject to reduction," must be followed. Where by reason of delay in the

disposition of the estate there have been decreases as well as appreciations in the value of its property, and there have been accruals of interest or income, the decreases must be taken into consideration in ascertaining the value of the estate as of the time of the death of the testatrix. *Matter of Brooklyn Trust Co.* (1915), 92 Misc. 695, 157 N. Y. Supp. 671.

The amount which corporations may take under the statute is to be ascertained by computing the value of the estate as of the date of death of the testator, subtracting therefrom the decedent's debts and dividing the remainder by two. Administration expenses do not enter into the calculation; and are not to be subtracted like the debts of the decedent. *In re Colburn's Estate* (1915), 157 N. Y. Supp. 676.

The one-half is computed with reference to the condition of the property at the time of the testator's death. *Matter of Dowd's Will* (1879), 8 Abb. N. C. 118; *Betts v. Betts* (1878), 4 Abb. N. C. 317.

When section does not apply.—This section does not apply where the testator leaves a first cousin as nearest of kin. *Matter of Danklefsen* (1916), 171 App. Div. 339, 157 N. Y. Supp. 119. Or where the testator does not leave surviving a husband, wife, child or parent. *Matter of Murray* (1915), 92 Misc. 100, 155 N. Y. Supp. 185; *Matter of Talmage* (1908), 59 Misc. 130, 112 N. Y. Supp. 206.

Charitable corporation incorporated by a special act, containing provisions permitting it to take by will from those named in the certificate of incorporation without limitation as to amount, is exempted from the provisions of this section. *Smith v. Havens Relief Fund Society* (1907), 118 App. Div. 678, 103 N. Y. Supp. 770, *affd.* 190 N. Y. 557, 83 N. E. 1132.

The act applies only to the particular class of private corporations enumerated, and does not apply to the state nor to individuals nor to public or municipal corporations. *Matter of Crane* (1896), 12 App. Div. 271, 42 N. Y. Supp. 904, *affd.* 159 N. Y. 557, 54 N. E. 1089; *Clements v. Babcock* (1889), 26 Misc. 90, 56 N. Y. Supp. 527.

Section does not apply to educational institutions. *Matter of Morgan* (1907), 56 Misc. 235, 245, 107 N. Y. Supp. 393, *affd.* 127 App. Div. 945, 111 N. Y. Supp. 1118, *affd.* 194 N. Y. 477, 87 N. E. 677.

This section does not apply to a devise or bequest to individuals in trust for a charitable purpose. *Allen v. Stevens* (1899), 161 N. Y. 122, 55 N. E. 568. Where by the will of an unmarried testatrix all of her small estate, both real and personal, was given to her executors in trust to pay or apply the income thereof to her sister, an incompetent, during her life, with power in the trustees to consume the corpus by the application of the principal to said sister, but at the rate of a certain sum per annum, in addition to the income payable to her, with remainder over to three charitable or benevolent corporations, a contention that the will contravenes section 17 of the Decedent Estate Law, as it carries more than one-half of the estate after payment of debts to such corporations, is untenable and the bequests and devises will be adjudged valid. *Matter of Dunlap* (1914), 86 Misc. 372, 148 N. Y. Supp. 431.

A bequest to a priest for the saying of masses for the repose of the soul of testatrix is not subject to the provisions of this act; it is in fact but a conditional legacy given to an individual exercising the pastoral functions of the church. *Matter of Zimmerman* (1898), 22 Misc. 411, 50 N. Y. Supp. 395; *Vanderveer v. McKane* (1890), 25 Abb. N. C. 105, 11 N. Y. Supp. 808.

Devise to individuals in perpetuity for charitable use; devise exceeding one-half of testator's estate.—A devise to trustees in perpetuity, the income to be applied to the maintenance of churches, ministers and missionaries of a certain religious

denomination located within certain counties, does not offend this section of the Decedent Estate Law, although the gift exceeds one-half of the testator's estate. Said statute limits the amount of devises and bequests only where the gift is to the charitable institution itself, or, if *seems*, to trustees who are to turn over the corpus to such charitable institution. The statute does not apply to a devise to individuals for charitable uses. *Decker v. Vreeland* (1915), 170 App. Div. 234, 156 N. Y. Supp. 442.

Allowance for life interests.—The value of the estate at the time of the death of the testator is to be determined, deducting the value of any life interest; and where, before such value has been computed the life interest has ceased, the value of such life interest is to be determined by the actual duration of the life, and not by a reference to annuity tables showing probable duration of such life. *Matter of Teed* (1891), 59 Hun 63, 12 N. Y. Supp. 642.

Where a life estate has ended before the determination of its value there is occasion to do more than make it appear what was, in fact, its value. In such case if nothing to the contrary appears, the interest upon the amount of the fund received by the life beneficiary will *prima facie* represent the value of the life estate. *Matter of Teed* (1894), 76 Hun 567, 28 N. Y. Supp. 203.

Where a testator gave the residue of his estate to his wife for life, and provided for a conversion of the estate into cash at her death, making bequests to individuals, charitable institutions and corporations, upon the judicial settlement of the account of the executor, after the life tenant's death, the value of the life estate should be determined, for the purpose of ascertaining whether the gifts to charitable institutions exceeded the statutory limits, by the actual duration of the life estate and not upon the basis of the probabilities of its duration at the time of the testator's death. *Matter of Runk* (1907), 55 Misc. 478, 106 N. Y. Supp. 851.

In ascertaining whether bequest to charitable corporation aggregates more than one-half of the estate in contravention of this section, the value of the life estate according to the annuity tables, together with other bequests not charitable, should be deducted from the whole estate. *Matter of Strang* (1907), 121 App. Div. 112, 105 N. Y. Supp. 566; *Orphan Asylum v. White* (1888), 6 Dem. 201, 3 N. Y. Supp. 137.

Where in the application of this section it becomes necessary to include in the valuation of the estate the value of vested remainders, they must be appraised by the use of the life tables. *Matter of Brooklyn Trust Co.* (1915), 92 Misc. 695, 157 N. Y. Supp. 671.

Allowance for dower.—Where all persons interested in a decedent's estate acquiesced in a decree of the surrogate determining that a legacy which was expressly made in lieu of dower be paid to the testator's widow, her dower rights were thereby released as of the date of the death of the testator. Hence, the dower rights are not to be considered in determining whether the testator has left more than one-half of his estate to charitable uses contrary to the provisions of this section (formerly, ch. 360 of laws of 1860). *Hughes v. Stoutenburgh* (1915), 163 App. Div. 512, 154 N. Y. Supp. 65.

The value of the widow's dower forms no part of the estate of the testator, and in ascertaining the value of the estate for the purpose of estimating the legacies to charitable corporations allowance should be made for it along with the allowance for the debts of the testator. *Chamberlain v. Chamberlain* (1871), 43 N. Y. 424, 440; *Chamberlain v. Taylor* (1887), 105 N. Y. 185, 11 N. E. 625; *Curran v. Fanning* (1878), 13 Hun 458. Unless she has elected to accept a provision of the will in lieu of dower, in which case, the release of the right of dower will be held to date back to the testator's death, and in determining the proportion of the

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estate given to charities, no deduction or allowance of the widow's dower interest from the gross estate will be made. *Lord v. Lord* (1904), 44 Misc. 530, 90 N. Y. Supp. 143.

Who benefited by restriction and entitled to raise objection.—The benefit to be derived from the prohibition contained in this section is not confined to the relatives mentioned therein, but its provision may be insisted upon by any person who derives a benefit therefrom. *Decker v. Vreeland* (1917), 220 N. Y. 326, N. E., revg. 170 App. Div. 234, 156 N. Y. Supp. 442; *Robb v. Washington & Jefferson College* (1906), 185 N. Y. 485, 78 N. E. 359, modfg. 103 App. Div. 327, 93 N. Y. Supp. 92 (1905); *Amherst College v. Ritch* (1897), 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; *Matter of Stilson* (1903), 85 App. Div. 132, 83 N. Y. Supp. 67; *Harris v. Am. Bible Society* (1867), 4 Abb. Pr. N. S. 421; *McKeown v. Officer* (1889), 2 Silv. 552, 6 N. Y. Supp. 201, appeal dismissed, 127 N. Y. 687, 28 N. E. 401.

The object of this provision is to protect the persons who would be the natural recipients of the bounty of the testator and would benefit by his intestacy. *Farmers' L. & T. Co. v. Shaw* (1907), 56 Misc. 201, 207, 107 N. Y. Supp. 337, affd. 127 App. Div. 656, 111 N. Y. Supp. 1118.

Persons who are in fact heirs-at-law of a testator, however remote their relationship may be, are entitled to raise the objection that this section is violated by the terms of the will. *Rich v. Tiffany* (1896), 2 App. Div. 25, 37 N. Y. Supp. 330.

The rights springing from this section are personal, the same as the rights of a borrower under the statute of usury, and only the persons named in the act and those benefited through them can invoke its protection. *Frazer v. Hoguet* (1901), 65 App. Div. 192, 201, 72 N. Y. Supp. 840.

This section has a broader design than the protection of certain specified relatives of the testator, and looks rather to the establishment of a general public policy than to the advancement of private personal interests. *Harris v. Slaght* (1866), 46 Barb. 470, 504.

Where a married woman, survived only by her husband and nephews and nieces, leaves by will more than one-half of her estate consisting wholly of personal property to a religious corporation, the husband alone can be heard to object to the bequest. *Matter of Eldredge* (1907), 55 Misc. 636, 106 N. Y. Supp. 1036.

Any heir at law who would be entitled to share in the estate, because the provisions of the will are violative of the statute may insist upon the restriction, although not one of the relatives designated in the statute. *McKeown v. Officer* (1889), 6 N. Y. Supp. 201.

Cousin may maintain action; pleading.—A cousin, in the absence of persons having prior rights to estate, is entitled to maintain an action to declare an excessive bequest to charitable corporations invalid. The complaint must show positively that there are not persons having a prior right to take the estate under the statutes of descents and distributions. *Moser v. Talman* (1906), 114 App. Div. 850, 100 N. Y. Supp. 231.

Survivorship of parties benefited.—The inhibition imposed by this section is dependent upon the survivorship of one of such parties; so where the deaths of the testator and his wife were apparently simultaneous, or at least non-ascertainable as to priority, and none of the relatives included have survived, it was held that the entire estate might pass to a charitable corporation. *St. John v. Andrews Institute* (1908), 191 N. Y. 254, 83 N. E. 981, 14 Am. Cas. 708, modfg. 117 App. Div. 698, 102 N. Y. Supp. 808. Motion to amend remittitur granted, 192 N. Y. 382 (1908), 85 N. E. 143.

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Waiver of the provisions of this section may be effected by united action on the part of the parties for whose benefit it is intended. *Amherst College v. Ritch* (1897), 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; *Matter of Stillson* (1903), 85 App. Div. 132, 83 N. Y. Supp. 67.

Jurisdiction of surrogate.—A surrogate, having no power under the provisions of the Code of Civil Procedure to pass upon the title of property as between a claimant and a representative of the testator's estate, has no jurisdiction in proceedings to determine whether certain religious corporations have been bequeathed more than one-half of testator's estate. *Matter of Will of Walker* (1892), 136 N. Y. 20, 32 N. E. 633. Although there be no objection at probate it is the duty of the surrogate to enforce the statute where the violation clearly appears and is pointed out in the judicial settlement of the accounts of the executor. *Matter of Counrod* (1891), 27 Misc. 475, 59 N. Y. Supp. 164.

The surrogate may, pursuant to § 2624 of the Code of Civil Procedure, construe a will as to the question of the application of this section. *Matter of Talmage* (1908), 59 Misc. 130, 112 N. Y. Supp. 206.

For antecedent law relative to devises and bequests to charitable societies, see *Bascom v. Albertson* (1866), 34 N. Y. 584, 600. As to bequests to charitable organizations generally, see *Beekman v. People* (1858), 27 Barb. 260, 304, *affd.* 23 N. Y. 298, 575.

Section cited.—*Levy v. Levy* (1865), 33 N. Y. 97, 114; *Garvey v. Horgan* (1902), 38 Misc. 164, 77 N. Y. Supp. 290, *affd.* 77 App. Div. 39, 79 N. E. 337; *Schlegel v. Roman Catholic Church* (1908), 124 App. Div. 502, 108 N. Y. Supp. 955.

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Application of section. *Spencer v. Hay Library Association* (1901), 36 Misc. 393, 73 N. Y. Supp. 712.

This section did not apply to foreign corporations. *Pottstown Hospital v. New York Life Ins. & Trust Co.* (1913), 208 Fed. 196.

§ 19. Devise or bequest to certain benevolent, charitable and scientific corporations.—(*Repealed by L. 1911, ch. 857, in effect July 29, 1911.*)

Construction of section.—Section 17 ante may be read with this section as though a part of it without any want of harmony with the inhibition of making the will within two months of death. *Le Fevre v. Le Fevre* (1875), 59 N. Y. 434; *Matter of Connor* (1887), 44 Hun 424.

The act of 1881, ch. 641, in no manner attempted to interfere with or amend this section. It was simply an enlargement of the powers of a corporation, as limited by section 2 of the act of 1848, and nothing more. *Matter of Conner* (1887), 44 Hun 424; *Wardlow v. Home for Incurables* (1886), 4 Dem. 473.

The amendment of 1903, ch. 623, specifically continued the above section in force and removed all doubt as to whether or not same was then unrepealed. *Pearson v. Collins* (1906), 113 App. Div. 657, 99 N. Y. Supp. 932.

The purpose and intent of this section was the protection of heirs and next of kin from improvident dispositions by testators of their estates, when weak and in apprehension of death. *People's Trust Co. v. Smith* (1894), 82 Hun 494, 498, 31 N. Y. Supp. 519, *affd.* 147 N. Y. 693, 42 N. E. 725; *Beekman v. People* (1858), 27 Barb. 260, 305, *affd.* 23 N. Y. 298, 575.

Application.—*Mark v. McGlynn* (1882), 88 N. Y. 357; *Matter of Farmers' Loan & Trust Co.* (1910), 138 App. Div. 121, 122 N. Y. Supp. 956, *affd.* 199 N. Y. 569, 93 N. E. 1120; *Ely v. Ely* (1914), 163 App. Div. 320, 148 N. Y. Supp. 691; *Simmons v. Bur-*

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rell (1894), 8 Misc. 338, 28 N. Y. Supp. 625; Matter of Cornelius (1898), 23 Misc. 434, 51 N. Y. Supp. 877; Matter of Rounds (1898), 25 Misc. 101, 54 N. Y. Supp. 710; Matter of Fitzsimmons (1899), 29 Misc. 731, 62 N. Y. Supp. 1009; Matter of Beaver (1909), 62 Misc. 155, 116 N. Y. Supp. 424; In re Benedict's Will (1889), 11 N. Y. Supp. 352; Matter of Kelemen (1890), 57 Hun 165, 11 N. Y. Supp. 139, *affd.* 126 N. Y. 73, 26 N. E. 968; Matter of Ingersoll (1891), 59 Hun 571, 14 N. Y. Supp. 22, *revd.* 131 N. Y. 573, 30 N. E. 47.

The first provision of this section related to the power of the corporation to take; the second, to the power of the testators in certain cases to give to them; and the third to the time which in all cases must lapse between the execution of the will and the death of the testator to render the gift valid. Hence to bring a will within the provision of the section relative to the time when the will must be made, there is no necessity that the testator leave wife, child or parent. *Stephenson v. Short* (1883), 92 N. Y. 433; *Clements v. Babcock* (1899), 26 Misc. 90, 56 N. Y. Supp. 527. These cases construe the section as it read prior to the amendment of 1903, ch. 623.

Where a testator made his will on the sixth day of February and died on the sixth day of April following, the will was not made "at least two months before death of the testator" and a bequest to a benevolent corporation contained therein is invalid. *Matter of Babcock* (1911), 74 Misc. 31, 133 N. Y. Supp. 655.

Effect of failure of legacies.—Where legacies bequeathed to certain charitable institutions fail, not by reason of any defect in the will and codicils, but solely in consequence of matter dehors the instrument, the doctrine of "Dependent relative revocation" is not applicable to preserve bequests made in a former codicil from the operation of the statute since in the codicil under consideration the declaration of revocation was complete and not dependent upon the validity of the bequests made therein which upon the face of the instrument were unambiguous; hence the courts are powerless to reinstate the earlier bequests. *Ely v. Megie* (1916), 219 N. Y. 112, N. E.

A secret trust which has for its object the circumvention of the statute (L. 1848, ch. 319) rendering void legacies to charitable uses contained in wills executed less than two months before death, is void. *Fairchild v. Edson* (1897), 154 N. Y. 199, 48 N. E. 541, *reargument denied*, 154, N. Y. 768, 49 N. E. 1096.

Corporations affected.—The effect of exception § 6 of the act of 1848 from repeal was not to incorporate it as a part of the Membership Corporations Law, or to give it a more extended application than it originally had, but to preserve it upon the statute book, in its application to corporations formed under the act of which it was a part. Its language indicates that; for it refers to "any corporation formed under this act," and that can only mean the act of 1848. *Matter of Lampson* (1900), 161 N. Y. 511, 56 N. E. 9. And see *Hollis v. Drew Theological Sem.* (1884), 95 N. Y. 166.

This section affected only corporations formed under the act of 1848. *Matter of Shattuck* (1907), 118 App. Div. 888, 103 N. Y. Supp. 520, *revd.* 193 N. Y. 446, 86 N. E. 455; *Riley v. Diggs* (1882), 2 Dem. 184; *St. Frances Hospital v. Schreck* (1884), 3 Dem. 225; *Privé v. Foucher* (1885), 3 Dem. 339; *Betts v. Betts* (1878), 4 Abb. N. C. 317, 57 How. Pr. 355. Section applies to all corporations, which could have been incorporated under the act of 1848, chartered prior to the taking effect thereof. *Chamberlain v. Chamberlain* (1871), 43 N. Y. 424.

Where a charter of an educational institution subjects its power to take by gift, grant or devise, "to all the provisions of law relating to devises and bequests by last will and testament," the provisions of the above section are applicable. *Le Fevre v. Le Fevre* (1875), 59 N. Y. 434. And see *Kerr v. Dougherty* (1880), 79 N.

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Y. 327; *Stephenson v. Short* (1883), 92 N. Y. 433; *Simmons v. Burrell* (1894), 8 Misc. 388, 28 N. Y. Supp. 625.

Bequests by a testator who died two weeks after making his will to benevolent, charitable, etc., societies incorporated under chapter 319 of the Laws of 1848 and the acts amendatory thereof are void under this section, which declares that a devise or bequest to any such corporation shall not be valid unless the will by which it is given shall have been executed at least two months prior to the death of the testator. Such a bequest to a corporation chartered by special act for religious, charitable and missionary purposes and subject to the provisions of said statute of 1848 is invalid under this section. *Matter of Smith* (1914), 85 Misc. 636, 149 N. Y. Supp. 24.

A bequest made to the use of St. Bernard's Seminary and St. Ann's Homes for the Aged of Rochester made less than two months prior to the death of the testatrix is invalid. This act being the only act under which these institutions could be incorporated it was assumed that they were formed thereunder. *Matter of Cooney* (1906), 112 App. Div. 659, 98 N. Y. Supp. 676.

Where in the charter of a corporation granted by an act of the legislature in 1866, the corporation formed was to be subject to the provisions of the Revised Statutes, identical with the provisions of this section, which provisions have been inserted in the Revised Statutes without authority by a compiler, the reference will be deemed to be the act of 1848. *St. Frances Hospital v. Schreck* (1884), 3 Dem. 225.

A testator was not prohibited by this section before its repeal from giving his entire estate to other corporations and associations not named in this section or to other individuals. *Allen v. Stevens* (1897), 22 Misc. 158, 173, 49 N. Y. Supp. 431, revd. 33 App. Div. 485, 54 Supp. 8, revd. 161 N. Y. 122, 55 N. E. 568; *Harris v. Slaght* (1866), 46 Barb. 504, mod. 2 Abb. Ct. of App., 4 Abb. Pr. N. S. 421.

Not applicable to institutions incorporated under L. 1853, ch. 184. *Brunnahan v. Manhattan College* (1889), 53 Hun 48, 5 N. Y. Supp. 613.

Bequests of specified amounts to parties of designated churches for masses are not invalidated by the L. 1848, ch. 319, § 6. *Vandever v. McKane* (1890), 25 Abb. N. C. 105.

Foreign corporations.—The section did not apply to foreign corporations. Such corporations come here as freely as natural persons subject to but the same limitations as are imposed upon natural persons, unless the legislature expressly otherwise provide. The statute cannot be stretched so as to comprehend corporations not expressly included. *Hollis v. Drew Theological Sem.* (1884), 95 N. Y. 166; *Cross v. U. S. Trust Co.* (1892), 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; *Hope v. Brewer* (1892), 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; *Dammert v. Osborn* (1893), 140 N. Y. 30, 35 N. E. 407; *Riley v. Diggs* (1882), 2 Dem. 184; *Hollis v. Hollis* (1883), 29 Hun 225, revd. 95 N. Y. 166; *Matter of Estate of Prime* (1893), 136 N. Y. 347, 362, 32 N. E. 1091, 18 L. R. A. 713; *Doty v. Hendrix* (1891), 16 N. Y. Supp. 284; *Pottstown Hospital v. New York Life Ins. & Trust Co.* (1913), 208 Fed. 196.

Section held not to apply to Yale College, an educational institution organized under the laws of the state of Connecticut. *Matter of Lampson* (1898), 33 App. Div. 49, 53 N. Y. Supp. 531, affd. 161 N. Y. 511, 56 N. E. 9.

Corporations organized by special act since the passage of this section, were not subject thereto, unless made so by express terms. *Pritchard v. Kirsch* (1901), 58 App. Div. 332, 68 N. Y. Supp. 1049, affd. 171 N. Y. 637, 63 N. E. 1121; *Cole v. Frost* (1889), 51 Hun 578, 4 N. Y. Supp. 308, affd. in 115 N. Y. 653, 21 N. E. 1118; *Riker v. Society of New York Hospital* (1883), 66 How. Pr. 246.

L. 1909, ch. 18. Devises or bequests to certain corporations. § 19.

The New York Bible and Common Prayer Book Society, incorporated by special act and being expressly made subject to chapter 360 of the Laws of 1860 by act of Legislature, is not within the provisions of chapter 319 of the Laws of 1848 (Decedent Estate Law, § 19) and may take a legacy although the testator died within two months after making his will. *Matter of New York Life Insurance & Trust Co.* (1915), 167 App. Div. 131, 152 N. Y. Supp. 881.

Membership corporations.—The provisions of this section did not apply to corporations organized under the Membership Corporations Law. *Spencer v. Hay Library Assn.* (1901), 36 Misc. 393, 73 N. Y. Supp. 712.

An association incorporated under the Membership Corporations Law was not subject to the provisions of L. 1848, ch. 319, and a bequest to it is valid. *Matter of Smith* (1914), 85 Misc. 636, 149 N. Y. Supp. 24.

Religious corporations.—A religious corporation incorporated under R. L. 1813, ch. 60, not expressly or constructively made subject to L. 1848, ch. 319, § 6, may take under a will made and executed at least two months before the death of the testator since such act was not intended by the legislature as a supplement to such laws as specifically provide for the incorporation of religious societies. *Matter of Brush* (1901), 35 Misc. 689, 72 N. Y. Supp. 421; *Matter of Foley* (1899), 27 Misc. 77, 58 N. Y. Supp. 201; *Matter of Hamm (Hardy)* (1899), 28 Misc. 307, 59 N. Y. Supp. 912.

Bequests to churches were not subject to this section. *Harris v. Am. Baptist Home Miss. Soc.* (1884), 33 Hun 411; *Riley v. Diggs* (1882), 2 Dem. 184. Section applied in case of bequests to churches and ecclesiastical schools and institutions. *Vanderveer v. McKane* (1890), 25 Abb. N. C. 105, N. Y. Supp. 808.

L. 1892, ch. 187, § 2, incorporating the Board of Foreign Missions of the Presbyterian Church, provided that such corporation shall be "subject to the liabilities and provisions contained in the eighteenth chapter of the first part of the Revised Statutes"; it was held that such provision did not subject such corporation to the limitations contained in § 6 of ch. 319 of L. 1848. *Matter of Norton* (1899), 39 App. Div. 369, 57 N. Y. Supp. 407, *affd.* in 160 N. Y. 684, 55 N. E. 1098. See *Matter of Kavanagh* (1891), 125 N. Y. 418, 26 N. E. 470.

Corporations specially authorized to take by will.—This section does not apply to a corporation which is specially authorized to take gifts by will from those named in the certificate of incorporation without limitation as to amount. *Smith v. Havens Relief Fund Society* (1907), 118 App. Div. 678, 103 N. Y. Supp. 770, *affd.* 190 N. Y. 557, 83 N. E. 1182.

Lapsed legacies; disposition.—The residuary clauses of testator's will gave the power to each of the residuary legatees to bestow any legacy which might come to them through any possible invalidity or lapse to such purpose as may have been intended by the testator. Where a legacy to a hospital failed as contravening this section, it was held that, while no imperative obligation to bestow the lapsed legacy was imposed upon the residuary legatees, yet they were by the will empowered to pay over the lapsed legacy to such hospital, though the exercise of this duty would be merely voluntary with them. *Riker v. St. Luke's Hospital* (1885), 35 Hun 512, *affd.* 102 N. Y. 742.

Evasion of section; devise to individual.—A bequest to "the person acting as treasurer for the time being, meaning the treasurer, if there be one of the Foundling Asylum for Babies, to be applied to the uses of said asylum" is void where testator died within two months of execution of will; the testator may not evade the policy of the statute, by the devise of making the gift to an individual, the bequest being in legal effect one to the asylum. *Efray v. Foundling Asylum* (1882), 5 Redf. 557.

§ 21.

Execution of will.

L. 1909, ch. 18.

Creation of a trust by making bank deposit books payable in trust for a certain religious corporation, to avoid operation of this section, held valid. *Bd. of Domestic Missions v. Mechanics' Savings Bank* (1899), 40 App. Div. 120, 57 N. Y. Supp. 582.

Jurisdiction of surrogates' court.—The contention that a bequest is really intended for such a charitable corporation, and is an evasion of this section, cannot be tried in a surrogates' court, but may be raised in equity by the next of kin. *Matter of Mullen* (1898), 25 Misc. 253, 55 N. Y. Supp. 432.

§ 20. Devise or bequest to certain bar associations, veterinary associations and fire corporations.—(*Repealed by L. 1911, ch. 857, in effect July 29, 1911.*)

§ 21. Manner of execution of will.—Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.
2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.
3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.
4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 40.

References.—Production of will may be compelled. *Code Civil Procedure (Surrogates' Code)*, § 2607. Proof of lost or destroyed will, *Id.* § 2613.

Object and construction of section.—The object of the section is to throw such safeguards around the execution of wills as will prevent fraud and imposition, and it is wiser to construe these statutes closely, rather than loosely, and so open a door for the perpetration of the mischiefs which the statutes are designed to prevent. *Matter of Will of Booth* (1891), 127 N. Y. 109, 116, 27 N. E. 826, 24 Am. St. Rep. 429, 12 L. R. A. 452; *Seguine v. Seguine* (1848), 2 Barb. 385.

The intention of the legislature and not that of the testator, must govern the construction of this statute, and if the testator fails to execute a will in conformity thereto, the court must condemn the instrument and can give no force to the fact that he honestly intended thereby to make a will. *Matter of Andrews* (1900), 162 N. Y. 1, 59 N. E. 529, 76 Am. St. Rep. 294, 48 L. R. A. 662; *Matter of Conway* (1891), 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; *Matter of Whitney* (1897), 153 N. Y. 259, 264, 47 N. E. 272, 60 Am. St. Rep. 616; *Matter of O'Neill* (1883), 91 N. Y. 516, 520; *Matter of Blair* (1895), 84 Hun 581, 32 N. Y. Supp. 845, *affd.* 152 N. Y. 645, 46 N. E. 1145.

The reason why the requirements of the statute demand implicit obedience is that, as an act of testamentation is unilateral and to take effect after the death of the chief actor, it is peculiarly exposed to fraud, simulation, or even forgery. *Matter of Foley* (1912), 76 Misc. 168, 172, 136 N. Y. Supp. 933.

A substantial compliance with the statute prescribing the formalities to be observed in the execution of a will is sufficient. *Matter of Voorhis* (1891), 125 N. Y. 765, 26 N. E. 935; *Gilbert v. Knox* (1873), 52 N. Y. 125; *Will of Cottrell* (1884), 95 N. Y. 329; *Matter of Higgins* (1884), 94 N. Y. 554; *Matter of Carey* (1895), 14 Misc. 486, 36 N. Y. Supp. 817, *affd.* 24 App. Div. 531, 49 N. Y. Supp. 32.

If the attestation clause is full and the signatures genuine and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption is that all the provisions of the statute were complied with. *Matter of Kellum* (1873), 52 N. Y. 517; *Grant v. Grant* (1844), 1 Sandf. Ch. 235; *Nelson v. McGriffert* (1848), 3 Barb. Ch. 158, 49 Am. Dec. 170; *Mairs v. Freeman* (1873), 3 Redf. 181.

Subscription at end of will.—Subscription must be at the end of the instrument as a completed whole, and if any material portion follows the subscription, the will is not properly subscribed. *Sisters of Charity v. Kelly* (1876), 67 N. Y. 409; *Matter of Dayger* (1888), 47 Hun 127, *affd.* 110 N. Y. 666, 18 N. E. 480; *Matter of Case* (1885), 4 Dem. 124; *Vogel v. Lehnritter* (1893), 139 N. Y. 223, 34 N. E. 914; *Heady's Will* (1873), 15 Abb. Pr. N. S. 211.

The provision requiring the testator to subscribe his will, "at the end" is intended to prevent fraud in the way of unauthorized additions and should be strictly construed. *Matter of Gibson* (1908), 128 App. Div. 769, 773, 113 N. Y. Supp. 266. The words "at the end of the will," relating to the signatures of the attesting witnesses, refer to the place and not the time. *Hewitt v. Hewitt* (1881), 5 Redf. 271. The actual physical termination is intended and not the place which the testator intended to be the end of the will. *Matter of the Will of O'Neill* (1883), 91 N. Y. 516.

"End of the will," what constitutes. *Matter of Schroeder* (1916), 98 Misc. 92. Where the signature of a testatrix is preceded by the disposing parts of her will and followed by the nomination of the executor, the instrument is not subscribed by her "at the end" and probate thereof will be denied. *Matter of Van Tuyl* (1917), 99 Misc. 618.

Form should not be raised above substance in order to destroy a will, and the substantial thing is whether a paper reads straightforward and without interruption from the beginning to the end, and when thus read the signature is found at the end. The testator, a layman, drew his own will, using a short-form printed blank. In the space intended for bequests he wrote: I "will and direct that my estate be settled as per the provisions of the pages hereto attached and numbered from one to six inclusive and this is to stand unchallenged and unchanged in any form provided I decease before a will is drawn by my attorney." Immediately after these words in the blank space there were attached by two pins six sheets in the handwriting of the decedent, written upon one side only, numbered by him at the top consecutively from one to six, which contain the disposing provisions of the will. Nothing was written in the blank form except as stated. The signature of the deceased was written in the usual place on the right-hand side at the bottom of the printed form directly beneath the clause commencing "in witness whereof," as filled out with the date. The signatures of the two witnesses were to the left of the signature of the decedent and right beneath the printed word "witnesses" on the form. Below the signature was a printed attestation clause, but it was not filled out or signed. When the paper was signed by the decedent and the two witnesses, the six separate pages were already attached in the manner above described. Due proof of the execution of the paper as a will in compliance with the requirements of the statute was shown by the testimony of the subscribing witnesses. It was held that the will when read consecutively has the signature at the physical and natural end thereof and should be admitted to probate. *Matter*

of Field (1912), 204 N. Y. 448, 97 N. E. 881, revg. 144 App. Div. 737, 129 N. Y. Supp. 590, and distinguishing and limiting Matter of Whitney, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616; Matter of Andrews, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294.

An instrument is signed at the end thereof when nothing intervenes between the instrument and the subscription. It was held that a codicil was signed by the subscribing witnesses at the end thereof, although there was a blank space of four inches between the signature of the testator and the commencement of the attestation clause. Matter of Gilman (1862), 38 Barb. 364. A will in which the attestation clause is carried entirely across the face of the instrument, separating the signature of the testator, which is above, from the signatures of the witnesses below it, is properly signed. Matter of Beck (1896), 6 App. Div. 211, 39 N. Y. Supp. 810, affd. 154 N. Y. 750, 49 N. E. 1093.

A will was written on both sides of an irregular-shaped piece of paper. The witnesses signed their names at the bottom of the first side and again at the top of the second side. The deceased signed his name at the end of the disposing portion near the middle of the second side and again at the bottom of the second side. It was held that the names of the witnesses were not signed at the end of the will and the execution was defective. Matter of Will of Hewitt (1883), 91 N. Y. 261. If the signature of the testator be followed by a clause appointing executors, and the date, the will is not properly subscribed. Matter of Gedney (1896), 17 Misc. 500, 41 N. Y. Supp. 205.

Where a single paper, consisting of two sheets of legal cap woven together in the web and folded so as to make four pages, was used in drafting a will, and the writing was commenced on the first page, continued consecutively on the fourth page and concluded on the second page with the signature of the testator, and there is no writing or signature on the third page, the instrument is signed at the end thereof within the meaning of the Statute of Wills and is entitled to probate. Matter of Peiser (1913), 79 Misc. 668, 140 N. Y. Supp. 844.

Where a will drawn on a blank, consisting of one sheet of paper folded so as to make four pages, was signed by the testator and the subscribing witnesses on the first page, and by the testator alone on the third page, it is not signed at the "end of the will" as provided by this section, and probate of the instrument will be refused. Matter of Reiser (1913), 81 Misc. 101, 142 N. Y. Supp. 1074.

Where all the writing of a last will, drawn on a blank form, other than that of the subscribing witnesses is in the handwriting of testator and both witnesses testify that testator's signature, which was in the attestation clause, was written therein by him before they signed it, testator's signature may properly be regarded as being "at the end of the will," and probate thereof will be decreed. Matter of Rudolph (1916), 97 Misc. 548.

A will duly executed by a competent testator free from restraint at the time of its execution may not be denied probate on the ground that testator did not sign his name at the end of the instrument where it appears that there was no date inserted at the beginning of the will nor in the body of it, nor above the signature of testator, the only date appearing just below the attestation clause. Matter of Talbot (1915), 91 Misc. 382, 154 N. Y. Supp. 1083.

Signature within or after attestation clause.—Where the testator signed her will in a blank space in the body of the attestation clause, pursuant to the instructions of the draftsman, with the intent, understood by the witnesses, to effect a subscription of her will, the instrument was held to be properly subscribed. Matter of Acker (1886), 5 Dem. 19.

Where a testator writes her name in a blank space left for that purpose in the

body of the attestation clause immediately following her holographic will, she has subscribed the will at the end thereof within the meaning of the statute. *Matter of DeHart* (1910), 67 Misc. 13, 122 N. Y. Supp. 220.

The signature of a testator merely after the attestation clause in the will, is a sufficient subscription of the instrument "at the end of the will," within the meaning of the statute. The only effect of so subscribing is to make said clause a part of the will. *Younger v. Duffie* (1884), 94 N. Y. 535, 46 Am. Rep. 156; *Porteus v. Holm* (1885), 4 Dem. 14; *Matter of Cohen* (1869), 1 Tuck. 286.

The signature of a testator beneath the attestation clause is a sufficient compliance with the statute. *Matter of Busch* (1914), 87 Misc. 239, 150 N. Y. Supp. 419.

Third page following signature and attestation.—Where parts of a will are written on the first and third pages of a printed blank of four pages, while the attestation clause and the signature of the testator are on the second page, and the scrivener has made no attempt to make the third page a part of the will, there has been no compliance with the statute requiring a will to be "subscribed by the testator at the end of the will." *Matter of Donner* (1902), 37 Misc. 57, 74 N. Y. Supp. 828. As to signature to will having a schedule annexed, see *Matter of Brand* (1902), 68 App. Div. 225, 73 N. Y. Supp. 1073.

A will, drawn upon a printed blank folded in the middle so as to make four consecutive pages, with the attestation clause at the top of the second page and executed at that point by the testator and the attesting witnesses, so that the first two pages together make a complete will, is not subscribed by the testator "at the end of the will," as required by the statute, where the third page contains further material and complete dispositions of property in no manner connected with the first or second pages except that the third page is numbered "second page" and the second page "third page"—the draftsman having passed to the third page after he had filled the first. *Matter of Andrews* (1900), 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662.

Signature on third page with fourth page following.—Where a stationer's blank form folded across the short way of the paper making four pages, none of which were numbered, was used by decedent in making his last will, and on the fourth page, more than half of which is blank, and on which there is no signature or authentication of any kind, there appears in the handwriting of decedent a money bequest to one already named as a legatee with an expression of a desire that he shall be the residuary legatee of decedent's estate, and such writing is not in continuation of anything written elsewhere in the instrument nor referred to in any way nor authenticated in any manner, and the signatures of testator and of the subscribing witnesses are on the third page, probate will be refused on the ground that the instrument was not signed "at the end." *Matter of Faye* (1916), 97 Misc. 532.

References to annexed sheets.—A will, drawn upon a printed blank covering only one page and signed by the testator and subscribing witnesses at the foot of the page, is not "subscribed by the testator at the end of the will," as required by the statute, when the blank space in the printed form is filled up by subdivisions marked respectively "first" and "second," followed by the words "see annexed sheet." *Matter of Whitney* (1897), 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616.

If a testator expressly refers in his will to any paper already written, and has so described it that there can be no doubt of the identity, that paper, whether executed or not, makes part of the will, but there must be no reasonable question of the identity of the paper and of its existence at the date of the will. *Ludlum v. Otis* (1878), 15 Hun 410, 414, holding reference to an unexecuted paper insufficient.

Signature on face of sheet with clauses on back.—In drawing a will a blank form

was used, the whole of which was upon one side of the paper. A blank was left for the disposition to be made, preceded by the words "I give, dispose and bequeath my property as follows." This blank was filled up by three complete devises; at the end of the last was underlined, in parenthesis, the words "carried to back of will." Upon the back was written the word "continued"; following it were various bequests, and then the words "signature on face of the will." The signature of the testator appeared at the end of the testimonium clause on the face of the paper, and those of the witnesses under the attestation. It was held that the will was not properly subscribed. *Matter of Conway* (1891), 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796.

A will written on four pages and signed by the testator and the witnesses at the end of the third page below the formal printed termination, the writing on the fourth page being a continuation of a broken paragraph and containing material provisions, is not subscribed at the end as the statute requires. *Matter of the Will of O'Neill* (1883), 91 N. Y. 516.

Blank page intervening.—A will was drawn up on a sheet of paper fastened together at the ends, only the first and third pages being written on and the second being left blank. It was signed by the testator at the bottom of the third page, while the attestation clause was placed at the top of the second, and signed by the witnesses. It was held that the will was properly executed. *Hitchcock v. Thompson* (1875), 6 Hun 279.

Words written in the body of a will, after testatrix had signed it, are not entitled to be probated unless she again subscribes the paper; that she subsequently acknowledged her subscription is insufficient to incorporate the words never in fact subscribed. Where, after the will of testatrix had been read to her and she had affixed her mark thereto, but before she had declared it to be her last will and testament and before the subscribing witnesses had signed it at her request, one of them, a lawyer and draftsman of the will, wrote in blank spaces in the testimonium clause the street number of the testatrix's residence, the date of the execution of the will and the names of the subscribing witnesses, and at the same time wrote about the signature of testatrix "Annie F. Foley X her mark" and the paper was not again subscribed by the testatrix, the will is entitled to probate in so far as it was subscribed by her but no further. *Matter of Foley* (1912), 76 Misc. 168, 136 N. Y. Supp. 933.

Manner of signing; mark.—The statute contemplates two kinds of subscriptions:—(1) A subscription by testator; (2) that another may sign a testator's name to his will by his direction. *Matter of Knight* (1914), 87 Misc. 577, 583, 150 N. Y. Supp. 137.

The testator may subscribe the will by his full name or by his mark, and if he does so that is the subscription required by the statute. Such subscription would be effectual as such, even though no one made the written memorandum thereof around such mark. *Jackson v. Jackson* (1868), 39 N. Y. 153, 159; *Chaffee v. Baptist M. Convention* (1843), 10 Paige 85, 91, 40 Am. Dec. 225.

A testator, being too weak to subscribe his name, may make a mark with a pen, his hand being guided by another, and declare the mark to be his signature. *Van Hanswyck v. Wiese* (1865), 44 Barb. 494.

Signature of will by making of mark with assistance of attorney held sufficient. *Matter of Caffrey* (1916), 174 App. Div. 398, 161 N. Y. Supp. 277.

Where a testator signs by a mark there should be a declaration that he signed the will and that the mark thereon is his signature. *Matter of Rogers* (1907), 52 Misc. 412, 103 N. Y. Supp. 423.

The testator, his fingers being partially paralyzed, may have another person sign for him. *Robin v. Coryell* (1858), 27 Barb. 556.

A testator who is physically unable to sign his name to his will may call in another person to aid him in doing so, even to the extent of holding his hand and guiding it. The extent of the aid does not affect the validity of the signature if the signing is in any degree an act of the testator acquiesced in and adopted by him—the question is whether the aid was assistance or control. *Matter of Kearney* (1902), 69 App. Div. 481, 74 N. Y. Supp. 1045.

If a testatrix is physically unable to sign her name she may call in another to her aid even to the holding of her hand and guiding it, and so long as there is the conscious wish of testatrix that her hand should make the signature and she participates in any degree in the making of it and acquiesces in and adopts the signature thus made, there has been a sufficient compliance with the statute. Such subscription having been actually made in the presence of the subscribing witnesses, an acknowledgment by testatrix that the signature was hers was unnecessary. *Matter of Baumann* (1914), 85 Misc. 656, 148 N. Y. Supp. 1049.

At common law, if a person wrote his name in the page of a will or contract with intent to execute it in that manner, the signature so written was as valid as though subscribed at the end of the instrument. This rule, however, has been changed in this state. *Matter of Will of Booth* (1891), 127 N. Y. 109, 116, 27 N. E. 826, 12 L. R. A. 452, 24 Am. St. Rep. 429; *Watts v. Public Administrator* (1829), 4 Wend. 168.

Use of mark, where decedent could write.—The fact that a decedent, who could read and write, did not sign her name to her will, but simply made her mark, does not of itself invalidate the will. But where one who can write has not signed his name to his will, but has instead thereof made his mark, and those taking substantial interests under the will are instrumental in obtaining it, while other interested persons act as witnesses to the signature, clear and satisfactory evidence is required to meet the burden of proof, and if the circumstances are not satisfactorily explained they may justify a conclusive presumption that the mark is not the subscription of the testator. *Matter of Irving* (1912), 153 App. Div. 728, 138 N. Y. Supp. 784, *affd.* 207 N. Y. 765, 101 N. E. 1106.

Execution by blind person.—On a proceeding to probate a will the proponent must satisfy the surrogate that it was executed with all the formalities required by law and, if the testator was blind, he must show that he was made aware of the full contents of the paper he was executing. This rule, however, refers to the probate of a will by the surrogate. *Primmer v. Primmer* (1915), 166 App. Div. 402, 151 N. Y. Supp. 1024.

Acknowledgment of signature.—Acknowledgment of the signature is equivalent to the signing in the presence of the witnesses. *Hoysradt v. Kingman* (1860), 22 N. Y. 372; *Chaffee v. Baptist M. Convention* (1843), 10 Paige 85, 40 Am. Dec. 225.

It is essential that the witnesses should either see the testator subscribe his name, or that, with the signature visible to him and to them, he should acknowledge it to be his signature. *Matter of Mackay* (1888), 110 N. Y. 611, 18 N. E. 433, 1 L. R. A. 491, 6 Am. St. Rep. 409. In this case the will was handed to the witnesses so folded that they could not, and they did not see his signature or any part thereof except the attestation clause. *Matter of Laudy* (1896), 148 N. Y. 403, 42 N. E. 1061.

The declaration, in the presence of another, by one who has affixed his signature to a paper, that the same is his last will accompanied with a request that the latter attest, is sufficient. *Taylor v. Brodhead* (1878), 5 Redf. 624.

Where the name of a person appears to an instrument purporting to be his will, and he acknowledges to witnesses that it was subscribed by him, or for him, and adopted by him, it is a good subscription of the paper as a will; but in the absence of a subscription in the presence of the witness, there must be substantially such an acknowledgment. *Sisters of Charity v. Kelly* (1876), 67 N. Y. 409.

Separate acknowledgment to witnesses.—An acknowledgment of the execution by the testator, made to a witness after the latter has signed, is sufficient, where the two acts are performed on the same occasion. The several independent requirements of the statute may be joint in their execution. *Lyman v. Phillips* (1883), 3 Dem. 459, *affd.* 1 How. Pr. N. S. 291, *affd.* 98 N. Y. 267. A will may be subscribed by the testator in the presence of one witness, and the signature thereafter acknowledged to the other. *Gardiner v. Raines* (1884), 3 Dem. 98.

The words of request or acknowledgment may proceed from another, and will be regarded as those of the testator if the circumstances show that he adopted them, and that the party speaking them was acting for him with his assent. *Gilbert v. Knox* (1873), 52 N. Y. 125.

Where the testator addresses the witnesses in words which are calculated and intended by him to give them to understand that the signature is his and are so understood by them, these facts would seem to amount to an acknowledgment of the genuineness of the signature within the meaning of the statute. *Matter of Austin* (1887), 45 Hun 1, 3.

The acknowledgment is sufficient even if the attesting witness did not look closely to see the testatrix's signature acknowledged by her, where it was visible and they heard her acknowledgment that the instrument was her last will, and there is no claim of fraud. *Matter of Laudy* (1896), 161 N. Y. 429, 55 N. E. 914, s. c. 148 N. Y. 403, 42 N. E. 1061.

The acknowledgment is sufficient if the testator, after having signed in the presence of one of the attesting witnesses, produced the paper bearing his signature to a second witness, declared it to be his will, and requested such person to sign as a witness. *Willis v. Mott* (1867), 36 N. Y. 486.

Where the testator produces a paper signed by himself and requests the witnesses to attest it, and declares the same to be his last will and testament, it is a sufficient acknowledgment. The subscription cannot be concealed from the witnesses. *Baskin v. Baskin* (1867), 36 N. Y. 416; citing *Peck v. Cary* (1863), 27 N. Y. 9, 29, 84 Am. Dec. 220; *Tarrent v. Ware* (1862), 25 N. Y. 425 note.

Although one of the witnesses partly wrote his name without knowing the instrument was a will, the testator's declaration and acknowledgment being made, however, before the witness completed his signature, it is a sufficient compliance with the statute. It seems, that the publication of a paper containing the testator's signature and request to witness it, may be regarded as an acknowledgment of the signature. *Matter of Will of Phillips* (1885), 98 N. Y. 267.

Where a testator produces a paper to which he has already personally subscribed his name, and exhibits the same so subscribed to another, with the request that the latter sign it as a witness, at the same time declaring it to be his last will and testament, the acknowledgment is sufficient. *Porteus v. Holm* (1885), 4 Dem. 14.

An acknowledgment by a testator of his signature to a will is sufficient, although he does not sign in the presence of the witnesses. *Matter of Engler* (1907), 56 Misc. 218, 220, 107 N. Y. Supp. 222.

Presentation of a will to the witnesses with the signature in plain sight is a substantial acknowledgment of the signature. *Matter of Lang* (1894), 9 Misc. 521, 30 N. Y. Supp. 388.

Acknowledgment of signature to will held sufficient. *Matter of Higgins* (1884), 94 N. Y. 554. .

Acknowledgment insufficient.—Where the testator made known the nature of the instrument to the witnesses, but failed to acknowledge that what purported to be his signature was in fact made by him, it was held that the acknowledgment was insufficient. *Mitchell v. Mitchell* (1878), 16 Hun 97, *affd.* 77 N. Y. 596; *Matter of Turrell* (1900), 47 App. Div. 560, 62 N. Y. Supp. 1053, *affd.* 166 N. Y. 330, 59 N. E. 910; *Woolley v. Woolley* (1884), 95 N. Y. 231; *Jones v. Jones* (1886), 42 Hun 563; *Butler v. Benson* (1847), 1 Barb. 526; *Lewis v. Lewis* (1854), 11 N. Y. 220. A statement that the instrument is the will of the decedent does not embody an acknowledgment of the signature. *In re Booth* (1886), 13 N. Y. St. Rep. 344, 23 Wk. Dig. 248.

Where a will has not been signed by the testator in the presence of either witness he must, with his signature to the will visible, acknowledge the same to each of the witnesses. An acknowledgment to one of the witnesses is insufficient. Hence, where a testator drew his own will on an ordinary printed form, signed the same at the end thereof, and also wrote his name in the attestation clause merely for the purpose of identification, an acknowledgment of his signature to one of the witnesses with the will so folded that his signature at the end thereof was not visible, the witness seeing only his signature in the attestation clause, is insufficient and probate will be refused although his signature was properly acknowledged to the other witness. *Matter of Keefe* (1913), 155 App. Div. 575, 141 N. Y. Supp. 5, *affd.* 209 N. Y. 535, 102 N. E. 1104.

Where an instrument declared by the testatrix to be her last will was not subscribed by her in the presence of either of the attesting witnesses, and neither of them saw her signature to it, and only one of them is able to testify that she acknowledged her signature, it was held that the execution was not sufficient. *Matter of Abercrombie* (1897), 24 App. Div. 407, 48 N. Y. Supp. 414; *Matter of McDougall* (1895), 87 Hun 349, 34 N. Y. Supp. 302; *Matter of Van Gelson* (1888), 47 Hun 5; *Baker v. Woodbridge* (1873), 66 Barb. 261. See generally as to sufficiency of acknowledgment and execution. *Dack v. Dack* (1881), 84 N. Y. 663; *Matter of Gilman* (1862), 38 Barb. 364; *Whitbeck v. Patterson* (1851), 10 Barb. 608.

Declaration a publication of instrument.—A declaration is an open act, a manifest signification or assertion, or assent by words or signs; and it must be made to appear by unequivocal circumstances, so that the testamentary character of the instrument is shown to have been communicated by the testator to the witnesses. *Ex parte Beers* (1862), 2 Bradf. 163. Where the testator stated that the instrument was his "will or agreement" it was held insufficient. *Rutherford v. Rutherford* (1845), 1 Den. 33, 43 Am. Dec. 644; *McCord v. Lounsbury* (1887), 5 Dem. 68; *Van Hooser v. Van Hooser* (1861), 1 Redf. 365.

The testator must declare his will to be such, either at the time of subscribing it or of acknowledging the execution thereof, and it is not sufficient that, upon a subsequent occasion, he states to the witnesses that the instrument signed by them was his last will and testament. *Matter of Dale* (1890), 56 Hun 169, 9 N. Y. Supp. 396, *affd.* 134 N. Y. 614, 32 N. E. 649.

"It is essential to the due publication of a will either that the witnesses should see the testator sign the will, or that such signature should have been affixed at some prior time and be open to their inspection." *Matter of Bernsee* (1894), 141 N. Y. 389, 392.

Declaration must be made in the presence of both the attesting witnesses. *Seymour v. Van Wyck* (1851), 6 N. Y. 120; *Tyler v. Mafes* (1854), 19 Barb. 448. But

publication may be made to the subscribing witnesses on different occasions, and when they are apart from each other. *Barry v. Brown* (1883), 2 Dem. 309.

Where it appears that a testator, by his acts at the time of executing his will, wished it to be understood that the paper signed by him was his will, and that he requested the witnesses to sign it as such, which they did, there has been a compliance with the statute. *Matter of Kindberg* (1910), 141 App. Div. 188, 126 N. Y. Supp. 33.

Where a testator exhibits a paper drawn and subscribed by him, with the subscription in plain sight, and declares to the witnesses that it is his last will and testament and asks them to sign as witnesses, he has done all that the statute requires and there is a sufficient publication of a will and acknowledgment of testator's subscription thereto. *Matter of Bassett* (1914), 84 Misc. 656, 146 N. Y. Supp. 842.

A testator must, in the presence of two witnesses, declare the instrument to be his last will and testament. *Abbey v. Christy* (1867), 49 Barb. 276, holding publication of will insufficient.

Publication held sufficient. *Matter of Forman's Will* (1869), 54 Barb. 274.

Where an alleged will having no attestation clause, though signed by the alleged testatrix and subscribing witnesses at her request, was not at any time declared by the testatrix to be her last will and testament, probate must be refused on the ground that there was no publication as required by statute. *Matter of Shaper* (1914), 86 Misc. 577, 149 N. Y. Supp. 468.

Probate refused where there is no proof that testatrix mentioned to attesting witnesses that the paper signed was a will. *Matter of Bryant* (1914), 148 N. Y. Supp. 917, *affd.* 165 App. Div. 955, 150 N. Y. Supp. 474.

No particular form of words is necessary under the statute to effect publication.—In a case where it is conclusively established that the testator and the witnesses met for a testamentary purpose, and that each of them understood the character of the instrument at the time it was executed, and one of the witnesses at request of testator made a copy of the will; and deceased told him that he had asked the other two witnesses to witness the will; that he read the will and spent some time perusing it to see if it were correct and signed his initials at the end of each page and then signed his name at the foot of the will; that this was done in the presence of the witnesses and that each witness then signed in the presence of the other; and he indicated where the witnesses were to sign, it is a valid publication within the meaning of the statute. And this, although as to two of the three witnesses there is no direct evidence that the testator in so many words asked them to witness the will. The testator knew and the witnesses understood, not only from his words but from his acts and conduct, that the instrument was his will. *Matter of Balmforth* (1909), 133 App. Div. 521, 117 N. Y. Supp. 1065; see also *Matter of DeHart* (1910), 67 Misc. 13, 122 N. Y. Supp. 220.

Subdivision 3 as to declaration does not require a literal adherence to its own words and phrases. A substantial compliance with its terms is all that is required. It is sufficient if the testator in some manner communicates to the witnesses the fact that the paper which he is signing and which they are requested to witness is understood and intended by him to be his will. The information need not consist of an oral assertion. It may be made known to the witnesses by all the circumstances attending the acts, and by the acts and conduct of the testator. *Perham v. Cottle* (1916), 98 Misc. 48, 55.

A literal adherence to the words of the statute is not required, but the necessary information may be given in any manner capable of conveying to the minds of the witnesses the testator's will. *Matter of Beckett* (1886), 103 N. Y. 167, 8 N. E.

506; *Torry v. Bowin* (1853), 15 Barb. 304. It is necessary that the testator should in some manner communicate to the attesting witnesses at the time of his subscription or acknowledgment, the information that the instrument which they are called upon to sign, as witnesses, is his will and that it is his desire that they sign the will as witnesses. If either communication is made through the intervention of a third person, it must be so made in the presence and hearing of the attesting witnesses. *Burke v. Nolan* (1883), 1 Dem. 436.

Publication may be made in any form whereby the testator indicates that the instrument the witnesses are requested to subscribe as such is intended and understood by him to be his executed will. *Coffin v. Coffin* (1861), 23 N. Y. 9, 80 Am. Dec. 235; *Nexsen v. Nexsen* (1865), 2 Keyes 229; *Lane v. Lane* (1884), 95 N. Y. 494; *Matter of Hunt* (1888), 110 N. Y. 278, 18 N. E. 106; *Matter of Carey* (1897), 24 App. Div. 531, 49 N. Y. Supp. 32; *Darling v. Arthur* (1880), 22 Hun 84; *Seguine v. Seguine* (1848), 2 Barb. 385; *Nipper v. Groesbeck* (1865), 22 Barb. 670; *Remsen v. Brinckerhoff* (1841), 26 Wend. 325, 331, 37 Am. Dec. 251; *Thompson v. Seastedt* (1875), 3 Hun 395, 6 T. & C. 78; *Walsh v. Laffan* (1884), 2 Dem. 498.

Knowledge of witness derived from other source.—It is not sufficient that the nature of the instrument was known to the testator and subscribing witnesses at the time it was executed. The testator must, at the time of subscribing or acknowledging his subscription, in the presence of the witnesses, "declare the instrument, so subscribed, to be his last will and testament." Knowledge derived from any other source or at any other time, cannot stand for the declaration of the testator. *Gilbert v. Knox* (1873), 52 N. Y. 125.

Where the witnesses had been sent for to witness the testator's will, and went for that purpose, but had no other information, that they were witnessing his will, the publication was insufficient. *Bagley v. Blackman* (1870), 2 Lans. 41.

Declaration at time of signing.—It is not necessary that the declaration of the testator, that the instrument signed by him is his will, should be made in the very act of signing. It is sufficient if the acts be done on one occasion, and form parts of the same transaction. *Matter of Collins* (1879), 5 Redf. 20.

Words of declaration required.—Where the testator failed to declare to the subscribing witnesses that the instrument which they were called to attest was his last will and testament, but simply acknowledged his signature, and requested them to sign at a particular place, it was held that this was not a valid declaration. *Hunt v. Mootrie* (1855), 3 Bradf. 322, *affd.* 26 Barb. 252, *revd.* 23 N. Y. 394. Where the testatrix expressly denied that the instrument was her last will, saying merely, that it was the last she had made, the court held that this was not such a declaration as the statute requires. *Kingsley v. Blanchard* (1860), 66 Barb. 317.

Publication is sufficiently shown by evidence that in the hearing of both witnesses, the testatrix asked the witness to draw her last will and testament and when he had done so, and had read it aloud to her, she approved and signed it. *Burk's Will* (1876), 2 Redf. 239. But otherwise where the will was read to and approved by the testatrix in the presence of only one of the two subscribing witnesses. *Neugent v. Neugent* (1876), 2 Redf. 369.

The fact that after a will had been read to a testatrix she, in the presence of both the subscribing witnesses, said that "it was all right," constitutes a valid publication. *Matter of Buel* (1899), 44 App. Div. 4, 60 N. Y. Supp. 385. But where the testator is very feeble and able to speak but faintly, his adoption of the acts of another person must be clearly proved. *Heath v. Cole* (1878), 15 Hun 100.

Where the testator answered in the affirmative to an inquiry, whether the instrument which he had subscribed was his last will and testament, it was held that this was sufficient evidence of publication. *Stewart's Will* (1874), 2 Redf. 77.

Where a will was read aloud to the testator in the presence of both witnesses and contained a statement that the testator declared "herewith in the presence of the two undersigned witnesses" that after his death a person named should "inherit whatever estate" he had; and where the testator thereupon signed the will and the witnesses thereupon signed their names thereto, there is sufficient evidence of publication and request by the testator that the witnesses subscribe the instrument. *Matter of Luthgen* (1908), 61 Misc. 544, 115 N. Y. Supp. 861.

Where as to one of the subscribing witnesses to a will drawn upon a printed blank there was a compliance with the statutory requirements, and thereafter the testator presented the paper with his signature upon it to his brother, the other witness, and asked him to witness his signature, which he did, but there was no declaration then that the instrument was a will, nor any circumstance from which such a declaration could be implied, and where after remaining together about an hour they went to luncheon together and at the table the testator told his brother that the paper was his will, to which the brother made no reply and did not again see the paper, the request previously made was not exhausted at the moment of its utterance but reached forward and joining itself to the declaration when made invalidated the execution of the instrument. *Matter of Baldwin* (1910), 67 Misc. 329, 124 N. Y. Supp. 612, *affd.* 142 App. Div. 904, 126 N. Y. Supp. 1121, *affd.* 202 N. Y. 548, 95 N. E. 1122.

Presumption that instrument was executed in conformity with statute.—Where an instrument in writing propounded as a last will and testament is found last in testator's custody, subscribed by him and two witnesses also deceased, it will be presumed that the instrument was executed in conformity with the Statute of Wills, and probate thereof will be decreed. *Matter of Rosenthal* (1917), 100 Misc. 84, N. Y. Supp.

The purpose of publication is to make sure that the testator is aware that he is making a will, and that he may not be imposed upon and procured to sign a will when he supposes it to be some other instrument. *Trustees of Auburn Seminary v. Calhoun* (1862), 25 N. Y. 422, 82 Am. Dec. 369; *Matter of Marley* (1910), 140 App. Div. 823, 125 N. Y. Supp. 886.

Signature by witnesses.—The witnesses need not sign in the presence of each other nor in the presence of the testator. *Willis v. Mott* (1867), 36 N. Y. 486; *Matter of Carey* (1895), 14 Misc. 486, 36 N. Y. Supp. 817, *affd.* 24 App. Div. 531, 49 N. Y. Supp. 32; *Lyon v. Smith* (1851), 11 Barb. 124, 126; *Ruddon v. McDonald* (1850), 1 Bradf. 352; *Herrick v. Snyder* (1899), 27 Misc. 462, 59 N. Y. Supp. 229; *Matter of Diefenthaler* (1903), 39 Misc. 765, 80 N. Y. Supp. 1121. It is not essential to the validity of a will that each witness sign in the presence of the other provided the will is signed in the presence of the testator. *Matter of Engler* (1907), 56 Misc. 218, 220, 107 N. Y. Supp. 222.

The simultaneous presence of testator and subscribing witnesses is not a requisite to the due execution of a last will. *Matter of Roe* (1913), 82 Misc. 565, 143 N. Y. Supp. 999. It is not essential that the testator and witnesses should be within the same enclosure, but that the latter should either actually see the former write his name, or have their attention directed to the act of signing while the same is taking place. *Gardiner v. Raines* (1884), 3 Dem. 98; *Spaulding v. Gibbons* (1881), 5 Redf. 316.

The statute requires each of the witnesses to sign his own name with the intention of becoming an attesting witness. *Ex parte Le Roy* (1855), 3 Bradf. 227. Both witnesses must sign during the life of the testator. *Matter of Fish* (1895), 88 Hun 56, 34 N. Y. Supp. 536, *affd.* 153 N. Y. 679, 48 N. E. 1104.

Place of signature by witnesses.—The witnesses, who are to attest the subscrip-

tion and publication of a will of the testator, should sign the same after the subscription by him. *Jackson v. Jackson* (1868), 39 N. Y. 153; *Knapp v. Reilly* (1885), 3 Dem. 427. The signatures of the attesting witnesses need not immediately follow that of the testator, but the attestation clause may intervene. *Williamson v. Williamson* (1877), 2 Redf. 449.

A will, prepared on the first page of a printed blank, was signed by the testator and duly attested by the subscribing witnesses; on the second page there were further provisions of disposal signed by the testator, but not attested by the witnesses. It was held that the writing on the first page, being a complete instrument, constituted a valid will. *Will of Mandelick* (1893), 6 Misc. 71, 26 N. Y. Supp. 888.

Where, upon the face of a paper offered for probate as a last will and testament, after the subscription by the testatrix, appeared words bequeathing legacies to two persons, following which was the date and signatures of the subscribing witnesses without any attestation clause and with a considerable blank space intervening between their signatures and that of the testatrix, the paper may be admitted to probate, when it appears that these words bestowing legacies were written by the residuary legatee several days after the execution of the will, and when the testatrix was not present. *Matter of Gartland* (1908), 60 Misc. 31, 112 N. Y. Supp. 718, *affd.* 135 App. Div. 915, 119 N. Y. Supp. 1125.

Where one of the witnesses to a will, without any fraud or intent to wrong, signs the name of the testator to the attestation clause instead of his own name, the will may be admitted to probate. *Matter of Jacobs* (1911), 73 Misc. 162, 132 N. Y. Supp. 481.

Witness signing by mark.—The subscribing witness may sign by making his mark. The establishment of the will may be more difficult in the case of the death of such witness. *Morris v. Kniffin*, (1861), 37 Barb. 336.

Request to sign.—The testator's request to the witnesses, to subscribe his will may be made through any words or acts which clearly evince that desire to them. *Coffin v. Coffin* (1861), 23 N. Y. 9, 80 Am. Dec. 235; *Belding v. Leichardt* (1874), 56 N. Y. 680; *Thompson v. Stevens* (1875), 62 N. Y. 634; *McDonough v. Loughlin* (1855), 20 Barb. 238. Request made by the person superintending the execution of the will and silently acquiesced in by the testator is sufficient. *Matter of Nelson* (1894), 141 N. Y. 152, 86 N. E. 3; *Matter of Hardenburg* (1895), 85 Hun 580, 33 N. Y. Supp. 150; *Matter of McGraw* (1896), 9 App. Div. 372, 41 N. Y. Supp. 481; *Matter of McLarney* (1895), 90 Hun 361, 35 N. Y. Supp. 893, *affd.* 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664.

The words of request or acknowledgment may proceed from another and will be regarded as those of the testator if the circumstances show that he adopted them, and that the party speaking them was acting for him, with his assent. *Gilbert v. Knox* (1873), 52 N. Y. 125; *Doe v. Roe* (1948), 2 Barb. 200; *Troup v. Reid* (1884), 2 Dem. 471.

Publication and the request of testatrix to the subscribing witnesses to attest a will may be made to them on different occasions and when they are separated and apart, but both a sufficient publication and such a request by testatrix must be proved by each of two subscribing witnesses or there is no due execution of the instrument as a last will. *Matter of Roe* (1913), 82 Misc. 565, 143 N. Y. Supp. 999.

Witnesses; number of.—Due execution of a will before two subscribing witnesses is sufficient, and its validity is not affected by the fact that when a third and unnecessary witness was asked to sign the formalities of the statute were not complied with. *Matter of Sizer* (1908), 129 App. Div. 7, 113 N. Y. Supp. 210, *affd.* 195 N. Y. 528, 88 N. E. 1122.

Will executed in another state.—The provision of the statute requiring wills to be executed in the presence of two witnesses does not apply to a will of personal property executed in another state by a person domiciled where such will was executed, and who continued to reside there until his death. *Matter of Robert's Will* (1840), 8 Paige 446. See *Moultrie v. Hunt* (1861), 23 N. Y. 394.

Attestation clause; omission of word "him"; witnesses.—Where an attestation clause was very slightly defective in that because of the omission of the pronoun *him* it did not conclusively appear therefrom that it was the testator who published the will, and does not refresh the recollection of the survivor of the two subscribing witnesses, a lawyer, who drew the will but had no independent recollection of the circumstances attending the execution of the will and who testifies to nothing which makes against the validity of its execution, and the verity of the signature of the deceased subscribing witnesses is established by independent testimony, the will which the proof shows to have been last in testator's own custody will be admitted to probate. *Matter of Reynolds* (1914), 87 Misc. 569, 151 N. Y. Supp. 380.

Absence of attestation clause; proof of instrument where attesting witnesses are dead.—The existence of an attestation clause is one of the circumstances attending the execution of a will from which arises a very strong inference of fact that due execution was had, the underlying reason being that all persons are presumed to know the contents of what they sign and so likewise are presumed to sign in good faith. Thus when a signed attestation clause is found in a will, which recites due execution, that fact is deemed a basis for a strong inference that there was an execution of the will according to the recitals. The existence of an attestation clause is simply to create very strong presumptive evidence of other facts. Even without an attestation clause, facts may be shown constituting such presumptive evidence, and, although the probative force of such facts may or may not be as strong as that of an attestation clause, the difference is in the degree or weight, and not in kind. So where, although a will was without an attestation clause and all three of the subscribing witnesses are dead at the time of its probate, proof of the signatures of the testatrix and all the witnesses, and that the proposed will was part of a scheme between the husband and wife for mutual wills, that the testatrix had testamentary capacity and was free from restraint, that the alleged will was drawn by her husband, that the husband had prepared another paper similar in terms to be executed by him to carry out the scheme of mutual wills, that the husband's will was executed, that the paper purporting to be the will of his wife was executed at the same time, makes *prima facie* proof of due execution. *Matter of Abel* (1910), 136 App. Div. 788, 121 N. Y. Supp. 452, affg. 63 Misc. 169, 118 N. Y. Supp. 429.

Although an attestation clause is not necessary for the proof of a will, yet where the subscribing witnesses are dead its absence makes against the proponent. A clause at the end of a holographic will which states that it was "sworn and described" before a notary on a certain date in the presence of two witnesses who signed their names and which is also signed by the notary who affixed his seal, does not take the place of a formal attestation clause. *Matter of Ellery* (1910), 139 App. Div. 244, 123 N. Y. Supp. 1015.

Presence of an attorney, like the certificate of attestation annexed to a will, affords some presumption of regularity in the execution. *Matter of Klinaner* (1911), 71 Misc. 620, 130 N. Y. Supp. 1059.

Where the will was prepared and its execution supervised by a competent attorney, and one of the three subscribing witnesses testified to a memory of all the facts sufficient to constitute a due execution and publication, probate will be

deceded though the other witnesses do not in all things remember, as matter of independent memory, all the circumstances surrounding the testamentary act. *Matter of Seymour* (1912), 76 Misc. 371, 136 N. Y. Supp. 942.

Effect of subsequent acknowledgment of subscription and subsequent attestation by witness after a defective execution.—The paper offered for probate was signed by the testatrix and by the witnesses with such disregard of statutory requirements that its invalidity would have to be confessed, were it not that, immediately thereafter and upon a separate occasion, the witnesses were brought into the presence of the testatrix, and the testatrix acknowledged her subscription thereto in the presence of each of the attesting witnesses, declared the instrument to be her last will and testament and requested the witnesses to attest her act; and the witnesses, with the knowledge of the testatrix, reaffirmed their previous signatures without further writing. Upon this second attempt nothing was wanting to a complete transaction, unless it be that the witnesses did not then write their names anew. The court held that where the signatures of the testatrix and of the witnesses all appear upon an instrument which has not yet been properly executed and attested, the witnesses may be said to have signed as such for the purpose of the statute if, as a new transaction, the testatrix acknowledges her signature, declares her will and requests the witnesses to attest the same, and the witnesses, thereupon, to the knowledge of the testatrix, accede to her request and adopt their previous signatures as an attestation of the transaction. *Matter of Karrer* (1909), 63 Misc. 174, 118 N. Y. Supp. 427.

Holographic will.—The statute makes no exception with respect to a holographic will in its requirements as to execution. In all such cases a substantial compliance will be sufficient and no particular form of words is required, or is necessary, to effect publication; but some compliance must be proved. *Matter of Turrell* (1901), 166 N. Y. 330, 336, 59 N. E. 910.

The rule in respect to holographic wills as to the manner and method of publication is not so close and severe as where the will is drawn and executed under the direction of an experienced scrivener. A substantial compliance with the statute is sufficient. *Matter of Livingston* (1913), 158 App. Div. 69, 142 N. Y. Supp. 829.

Statutory requirements as to publication are not so strictly enforced where the will is holographic. *Matter of Marley* (1910), 140 App. Div. 823, 125 N. Y. Supp. 886.

Where both of the subscribing witnesses to a holographic will positively swear that there was no publication of the instrument by the testator and that they did not know that it was a will until long after they had signed it, probate will be refused. *Matter of Wilmerding* (1912), 75 Misc. 432, 135 N. Y. Supp. 516.

About six days after testatrix had taken bichloride of mercury, presumably with suicidal intent, she requested that her mother and two witnesses be sent for as she desired to make her will. Shortly after their arrival at the hospital the two witnesses were taken into the room where testatrix, sitting up in bed, had a paper which had been drawn and signed by her. The nurse handed the paper to the two witnesses and said, "this is Anna's will and she wants you to sign it," and testatrix answered, "Yes," according to the testimony of one subscribing witness, and nodded her head, indicating "Yes," according to the testimony of the other subscribing witness. Both witnesses then in the presence of each and in the presence of testatrix signed their names as witnesses to the will. Within two weeks testatrix died from the effects of bichloride poisoning. Held, that there was a practical compliance with the statute as to due execution of the instrument as a last will and that it should be admitted to probate. *Matter of Holmberg* (1913), 83 Misc. 245, 145 N. Y. Supp. 846.

The illiteracy of a testator who left a holographic will may be taken into consideration in determining whether alterations and mutilations appearing in the instrument were made before or after execution. *Matter of Wood* (1911), 144 App. Div. 259, 129 N. Y. Supp. 5.

Due execution of will entirely in handwriting of testatrix established. *Matter of MacDowell* (1915), 170 App. Div. 245, 156 N. Y. Supp. 387.

Testimony of subscribing witnesses; sufficiency of, when corroborated by testimony of attorney who drew the will. *Matter of King* (1915), 89 Misc. 638, 154 N. Y. Supp. 238.

The probate of a will should not be refused because the testator chanced to select forgetful or untruthful witnesses. *Matter of Marley* (1910), 140 App. Div. 823, 125 N. Y. Supp. 886.

Where the paper has a full attestation clause signed by two witnesses, one of whom testified that testator presented the paper to both of them with his subscription in plain sight and in substance and effect told them that it was his will and asked them to sign it as witnesses, the instrument may be admitted to probate though the other subscribing witness testifies that the testator did not tell him that it was his will and did not ask him to sign as a witness, where the court is satisfied from his testimony that he has forgotten the transaction. *Matter of Bassett* (1914), 84 Misc. 656, 146 N. Y. Supp. 842.

Where the testimony of two of the three witnesses to a will is precise and sufficient to prove that the execution of the paper propounded conformed with all the requirements of statute, no presumption against the sufficiency of the execution arises from the fact that the third witness has forgotten nearly all the essentials to a due execution. *Matter of McCabe* (1911), 75 Misc. 35, 134 N. Y. Supp. 682.

Where it appears that neither of the subscribing witnesses to a will saw the testatrix sign it, and one of them is not positive as to whether or not he observed her signature thereto, and the other, after a lapse of three years, at the request of testatrix signed the will as a subscribing witness, probate will be denied. *Matter of Harty* (1914), 85 Misc. 628, 148 N. Y. Supp. 1052.

Subscribing witnesses; declaration by subscribing witness when given credence in preference to opinion of expert.—Where the subscribing witnesses to a last will swear positively that the testator personally signed it, the declarations of one of them contrary to his testimony and certificate of attestation, testified to by a contestant of the will, are of trifling weight. The testimony of subscribing witnesses that a will was subscribed by the testator should be given credence in preference to the opinion of an expert that the subscription was not that of testator. *Matter of Hoffman* (1914), 86 Misc. 365, 148 N. Y. Supp. 357.

Form and construction of will.—Form should not be raised above substance in order to destroy a will. The substantial thing is whether a paper reads straightforward and without interruption from the beginning to the end, and when thus read the signature is found at the end. *Matter of Field* (1912), 204 N. Y. 448, 97 N. E. 881, revg. 144 App. Div. 737, 129 N. Y. Supp. 590.

The law does not require that a will should assume any particular form or language. It is sufficient if the instrument discloses the intention of the maker respecting the disposition of his property. *Matter of Hansen* (1911), 72 Misc. 610, 132 N. Y. Supp. 257.

It is an established rule that the courts should give effect to every word and provision of a will, in so far as they may, without violating the intent of the testator or well-established rules of law. *Eidt v. Eidt* (1911), 203 N. Y. 325, 96 N. E. 729.

Courts have no power to construct a will when none has in fact been made;

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nor to import into a will new provisions which are designed to create a testamentary disposition which is neither expressed nor necessarily to be implied. *Dreyer v. Reisman* (1911), 202 N. Y. 476, 96 N. E. 90, 36 L. R. A. (N. S.) 618.

Punctuation cannot control in the construction of a will and when wanting may be supplied in order to separate words that are not clearly related in sequence. *Matter of Hansen* (1911), 72 Misc. 610, 132 N. Y. Supp. 257.

A seal is not requisite to a will of real or personal estate. *Matter of Diez* (1872), 50 N. Y. 88.

§ 22. Witnesses to will to write names and places of residence.—The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 41.

References.—Attorney may testify as to execution of will prepared and witnessed by him, Code Civil Procedure § 836. Witness not disqualified because beneficiary, *Id.* § 2545.

Use of stamp.—The requirement of this section, that a witness to a will shall write opposite his name his place of residence, is sufficiently complied with where he stamped opposite his name with a seal the words "Notary Public, New York County." *Bossie v. Edelson* (1912), 76 Misc. 234, 134 N. Y. Supp. 615.

Signature as witness of person who signed testator's name around his mark or guided his hand. *Matter of McCabe* (1911), 75 Misc. 35, 134 N. Y. Supp. 682; *Matter of Kearney* (1902), 69 App. Div. 481, 74 N. Y. Supp. 1045; *Matter of Knight* (1914), 87 Misc. 577, 583, 150 N. Y. Supp. 137; *Robins v. Coryell* (1853), 27 Barb. 556, 561; *Meehan v. Roucke* (1853), 2 Bradf. 385.

A will is not void, because the person who signed the testator's name to the will, by his direction, neglected to write his own name as a witness. *Hollenbeck v. Van Valkenburgh* (1850), 5 How. Pr. 281.

Limitation of actions for penalties.—The three years' statute of limitations against the right to enforce a penalty imposed by the statute upon a witness to a will who omits to write his address opposite to his signature, does not begin to run until the death of the testator. *Dodge v. Cornelius* (1899), 168 N. Y. 242, 61 N. E. 244, revg. 40 App. Div. 18, 57 N. Y. Supp. 791.

§ 23. What wills may be proved.—A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state, and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property executed by a person not a resident of the state, according to the laws of the testator's residence, may be admitted to probate in this state.

Source.—Code Civ. Pro. § 2611, as amended by L. 1893, ch. 686; originally derived from L. 1876, ch. 118, §§ 1, 2.

References.—As to probate of will and grant of letters thereupon; Code Civ. Pro. (Surrogates' Code) §§ 2607-2641.

Probate of wills of citizens of this country domiciled in Great Britain or any of its dependencies, Id. § 2608. Ancillary letters upon foreign probate, Id. § 2629.

What is a will.—An instrument that is not to have any operation until after death is a will, notwithstanding that it may have been executed in pursuance of a previous promise or obligation appearing upon its face; the distinguishing feature of a will is that it is not to take effect except upon the death of a testator. *Matter of Will of Diez* (1872), 50 N. Y. 88. An instrument conveying land, which is not intended to take effect until after the death of the person executing it, is properly construed to be a will and not a deed and may be revoked by the person making it during his lifetime. *Perry v. Perry* (1892), 49 N. Y. St. Rep. 291, 21 N. Y. Supp. 133.

Although a proper definition of a will is an instrument by which a person makes a disposition of his property to take effect after his decease, every word contained in the instrument may not relate to or bear upon the disposition of property. *Younger v. Duffie* (1884), 94 N. Y. 535, 46 Am. Rep. 156. An instrument duly executed by the deceased, which simply nominates certain persons as executors and authorizes them to sell real estate, is a will and is entitled to probate as such. *Barber v. Barber* (1879), 17 Hun 72. Provisions providing for appointment of executors, direction to pay debts, and directions for the distribution of the residue are not essential to a valid will. *Matter of Nies* (1887), 13 N. Y. St. Rep. 756.

An instrument was executed under seal and acknowledged, whereby the owner undertook for a good consideration to "give, bequeath and convey," and referred to an accompanying paper for a full description; the instrument was to take effect upon the maker's death and was delivered by him to a third party for delivery to the grantee at the time stated, and was on the maker's death delivered to the grantee and recorded. It was held that the instrument was a deed and not a will and conveyed to the grantee a good title in fee. *Campbell v. Morgan* (1893), 68 Hun 490, 22 N. Y. Supp. 1001.

Whether a paper is a will or not in its character does not depend upon the maker declaring it to be a will but upon its contents. *Carle v. Underhill* (1854), 3 Bradf. 101. A will may be entitled to probate although all its dispositions of property may be invalid. *Estate of McMulkin* (1880), 5 Dem. 295, 5 N. Y. St. Rep. 349.

A writing containing this statement, "this writing is instead of formal will which I intend to make later," duly signed by testatrix and attested by two witnesses, was held a valid will. *Matter of Beebe* (1888), 6 Dem. 43, 19 N. Y. St. Rep. 833.

Libelous matter.—Wording in a will which is libelous and superfluous should not be reduced to probate and record, but the dispositive words only should be admitted. *Matter of T. B.* (1892), 27 Abb. N. C. 425, 18 N. Y. Supp. 214.

Reference to other papers.—A paper or document containing testamentary provisions not authenticated according to the provisions of our statute of wills is not a valid testamentary disposition of property, simply because it was referred to in the body of a will. *Matter of Will of O'Neill* (1883), 91 N. Y. 516; distinguishing *Tonnele v. Hall* (1850), 4 N. Y. 140.

Where a will, otherwise properly executed, refers to another paper already written, and was described so as to leave no doubt of its identity, such paper, it seems,

is a part of the will, although the paper be not subscribed or even attached. *Tonnele v. Hall* (1850), 4 N. Y. 140; *Matter of Will of O'Neil* (1883), 91 N. Y. 516; *Brown v. Clark* (1879), 77 N. Y. 369.

Reference may be made in a will to another document for the purposes of description, but there can be no valid testamentary disposition unless contained in the will; and the testator cannot reserve the power of giving or declare that he does give by an instrument not formally executed as for instance a schedule intended to be attached to the will. Such schedule, as well as the clause in the will referring to it, are void, but the failure of that provision will not avoid the entire will. *Thompson v. Quimby* (1853), 2 Bradf. 449, affd. 21 Barb. 107; *Matter of Frey* (1889), 2 Connolly 70, 26 N. Y. St. Rep. 425, 7 N. Y. Supp. 330.

An unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument. *Booth v. Baptist Church* (1891), 126 N. Y. 215, 28 N. E. 238. So held of original declarations of trust deposited with certificates of stocks and separate from the will. *Locke v. Rings* (1892), 66 Hun 428, 21 N. Y. Supp. 524, revd. in *Locke v. Farmers' Loan & Trust Co.*, 140 N. Y. 135, 35 N. E. 578.

In order to incorporate a paper into a will, by reference, the testator must distinctly describe it, and it must be then in existence. *Dyer v. Erving* (1882), 2 Dem. 160. Partial probate cannot be granted where several writings are propounded as a will, unless the matter rejected appears to have formed no part of the testamentary purpose. *Dennett v. Taylor* (1882), 5 Redf. 561.

A memorandum forming no part of the instrument cannot be received as a part of the will so as to change a general into a specific legacy. *Booth v. Baptist Church* (1891), 126 N. Y. 215, 28 N. E. 238.

Slight evidence of testamentary connection between documents, and the last will referring to "memorandums left with this will," is afforded by the mere fact of their being found in the same package or enclosure after testator's death. *Dyer v. Erving* (1882), 2 Dem. 160.

The affixing by pins, of another paper containing additional bequests, at a blank space in a will preceding the executors' clause, renders the will void. *Matter of Fultz* (1889), 42 App. Div. 593, 59 N. Y. Supp. 756.

Interlineations.—A will is not invalid merely because an interlineation has been put in the margin upon the same page. Such additions are only void when inserted after the signature. Thus, where the part of a marginal interlineation in a will which extends below the signature of the testator only disposes of property in the same manner in which it would be distributed, the clause being wholly immaterial may be ignored and the portion above the signature admitted to probate. *Matter of Gibson* (1908), 128 App. Div. 769, 113 N. Y. Supp. 266.

Restriiction of testamentary power.—A testator can by suitable agreement upon sufficient consideration lawfully restrict his power of testamentary disposition. *Giles v. De Talleyrand* (1882), 1 Dem. 97.

An agreement to devise land, if founded on a good consideration and clearly proved, may be enforced in equity by holding a will made pursuant to it irrevocable; a subsequent will inconsistent therewith may be judged void as a cloud on title. *Mutual Life Ins. Co. v. Holloday* (1883), 13 Abb. N. C. 16.

Duplicate will.—Where a will is written in duplicate and each is exactly alike, each expresses and contains the will of the testator; either may be admitted to probate without the other. Revocation of either is a revocation of both. *Crossman v. Crossman* (1884) 95 N. Y. 145. And under the proper circumstances the production of the duplicate will be required by the court.

Mutual wills executed by husband and wife devising reciprocally to each other

are valid; such an instrument operates as a separate will of whichever dies first. *Matter of Will of Diez* (1872), 50 N. Y. 88.

Two written instruments executed by the same persons at the same time may, notwithstanding their repugnancy in certain particulars, or in certain respects, be construed a will. *Matter of Forman's Will* (1869), 54 Barb. 274. A mutual will executed according to the Danish Law in a Danish Colony is valid. *Ex parte McCormick* (1852), 2 Bradf. 169.

Revocability of mutual wills.—Such an instrument, though irrevocable as a compact is revocable as a will by any subsequent valid testamentary paper; but if unrevoked it may be proved provided it be executed with the required formalities. *Ex parte Day* (1851), 1 Bradf. 476; *Wood v. Vanderburgh* (1837), 6 Paige 277. Where a testator and petitioner, pursuant to an ante-nuptial agreement between them to execute mutual wills, did so execute wills, it was held that the will so executed by decedent did not thereby become irrevocable nor prevent him from afterwards executing a testamentary paper entirely varying it or repugnant to it. *Matter of Keep* (1888), 1 Connolly 104, 17 N. Y. St. Rep. 812, 2 N. Y. Supp. 750.

Effect of mistake in signing mutual will.—A husband and wife, intending to make their wills in favor of each other, had them drawn alike, *mutatis mutandis*, and as they supposed executed them. Upon the husband's death it was found that each had signed the other's will. *Held* that, as the paper signed by the husband was not intended as his will, it could not be reformed. *Nelson v. McDonald* (1891), 61 Hun 406, 16 N. Y. Supp. 273.

Will of non-resident or one executed without state.—A will executed abroad in conformity with both the laws of this state and of the foreign country where executed, by one domiciled in this state but temporarily residing abroad may be established under the laws of this state. *Younger v. Duffie* (1884), 94 N. Y. 535, 46 Am. Rep. 156.

Apart from any statute, the administration of an estate in whatever country is independent, so far as the strict right of jurisdiction is concerned, and it is only as a matter of comity that the administration in one jurisdiction respects that in another; it is doubtful whether the courts of a state, not the domicile of a decedent, have any further jurisdiction than to make a decree binding the assets within that state. *Matter of Gaines* (1895), 84 Hun 520, 32 N. Y. Supp. 398, *affd.* 154 N. Y. 747, 49 N. E. 1097.

If a testamentary paper is shown to have been executed in conformity with the laws of this state, it is, so far as regards the formalities of execution, entitled to probate wheresoever and by whomsoever executed, whatever the nature of the property whose disposition it seeks to affect and wherever such property may be situated. History of statutes given. *Estate of McMulkin* (1886), 5 Dem. 295, 5 N. Y. St. Rep. 349.

The will of a non-resident without regard to the place of its execution, or the place of the testator's death, may be admitted to probate if the same be executed in pursuance of the laws of this state, or as prescribed by the laws of the testator's residence. *In re Will of Scabra* (1884), *Wkly. Dig.* 428.

A will executed in Austria unattested in accordance with the law of that country may be admitted to probate within this jurisdiction. *Matter of Delaplaine* (1887), 45 Hun 225, *affg.* 5 Dem. 398, 19 Abb. N. C. 36.

Real property.—The rule that a will disposing of real property within this state must conform to the formal requirements for execution as laid down by the statutes of New York, applied. *Koppel v. Holm* (1898), 23 Misc. 557, 52 N. Y. Supp. 830.

A will executed in a foreign country, although executed in accordance with the law of that country, if not executed in accordance with the laws of New York is

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not effectual to pass lands in this state. *Bogel v. Lehritter*, N. Y. Law Journal, Aug. 23, 1892.

A will of real property located in this state, executed by a citizen while residing in Bavaria, according to the law of said county, but not in compliance with the statute of this state, is not entitled to probate. *Bogel v. Lehritter* (1892), 64 Hun 308, 18 N. Y. Supp. 923, affd. 139 N. Y. 223, 34 N. E. 914.

The validity of a devise of real estate situated in England is governed by the law of England. *Matter of Fowles* (1917), 176 App. Div. 637.

Wills of personal property.—Land sold in pursuance of a power of sale in a will is treated as personal property and may be disposed of by the will of an infant over eighteen. *Horton v. McCoy* (1871), 47 N. Y. 21. As to what class of wills can be admitted to probate only as wills of personal property, notwithstanding they may relate to real property, see *Matter of Will of Merriam* (1892), 136 N. Y. 58, 32 N. E. 621.

A holographic will made without witnesses by a resident of a foreign state while sojourning here, properly executed according to the laws of said state, is entitled to probate in this state as to personal property. *Matter of Seixas* (1911), 73 Misc. 488, 133 N. Y. Supp. 406.

A decree of a surrogate's court admitting to probate a will or codicil of personal property, executed in a foreign state, is binding as to the disposition of the property, although the codicil was rejected in the foreign state upon the ground of want of testamentary capacity. *Higgins v. Eaton* (1913), 202 Fed. 75.

Law governing wills of personal property.—A leasehold estate for years in lands situate in this state owned by a resident of another state will be considered as personal property, and as such, as to its transmission by last will and testament, controlled by the law which governed the person of its owner. *Despard v. Churchill* (1873), 53 N. Y. 192. A will of personal property executed by a person not a resident of the state according to the laws of the decedent's residence may be proved. *Matter of Cruger* (1901), 36 Misc. 477, 73 N. Y. Supp. 812.

The requirement that a foreign will of personal estate be executed according to the law of the place where executed relates only to the case of a person domiciled out of the state at the time of his death. *Moultrie v. Hunt* (1861), 23 N. Y. 394; revg. 26 Barb. 252, affg. 3 Bradf. 322, overruling in effect *Ex parte McCormick* (1852), 2 Bradf. 169; *Isham v. Gibbons* (1849), 1 Bradf. 69.

A will executed in the state of Louisiana if not made according to the statutes of the state of New York can be proved only as a will of personal property. *Matter of Gaines* (1895), 84 Hun 520, 32 N. Y. Supp. 398, affd. 154 N. Y. 747, 49 N. E. 1097. The will of a person residing in France and owning personal property in this state executed in France according to our laws, but not according to the laws of France, should be admitted to probate here as a will of personal property. *Matter of Rubens* (1908), 128 App. Div. 626, 112 N. Y. Supp. 941.

The status or capacity of a testator to dispose of his personal property by will depends upon the law of his domicile. But as to the mere formal execution of the will, it seems it is sufficient if it conforms to the laws of the place where it was executed. *Matter of Roberts* (1840), 8 Paige Ch. 519.

A codicil, affecting personal property, executed by a resident of this state while in the state of Florida in compliance with the laws of the latter state, is entitled to probate in this state, though not attested by any subscribing witnesses. *Matter of Anderson's Will* (1912), 78 Misc. 713, 140 N. Y. Supp. 230.

A will unsigned but acknowledged to have been executed by the testator in the presence of two witnesses, being in conformity with the statute of New Jersey at

the time it was executed, may be admitted to probate in New York for the purposes of personal property situated in this state. *Estate of Booth* (1885), 3 Dem. 416, 2 How. Pr. N. S. 110.

Proof of due execution of will.—Due execution of a will is to be determined, like any other fact, in view of all the legitimate evidence in the case and no controlling effect is to be given to the testimony of the subscribing witnesses. *Estate of Bogert* (1884), 2 Dem. 117, 67 How. Pr. 313, 4 Civ. Pro. R. 441, affd. 6 Civ. Proc. R. 128.

The formalities in the execution of a will are those required at the time of its execution; but proof must be made according to the statutes in force when the will is propounded for probate. *Jauncey v. Thorne* (1846), 2 Johns. Ch. 40, 45 Am. Dec. 424.

The validity of the execution of a will will be governed by the laws of the state where executed. *Matter of Cameron* (1900), 47 App. Div. 120, 62 N. Y. Supp. 187, affd. 166 N. Y. 610, 59 N. E. 1120.

Proof of execution of codicil; when proof of will.—Where a codicil distinctly refers to and identifies the will and reaffirms the same, the will and the codicil constitute the will of the testator; the provisions of the former may be treated as embodied in the latter and both may be treated as executed and published at the same time. *Caulfield v. Sullivan* (1881), 85 N. Y. 153; *Brown v. Clark* (1879), 77 N. Y. 369.

A codicil properly executed amounts to a republication of the will to which it refers and proof of the due execution of such codicil will cure a defect, not only in the proof, but in the execution of the will; so held where a codicil was duly proved but the testimony of one of the subscribing witnesses to the body of the will was lacking. *Estate of Masters* (1881), 1 Civ. Pro. 459; *Matter of Nisbet*, 5 Dem. 286 (1886). Codicils are additions, to be read as part and parcel of the original will, and the publication of the codicil is a republication of the will itself, as modified by the codicil. *Weeks v. Frost* (1887), 7 N. Y. St. Rep. 487.

A codicil cannot be admitted to probate where the will to which it refers has been revoked. *Matter of Nokes* (1911), 71 Misc. 382, 130 N. Y. Supp. 187.

Proof of foreign will.—Where a will is in another state or country and it is shown that it cannot be obtained therefrom by reason of its being impossible to have it released from the files of the court of such state or country it is not necessary to produce the original instrument, but probate may be made upon an exemplified copy. *Matter of Delaplaine* (1887), 45 Hun 225, affg. 5 Dem. 398.

A surrogates' court may grant probate to a will executed in and according to the laws of another state, by a resident thereof who dies therein, leaving personal property in the county of such surrogates' court, without waiting until the instrument has been submitted to the proper judicial tribunal of the testator's domicile. *Booth v. Timoney* (1885), 3 Dem. 416, 2 How. Pr. N. S. 110. As to the jurisdiction of the surrogate over the will of a resident sojourning abroad, see *Matter of Cleveland* (1899), 28 Misc. 369, 59 N. Y. Supp. 985.

Procedure where after admitting a will to probate it is learned that an heir and next of kin exists who has not been cited. *Will of Crumb* (1888), 6 Dem. 478, 2 N. Y. Supp. 744.

§ 24. Effect of change of residence since execution of will.—The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will.

Source.—Code Civ. Pro. § 2611, as amended by L. 1893, ch. 686; originally derived from L. 1876, ch. 118, § 3.

Domicile and residence; distinction.—The words "domicile and residence" as used in relation to succession either by will or intestacy are not identical terms; residence means living in a particular locality and a person may have two or more places of residence, but domicile means living in that locality with intent to make it a fixed and permanent home; and a person may have but one domicile. *Matter of Newcomb* (1908), 192 N. Y. 238, 84 N. E. 950, affg. 122 App. Div. 920, 107 N. Y. Supp. 1139.

Domicile of testator at time of death governs.—The validity of the execution of a will of personal property is governed by the law of the place where the testator was domiciled at the time of his death, not at the time of the execution of the will. *Dupuy v. Wurtz* (1873), 53 N. Y. 556.

The law of the testator's domicile at the time of death governs as to the validity of his will; so where testatrix, while unmarried and a resident of another state, made her will, and afterwards married and removed to this state, such will was revoked by the subsequent marriage and therefor could not be admitted to probate. *Matter of Coburn* (1894), 9 Misc. 437, 30 N. Y. Supp. 383.

Domicile of married woman.—A married woman who though separated from her husband for many years, has not been divorced from him, has no domicile separate from his, and her will, although it states that she resides in this state must be construed according to the laws of his residence. *Jones v. Jones* (1894), 8 Misc. 660, 30 N. Y. Supp. 177.

As to what constitutes a change of domicile so as to subject the property of the deceased to the laws of this state and authorize admission of her will to probate here, see *Ames v. Duryea* (1874), 61 N. Y. 609, affg. 6 Lans. 155, *Dupuy v. Wurtz* (1873), 53 N. Y. 556.

Testatrix held to have been domiciled in this state at the time of her death, and not to have established a domicile in France. *Tucker v. Field* (1881), 5 Redf. 139.

Effect of change of residence.—The right to have a will admitted to probate is not affected by a change of the decedent's residence made since the execution of the will. *Cruger v. Phelps* (1897), 21 Misc. 252, 47 N. Y. Supp. 61.

Proof of residence.—The fact that a will recites that the testator is a resident of a certain county is not conclusive though it might be were the instrument holographic; residence is a matter of intention and a question of fact. *Matter of Brant* (1899), 30 Misc. 14, 62 N. Y. Supp. 997.

An application to take further evidence on the question of residence of testatrix is properly denied after a considerable lapse of time after the decree admitting the will to probate was entered, where no evidence as to the residence of the testatrix was produced by the contestants before the surrogate. *Matter of Gaines* (1893), 74 Hun 94, 26 N. Y. Supp. 312.

See generally, *Alexander's Estate* (1869), 1 Tuck. 114; *Mills v. Fogal* (1844), 4 Edw. 559; *Moultrie v. Hunt* (1861), 23 N. Y. 394, revg. 26 Barb. 252, affg. 3 Bradf. 322, overruling in effect *Ex parte McCormick* (1852), 2 Bradf. 169; *Isham v. Gibbons* (1849), 1 Bradf. 69.

§ 25. **Application of certain provisions to wills previously made.**—The last two sections apply only to a will executed by a person dying after April eleventh, eighteen hundred and seventy-six, and they do not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter one hundred and eighteen of the laws of eighteen hundred and seventy-six, except where

such a will is revoked or altered, by a will which those sections rendered valid, or capable of being proved as prescribed in article first of title third of chapter eighteen of the code of civil procedure.

Source.—Code Civ. Pro. § 2611, as amended by L. 1893, ch. 686; originally derived from L. 1876, ch. 118, §§ 4, 5.

§ 26. Child born after making of will.—Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 49, as amended by L. 1869, ch. 22, § 1.

Reference.—Effect of birth of posthumous child as to future estates, Real Property Law, § 56. Action by child born after execution of will, Decedent's Estate Law, § 28.

Derivation.—The provision is derived not from the common law, but from the civil law. The latter presumed an oversight of the parent and applied when living children were left unprovided for. *Wormser v. Croce* (1907), 120 App. Div. 287, 104 N. Y. Supp. 1090.

This section was derived from a rule of the civil law, which, upon the subsequent birth of a child, unnoticed in the will, annulled the will. It is based upon the strong presumption of an oversight, or an unintentional neglect of the testator to provide for those who have a natural and moral claim to a provision for their support out of their father's property. *Tavshanjian v. Abbott* (1911), 200 N. Y. 374, 93 N. E. 978, affg. 130 App. Div. 863, 115 N. Y. Supp. 938.

This provision of the Decedent Estate Law is a recent re-enactment of a provision of the statute uniformly sustained by the courts of the state. *Matter of McLarney*, 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664; *Matter of Kaufman*, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292; *Lathrop v. Dunlop* 4 Hun 213, affd. 63 N. Y. 610; *Near v. Shaw* (1912) 76 Misc. 303, 137 N. Y. Supp. 77.

Purpose and intent of section.—This section was not intended to contravene the policy of our law to give to every one, competent to make a will, the right absolutely to control the disposition of his estate; it was intended to provide a rule, by which an intent to disinherit must appear from the will itself. *Tavshanjian v. Abbott* (1911), 200 N. Y. 374, 93 N. E. 978, affg. 130 App. Div. 863, 115 N. Y. Supp. 938.

"The policy of the statute is provision for such a child who is thus unprovided for outside of the will, and neither provided for nor in any way mentioned in the will; not for such a child who may have been provided for by a settlement, and yet is not provided for or is not in any way mentioned in the will." *Obecny v. Goetz* (1907), 116 App. Div. 807, 811, 102 N. Y. Supp. 391.

The object of the statute is to prevent a child being disinherited by reason of a probable oversight. *Tavshanjian v. Abbott* (1909), 130 App. Div. 863, 115 N. Y. Supp. 938, affd. 200 N. Y. 374, 93 N. E. 978.

Application to wills of mothers.—Chapter 22 of the Laws of 1869 which amended

section 49 of the Statute of Wills, from which this section is derived, by making such section 49 apply to wills of mothers as well as of fathers, is retroactive and applies to wills made before its passage, if the estate has not already vested by the death of the testator. *Obecny v. Goetz* (1909), 134 App. Div. 166, 118 N. Y. Supp. 832.

This section has not since the act of 1849, giving to married women the right to devise and bequeath their property in the same manner as if they were unmarried, become applicable to them, nor are their testamentary dispositions limited by or subject to it. *Cotheal v. Cotheal* (1869), 40 N. Y. 405.

Applies to will of testatrix as well as of testator. *Matter of Hulell* (1887), 6 Dem. 352, 15 N. Y. St. Rep. 715; *Plummer v. Murray* (1868), 51 Barb. 201.

Illegitimate children.—This section applies to an illegitimate child. *Bunce v. Bunce* (1891), 27 Abb. N. C. 61, 14 N. Y. Supp. 659; *Matter of Bunce* (1887), 6 Dem. 278.

Posthumous children are placed on the same footing, with respect to property devised, and to property coming by descent as other children of the same parent. *Mason v. Jones* (1848), 2 Barb. 229, 251, affd. 3 N. Y. 375, 5 How. Pr. 118. Posthumous children take the same portion of their father's estate as though the father had died intestate, and where the children are the devisees the object of the statute can only be accomplished by requiring each to distribute in proportion to his devise. *Rockwell v. Geery* (1875), 4 Hun 606, 6 T. & C. 687; *Sanford v. Sanford* (1872), 61 Barb. 293, 5 Lans. 486; *Dirschler v. Van Den Henden* (1883), 49 Super. (17 J. & S.) 508; *Davis v. Davis* (1899), 27 Misc. 455, 59 N. Y. Supp. 223.

After-born children are not entitled to take under this section where they would have taken nothing had the testatrix died intestate. *Matter of Witter* (1891), 2 Connolly 530.

A will which gives all the testator's property to his wife absolutely, but provides that in case of her death before the testator "leaving lawful issue her surviving," the interest which the wife would take, if living, shall on the testator's death go to such issue in equal portions, cannot be construed as mentioning or providing for posthumous children. *Stachelberg v. Stachelberg* (1908), 124 Ap. Div. 232, 108 N. Y. Supp. 645, affd. 192 N. Y. 576, 85 N. E. 1116.

Where from the will it is apparent that the testator had in mind the probability that children might be born after the execution of the will, after-born children are not entitled to the privilege given. *Wormser v. Croce* (1907), 120 App. Div. 287, 104 N. Y. Supp. 1090.

Failure of a pregnant woman to provide in her will for her child, does not prevent the child from succeeding to a portion of his mother's estate under this section. *McCrum v. McCrum* (1910), 141 App. Div. 83, 125 N. Y. Supp. 717.

Child born after execution of will; effect on will.—The birth of a child after the making of the will does not operate to revoke it. It merely renders it inoperative as to that portion of the estate which, if the parent had died intestate would have been distributed to the child as the next of kin. *Matter of Murphy* (1895), 144 N. Y. 557, 39 N. E. 691; *Luce v. Burchard* (1894), 78 Hun 537, 29 N. Y. Supp. 215; *Bloomer v. Bloomer* (1853), 2 Bradf. 339. A child born after the making of a will by his father, where such child is the sole heir and is left unprovided for and unmentioned in the will, is entitled to the whole of the real estate left by the testator as if the father had died intestate. *Smith v. Robertson* (1882), 89 N. Y. 555; *Matter of Campbell* (1914), 87 Misc. 83, 150 N. Y. Supp. 416.

The fact that a testator having two children living devised all his lands to his wife but failed to change his will after the birth of other children during his lifetime does not show an intention to leave the latter children unprovided for. Hence by virtue of this section they take the same portion they would have taken

had the testator died intestate. *Udell v. Stearns* (1908), 125 App. Div. 196, 109 N. Y. Supp. 407.

Where the testatrix executed her will in this state and then removed to Rhode Island where she died leaving several children born after the execution of the will none of whom were provided for or mentioned in the will, it was held that the testatrix died intestate as to such children under the laws of both states. In re *Witter's Estate* (1891), 2 Connolly 530, 15 N. Y. Supp. 133.

Where a child born to testator after he made his will was not provided for or mentioned therein, the proceeds of a sale of testator's lands in Wyoming by his executor under a power of sale in the will, when brought to this state, must be disposed of as directed by the will, which, as to the lands sold, was valid. *Matter of Mackay* (1912), 77 Misc. 303, 136 N. Y. Supp. 821.

Bequest to child born after execution of will.—A testator by a codicil to his will made a bequest to a son born after making his will, and "in the event of the death of myself, wife and child or children at one and the same time," etc., changed certain bequests in his will. This was the only mention by the testator in his will or codicil of the words "child" or "children." Subsequently two daughters were born, who survived the testator. It was held that the two daughters took under the statute. *Tavshanjian v. Abbott* (1911), 200 N. Y. 374, 93 N. E. 978, affg. 130 App. Div. 863, 115 N. Y. Supp. 938.

Failure to provide for or mention children in will.—The phrase "unprovided for by any settlement" as used in this section means a settlement made by the testator. Where after-born children of a testator were neither mentioned in his will nor provided for by any settlement made by the testator, the decree admitting the will to probate should make the same provision for the said children as they would have been entitled to had their father died intestate. *Matter of Bostwick* (1912), 78 Misc. 695, 140 N. Y. Supp. 588.

Failure to bequeath personal estate does not constitute a failure to make provision for after-born children within the meaning of this section. *McCrum v. McCrum* (1910), 141 App. Div. 83, 125 N. Y. Supp. 717.

A testatrix, having no children at the time of making her will, devised her real property to her husband for and during his life, and on his death to her issue surviving her said husband, and provided further that if there should be no issue of testatrix or descendants of such issue surviving her said husband at the time of his death, then and in that event the property should go to certain designated cousins. After the execution of said will two children were born to testatrix, a daughter and a son. She died leaving both the children surviving her but the son died, an infant, soon after his mother, intestate. The husband of testatrix died about two years later leaving him surviving the daughter by testatrix, and a son by a second wife. After the death of the husband of testatrix, her said daughter died unmarried and intestate, leaving her surviving her half-brother, the son of her father by his second marriage. It was held, that there was in the will of said testatrix no such failure to mention or provide for after-born children as entitled her infant son to inherit an interest in the real estate in question, as though no will had been made, and which by inheritance might pass to his surviving sister, and through her to her half-brother. *McLean v. McLean* (1913), 207 N. Y. 365, 101 N. E. 178, affg. 152 App. Div. 479, 137 N. Y. Supp. 341.

It is not necessary that any particular provision shall be made, but it is sufficient if it can be inferred from the terms of the will that the testator had in mind the possibility of the birth of a child and made a provision in the will to which the child when born would be entitled. *Minot v. Minot* (1897), 17 App. Div. 521, 45 N. Y. Supp. 554; *Herriot v. Prime* (1898), 155 N. Y. 5, 49 N. E. 142.

Provision for children generally.—Where a will giving the residuary estate to the

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testator's wife stated that his children, of whom he had three living, were not mentioned or given a portion of the estate by reason of the fact that he had confidence that his wife would provide for "our said children" out of the estate so far as it was in her power, a child born after the making of the will, but before the testator's death, is not mentioned therein, within the meaning of this section, and is entitled to the share she would have taken if her father had died intestate. Hence, the widow cannot convey a marketable title to lands devised to her by the residuary clause. *Crocker v. Mulligan* (1913), 154 App. Div. 711, 139 N. Y. Supp. 381.

If the marriage occurred after the execution of the will the rights of the child are to be ascertained by reference to § 35 post. *Matter of Gall* (1887), 5 Dem. 374.

Contribution by other devisees and legatees.—All the devisees and legatees must contribute ratably in proportion to the value of the real or personal estate devised or bequeathed to them respectively to make up the distributive share of the after-born child. *Mitchell v. Blain* (1836), 5 Paige 588. In no case can a child, born after the making of a will by his father, recover of any brother or sister, born before the will was made, any portion of any advancement made by his father, in his lifetime, to such brother or sister. *Sanford v. Sanford* (1872), 61 Barb. 293, 5 Lans. 486.

The adoption of a child does not operate to revoke a prior will in which it was not mentioned. *Matter of Gregory* (1896), 15 Misc. 407, 37 N. Y. Supp. 925.

An after-born child takes under this section by inheritance as an heir at law, and his father is entitled to a tenancy by curtesy in so much of the real estate as descends to him from his mother. *Young v. Blake* (1914), 163 App. Div. 501, 148 N. Y. Supp. 557.

After-born children may maintain an action to partition lands devised, but the devisee is entitled to be protected for the payment of liens and for improvements on the premises. *Obecny v. Goetz* (1907), 116 App. Div. 807, 102 N. Y. Supp. 232.

A petition under section 2615 of the Code of Civil Procedure to determine whether or not a testator by his last will had provided for his after-born child in conformity with this section must be dismissed, but without prejudice to the proper action to enforce the infant's rights in the premises, if any. *Matter of Sauer* (1915), 89 Misc. 105, 151 N. Y. Supp. 465.

Section cited.—*Young v. Blake* (1913), 156 App. Div. 211, 213, 141 N. Y. Supp. 300.

§ 27. **Devise or bequest to subscribing witness.**—If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will can not be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.

But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees

named in the will, in proportion to, and out of, the parts devised and bequeathed to them.

Source.—R. St., pt. 2, ch. 6, tit. 1, Article 3, §§ 50, 51.

Reference.—Person not disqualified from testifying respecting a will because of his beneficial interest therein; Code Civ. Pro. § 2545.

The object of this section is twofold; first, to render the subscribing witnesses competent, even though legatees or devisees; second, to guard against fraud in the preparation and execution of wills. Before the revised statutes a devise to subscribing witnesses was held void and such subscribing witnesses could not testify on the probate. *DuBois v. Brown* (1882), 1 Dem. 317.

Devise to witness; when valid.—A devise is not rendered void if the will can be proven without the testimony of the devisee as a subscribing witness. *Cornell v. Woolley* (1867), 3 Keyes 378, 43 How. Pr. 475, *Caw v. Robertson* (1851), 5 N. Y. 125. Where there are only two witnesses to a will both of them must be examined and if one be a devisee he is prevented from taking under such will. *Matter of Brown* (1883), 31 Hun 166, 66 How. Pr. 289; *Jackson ex dem. Denniston v. Denniston* (1809), 4 Johns. 311.

A subscribing witness forfeits his legacy under a will proven by his testimony, where he would not have been entitled to share in the estate in the absence of a will. *Morse v. Tilden* (1901), 35 Misc. 560, 72 N. Y. Supp. 30, modified 74 App. Div. 132, 77 N. Y. Supp. 505. *Barnard v. Crossman* (1889), 54 Hun 53, 7 N. Y. Supp. 275; *Estate of Orser* (1883), 4 Civ. Pro. 129.

Where each of three subscribing witnesses to a will, one of whom was a legatee and a devisee thereunder, is examined in a proceeding for its probate, although the contestants did not serve a notice under section 2618 of the Code of Civil Procedure demanding that all of such subscribing witnesses should be examined, the witness, who was also a legatee and a devisee under the will, does not forfeit his beneficial interest where the proof given, exclusive of his testimony, was sufficient to establish the due execution of the will. *Matter of Owen* (1900), 48 App. Div. 507, 62 N. Y. Supp. 919.

Rescission of contract to allow payment of invalid legacies to witnesses upon ground of mistake of fact.—Where the sole witnesses to a will were named as legatees and the will was proved by means of their testimony, thus avoiding the legacies, agreements, executed between non-resident legatees and the executors, but not carried out, consenting to the payment of the void legacies and signed solely in reliance upon a misrepresentation as to the laws of this State made by the representative of the witnesses, may be rescinded upon the ground of a mistake of fact, without imputing fraud or intentional misrepresentation on the part of said representative. *Orth v. Kaesche* (1914), 165 App. Div. 513, 150 N. Y. Supp. 957.

The question of forfeiture does not arise in the proceedings to prove the will, but only when, either upon the accounting or in an action brought for that purpose, he seeks to retain his legacy or devise. *Matter of Beck* (1896), 6 App. Div. 211, 39 N. Y. Supp. 810, *affd.* 154 N. Y. 750, 49 N. E. 1093.

Executor as witness.—In *McDonough v. Loughlin* (1855), 20 Barb. 238, it was held that an executor could testify as a subscribing witness, without forfeiture of his appointment as executor, since such appointment was not for his own benefit. Cited and approved in *Matter of Will of Wilson* (1886), 103 N. Y. 374, 376, 8 N. E. 731. A person named as an executor in a will is a competent witness after he has renounced his executorship. *Burritt v. Silliman* (1855), 13 N. Y. 93, 64 Am. Dec. 532. See also *Children's Aid Society v. Loveridge* (1877), 70 N. Y. 387.

A legacy to an executor as compensation for his services, in addition to commissions, is not such a beneficial legacy as must be held to be void, if the executor

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ness a necessary witness. *Pruyn v. Brinkerhoff* (1867), 57 Barb. 176, 7 Abb. S. 400; *Matter of Burke* (1882), 5 Redf. 369.

Trustee as witness.—A bequest to a person as trustee, where he has no beneficial interest, is not void by reason of his being a subscribing witness. *Barnard v. Barnard* (1889), 54 Hun 53, 7 N. Y. Supp. 275.

Subscribing witnesses to a codicil.—The fact that legatees under a will are the subscribing witnesses to a codicil indorsed upon it does not preclude them from suing under the will where it alone is proved, and the codicil does not benefit them. It is not necessary to the proof of the will. *Matter of Johnson* (1902), 37 Misc. 334, 10 N. Y. Supp. 489.

28. Action by child born after making of will, or by subscribing witness.—A child, born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; and he is subject to the same defenses, and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.

Source.—Code Civ. Pro. § 1868; derived from R. S., pt. 3, ch. 8, tit. 3, §§ 62–66.

Reference.—As to rights of posthumous child, see Decedents Estate Law, § 26.

Remedies.—A child of a decedent, born of a marriage contracted before the execution of the will, cannot contest probate on the ground that he is not therein otherwise provided for, but he is confined to the remedy afforded by this section, to the share of property saved to him by § 26 ante. Were the marriage to follow the testamentary act, and such a child survive, it would be otherwise, and the will would be deemed revoked pursuant to § 35 post. *Matter of Gall* (1887), 5 Dem. 374. The will is not revoked by the advent of an after-born child of testator, but the child, as heir, is put to his or her special statutory action under this section and the Supreme Court may determine whether or not the action will lie. *Matter of Gauer* (1915), 89 Misc. 105, 151 N. Y. Supp. 465.

In the case of real property, a child born after the making of the will of his father, and the sole heir of the testator, is not confined to a personal action against the devisee, but may follow the land though it be conveyed and bring ejectment. *Robertson v. Robertson* (1882), 89 N. Y. 555.

29. Devise or bequest to child or descendant, or to a brother or sister of the testator not to lapse.—Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate. (*Amended by L. 1912, ch.*

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 52.

Object and effect.—The provisions of this section were enacted for the benefit of

the descendants of a deceased legatee or devisee; under it they take as new or substituted legatees or devisees directly from the testator, and not through or by way of representation of their deceased parent or intermediate ancestor. *Tittle v. Tuttle* (1879), 2 Dem. 48.

"This statute was not intended for the benefit of creditors, but solely for the child or descendant of the deceased legatee by making that child or descendant the immediate recipient of the testamentary gift directly from the testator." *Matter of Hafner* (1899), 45 App. Div. 549, 553, 61 N. Y. Supp. 565.

Common law rule that legacy lapses in case of the death of the legatee before the testator, in the absence of express words or some provision in the will showing a contrary intent, is still in force, except as modified by the above section. *Matter of Wells* (1889), 113 N. Y. 396, 21 N. E. 137, 10 Am. St. Rep. 457.

At common law a legacy does not vest in the legatee until the death of the testator, and should the legatee predecease the testator the legacy lapses and becomes part of the residuary. *Matter of Pearsall* (1915), 91 Misc. 212, 217, 155 N. Y. Supp. 59.

The words "shall die," as used in this section, refer to a death before or after the making of the will. *Pimel v. Betjemann* (1905), 183 N. Y. 194, 76 N. E. 157; *Lightfoot v. Kane* (1915), 170 App. Div. 412, 415, 156 N. Y. Supp. 112.

The words "shall die" are not to be construed as referring to a time intermediate the making of a will and the death of the testator. Whether the death of the devisee occur before or after the making of the will, is of no importance. *Barnes v. Huson* (1871), 60 Barb. 598; *Matter of Tienkin* (1892), 131 N. Y. 391, 30 N. E. 109; *In re Maben's Estate* (1899), 32 N. Y. Rep. 790, 12 N. Y. Supp. 5, revd. *Mead v. Maben*, 60 Hun 268, revd. 131 N. Y. 255, 30 N. E. 98.

Descendants.—The provision does not extend to collateral relatives. The word "descendants" is limited to the issue, in any degree, of the deviser. *Van Beuren v. Dash* (1864), 30 N. Y. 393. See also *Cook v. Munn* (1883), 12 Abb. N. C. 344. A legacy to a sister's child is not a legacy to a descendant of the testator. By descendant is not meant any relative to whom in some possible contingency property might descend, but lineal descendants, issue of the body. *Armstrong v. Moran* (1850), 1 Bradf. 314. But see section, as amended by L. 1912, ch. 384.

Legacy to a class.—*Hoppock v. Tucker* (1874), 59 N. Y. 202.

A direction to executors, by a testator with knowledge of the death of one of his children, "to pay to each of my children who shall have arrived at the age of twenty-one years, the sum of \$500 as soon after my death as my executors conveniently can," is a bequest to a class and indicates no intent upon the part of the testator that the issue of the deceased child should share therein; a daughter of the deceased child is not entitled, therefore, under this section, to the legacy which her mother would have had, had she lived. *Pimel v. Betjemann* (1904), 183 N. Y. 194, 76 N. E. 157, 2 L. R. A. (N. S.) 580, 5 Ann. Cas. 239, revg. 99 App. Div. 559, 91 N. Y. Supp. 49.

Effect of death of child or descendant to whom devise or bequest has been made. *Vernon v. Vernon* (1873), 53 N. Y. 351; *Youngs v. Youngs* (1871), 45 N. Y. 254; *Matter of Mapes* (1889), 5 Silv. 332, 7 N. Y. Supp. 872, affd. in 125 N. Y. 728, 26 N. E. 757; *Matter of Tienkin* (1892), 131 N. Y. 391, 30 N. E. 109.

Gift of the net income of an estate to a grandchild of the testator, upon the death of the grandchild during the testator's life, vests in the child of such grandchild. *Matter of Hafner* (1899), 45 App. Div. 549, 61 N. Y. Supp. 565.

When a testator bequeaths the interest on a certain mortgage to his wife for life and "at her death the said principal . . . to be equally divided between my sons or their heirs, share and share alike," the gift will be construed to be made to the sons living at the time the will was made, so that the issue of sons who

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before the testator will take their parent's share. *Matter of Depeirris* (1905), 107 App. Div. 421, 97 N. Y. Supp. 321.

Death of a devisee of a life estate before the will can take effect, does not destroy independent limitation based thereon, to other persons who are living at testator's death. *Downing v. Marshall* (1861), 23 N. Y. 366, 370, 80 Am. Dec. 515. Death of devisee for life, during life of testator, entitles the remainderman to possession as soon as will takes effect. *Campbell v. Rawdon* (1858), 18 N. Y. 412. Devise to a son who died subsequent to the testator, but before the termination of the intermediate life estate, does not lapse by reason of such son dying without issue. *Stokes v. Weston* (1894), 142 N. Y. 433, 37 N. E. 515.

When legacy lapses.—A legacy to a decedent who predeceased the testatrix and is distributable under the residuary clause of the will, and where a devisee of said legatee also predeceased testatrix without leaving issue this section, as amended by chapter 384 of the Laws of 1912, does not apply. *Matter of Rywolt* (1912), 81 Misc. 103, 142 N. Y. Supp. 1066.

Rule, that a legacy or devise will lapse when the legatee or devisee dies before the testator, operates when the legatee or devisee is dead when the will is made. Rule that the legal intendment is that intestacy in part was not intended by a testator, and is to be avoided in construing the will, is entitled to no recognition in the enforcement of the plain or paramount meaning of the language of the will, which would affect intestacy. Where the gift of the residuary estate of testatrix to persons named was absolute, and where one of such persons, who was not a descendant or brother or sister of the testator died before the will of testatrix executed the legacy to that person lapsed and testatrix died intestate as to the residuary bequest. *Matter of Tamargo* (1917), 220 N. Y. 225, revg. 170 App. Div. 10, 107 N. Y. Supp. 845.

Legacies to unmarried sons, who died before the testator, lapse. *Savage v. Burn* (1858), 17 N. Y. 561.

Where the legatee is not a "descendant," the fact that at the time of the execution of the will the testator was aware of the death of the legatee and intended that the legacy should go to her descendants, will not prevent the lapsing of the legacy. *Booth v. Bosworth* (1905), 107 App. Div. 511, 95 N. Y. Supp. 239.

Legacy in satisfaction of a debt does not lapse upon the death of the legatee before the death of the testator. *Cole v. Niles* (1874), 3 Hun 326, 5 T. & C. 451, affd. 62 N. Y. 251.

Legacy to one without legal adoption who had for more than twenty-five years been in the relation of daughter to testatrix lapses upon the death of the legatee before the death of testatrix. *Matter of Hunt* (1913), 82 Misc. 211, 143 N. Y. Supp. 492. It seems that an informal adoption of a child by a testatrix does not operate to carry a legacy within the protection of this section. *Matter of Maley* (1911), 107 App. Div. 195, 197, 132 N. Y. Supp. 492.

Section cited.—*Matter of Tamargo* (1915), 170 App. Div. 10, 13, 155 N. Y. Supp. 845.

§ 30. Reception of wills for safe keeping.—The clerk of every county in this state, the register of deeds in the city and county of New York, the surrogate of every county, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any last will and testament which any person shall deliver to them for that purpose, and shall give a written receipt therefor to the person depositing the same.

Code.—R. S., pt. 3, ch. 7, tit. 3, Article 7, § 67.

References.—County clerk to receive certain papers, including wills, for safe keeping, County Law, § 167.

§ 31. **Sealing and indorsing wills received for safe keeping.**—Such will shall be inclosed in a sealed wrapper, so that the contents thereof can not be read, and shall have indorsed thereon the name of the testator, his place of residence, and the day, month and year when delivered; and shall not, on any pretext whatever, be opened, read or examined, until delivered to a person entitled to the same, as hereinafter directed.

Source.—R. S., pt. 3, ch. 7, tit. 3, Article 7, § 67.

§ 32. **Delivery of wills received for safe keeping.**—Such will shall be delivered only,

1. To the testator in person; or,
2. Upon his written order, duly proved by the oath of a subscribing witness; or,
3. After his death to the persons named in the indorsement on the wrapper of such will, if any such indorsement be made thereon; or,
4. If there be no such indorsement, and if the same shall have been deposited with any other officer than a surrogate, then to the surrogate of the county.

Source.—R. S., pt. 3, ch. 7, tit. 3, Article 7, § 69.

§ 33. **Opening wills received by surrogate for safe keeping.**—If such will shall have been deposited with a surrogate, or shall have been delivered to him as above prescribed, such surrogate, after the death of the testator, shall publicly open and examine the same, and make known the contents thereof, and shall file the same in his office, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof; or until required by the authority of some competent court to produce the same in such court.

Source.—R. S., pt. 3, ch. 7, tit. 3, Article 7, § 70.

§ 34. **Revocation and cancellation of written wills.**—No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator; and the fact of such injury or destruction, shall be proved by at least two witnesses.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 42.

Reference.—Action to establish or impeach will, Code of Civil Procedure, §§ 1861-1867.

Construction and application of section.—In the first clause, the act of revocation becomes effectual whether it relates to the whole will or simply to some portion thereof. The second clause requires no such construction; the words, "or any

part thereof," are omitted. The will itself is to be burned, torn, canceled, obliterated, or destroyed, not with an intent or purpose of altering but as the statute says "with the intent and for the purpose of revoking the same." *Lovell v. Quitman* (1882), 88 N. Y. 377, 42 Am. Rep. 254; *Dan v. Brown* (1825), 4 Cow. 483, 15 Am. Dec. 395.

A will can only be revoked by an actual compliance with the methods of revocation laid down in the statute, and a mere intention to comply with the statute is insufficient. *Matter of Evans* (1906), 113 App. Div. 873, 98 N. Y. Supp. 1042.

A specific devise of real estate can only be revoked by the destruction of the will or the execution of another will or codicil, or by alienation of the estate during the testator's life. *Burnham v. Comfort* (1888), 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462.

A testator duly executed a will and thereafter made a second will by which he revoked the former one. Subsequently he destroyed the second will and stated to several persons, not, however, to the witnesses to the first will, that the latter instrument was his will. It was held that such action on the part of the testator was not sufficient to constitute a republication of the first will, or to justify its admission to probate. *Matter of Stickney* (1898), 31 App. Div. 382, 52 N. Y. Supp. 929, affd. 161 N. Y. 42, 55 N. E. 396.

Erasures, interlineations and additions made to a will after its execution do not change the will unless it is re-executed with all the statutory formalities, and the will should be probated as though alterations had not been made. *Matter of Ackerman* (1908), 129 App. Div. 584, 114 N. Y. Supp. 197.

Changes in a will made by a testator after execution do not destroy the will, and it will be probated as originally executed if the original provisions can be determined. *Matter of Wood* (1911), 144 App. Div. 259, 129 N. Y. Supp. 5.

When alterations, interlineations and erasures have been made in a will, but have not been executed as required by statute, the original will, if it can be ascertained stands. *Matter of Johnson* (1908), 60 Misc. 277, 113 N. Y. Supp. 283; *McPherson v. Clark* (1854), 3 Bradf. 92; *Jackson v. Holloway* (1811), 7 Johns. 394; *Matter of Prescott* (1879), 4 Redf. 178.

A revocation of a portion of a will cannot be made by obliterating a clause, even if it be done with intent to revoke the same. Such an alteration can only be effected in the manner prescribed by statute. *Lovell v. Quitman* (1882), 88 N. Y. 377, 42 Am. Rep. 254; *Delafield v. Parish* (1862), 25 N. Y. 9; *Havens v. Havens* (1844), 1 Sandf. Ch. 324, 334; *Ordish v. McDermott* (1877), 2 Redf. 460; *Dyer v. Erving* (1884), 2 Dem. 160, 170; *Quinn v. Quinn* (1873), 1 T. and C. 437; *Matter of Johnson* (1908), 60 Misc. 277, 281, 113 N. Y. Supp. 283.

The statute does not provide for the revocation of a part of a last will and testament by burning, tearing, canceling, obliterating or destroying that part alone. *Matter of Hildenbrand* (1914), 87 Misc. 471, 150 N. Y. Supp. 1067.

The tearing or obliteration of one clause in the will although with the purpose of revoking the same and permitting the remainder of the will to stand is not effectual for that purpose. No tearing or obliteration can be effectual unless it altogether destroys the whole will and was intended so to do. If the will is to be admitted to probate it must be a will in the form and condition in which the will was when originally executed and witnessed. *Matter of Curtis* (1909), 135 App. Div. 745, 119 N. Y. Supp. 605.

Where a testator, after having duly executed his last will with a lead pencil, struck out some of the testamentary provisions, added clauses and changed the amounts of many legacies, but the original words are plainly discernible beneath the pencil marks, the testator's signature is undefaced and material parts of the instrument as originally executed remain unchanged and uncanceled, such acts of

testator will not be deemed to have been done *animo revocandi*. Such acts even if made with intention to revoke the will would be inoperative, as under this section a will cannot be revoked, either in part or in whole, by a cancellation of a part of the instrument. *Matter of Crawford* (1913), 80 Misc. 615, 142 N. Y. Supp. 1032.

A testator cannot revoke a bequest by obliterating the clause whereby it is made. The revocation of a will depends on the testatrix's intention, and where, without intending to revoke the whole will but merely wishing to destroy a single bequest, she obliterates the clause making that bequest, the original will may be admitted to probate in the form and condition in which it was when executed if that can be ascertained. *Matter of Van Woert* (1911), 147 App. Div. 483, 131 N. Y. Supp. 748, revg. 71 Misc. 372, 130 N. Y. Supp. 124.

The fact that after execution of a will its first subdivision was cut out and the edges of the remaining parts of the will fastened together by a piece of paper pasted on them and that the piece cut out cannot be found, is not a sufficient reason for denying the will probate as lost, destroyed or revoked, where it appears not to have been the intention of the testator. *Matter of Westbrook* (1904), 44 Misc. 339, 89 N. Y. Supp. 862.

Implied revocation.—The statute disposes of the whole doctrine of implied revocations. *Delafield v. Parish* (1862), 25 N. Y. 9; *Langdon v. Astor's Executors* (1854), 3 Duer, 477, 558, revd. 16 N. Y. 9. The revocation of a will can be accomplished only in the manner pointed out by the statute, which statute supplants and disposes of the entire doctrine of implied revocation. The lapse of a bequest or devise cannot effect the revocation of a will. *Matter of Davis* (1905), 105 App. Div. 221, 93 N. Y. Supp. 1004, affd. 182 N. Y. 468, 75 N. E. 530.

A will which in terms provides that it is to be regarded as canceled the day the testator enters matrimony is not effectually "canceled," within the meaning of this section, by his marriage, and is entitled to be admitted to probate. *Matter of Steiner* (1915), 89 Misc. 66, 152 N. Y. Supp. 725.

Revocation of one of two wills.—Where there are two wills, not repugnant to each other, unrevoked at the death of a testator, they will be construed together, but if one be intentionally destroyed or revoked the other remains in force. While a portion of a will can be revoked only by an instrument in writing properly executed, the rule applies only where it is sought to probate an instrument of which some portion has been removed or obliterated. Thus, the rule does not hold where a testator, having two or more wills or codicils which may consistently exist together as the expression of his intention, destroys one of them with intent to revoke it and without the intention of affecting the other wills. *Osburn v. Rochester Trust & Safe Deposit Co.* (1912), 152 App. Div. 235, 136 N. Y. Supp., 859, mod. 209 N. Y. 54, 102 N. E. 571, 46 L. R. A. (N. S.) 983, Ann. Cas. 1915 A 101.

Revocation of duplicate.—Where a will is executed in duplicate, a destruction of one, in the absence of evidence to the contrary, will raise a presumption that both were to be destroyed. *Asinari v. Bangs* (1885), 3 Dem. 385. A revocation of one of such duplicates is a revocation of both. *Crossman v. Crossman* (1884), 95 N. Y. 145.

When a testator executed his will in duplicate leaving one copy in the possession of his counsel and placing the other in his safe, and subsequently placed his copy in his pocket, after which it was never seen again, it must be inferred that the will was revoked by the testator in his lifetime, and probate of the copy in the possession of the attorney will be refused. *Matter of Schofield* (1911), 72 Misc. 281, 129 N. Y. Supp. 190. See also *Betts v. Jackson* (1830), 6 Wend. 173.

Revocation by later will.—Where the later will did not expressly revoke an earlier one, it was held that the first will was revoked by the second one, since it was inconsistent. *Ludlum v. Otis* (1878), 15 Hun. 410. Both wills will be permitted to

if such appears to be the testator's intention. *Campbell v. Logan* (1852), 11 F. 90.

A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is inconsistent with it. And where it is inconsistent with the former will, in some of its provisions merely, it is only a revocation *pro tanto*. *McGiffert v. McGiffert* (1848), 3 Barb. Ch. 153.

A former will may be revoked by a subsequent will although the latter is lost. *Matter of Myers*, 28 Misc. 359, 59 N. Y. Supp. 908 (1899); but there must be sufficient proof that the latter will was duly executed. *Matter of Williams*, 34 Misc. 100, 10 N. Y. Supp. 1055 (1901).

Proof of revocation by proof of execution of subsequent will. *Matter of Burdett* (1905), 104 App. Div. 312, 93 N. Y. Supp. 866, *affd.* 185 N. Y. 559, 77 N. E. 100; *Matter of Barnes* (1902), 70 App. Div. 523, 75 N. Y. Supp. 373; *Matter of Barnes* (1902), 75 App. Div. 403, 78 N. Y. Supp. 29.

A mutual will, though irrevocable as a compact, is revocable as a will, by any subsequent valid testamentary paper. *Ex parte Day*, 1 Bradf. 476 (1851).

It has been held that where mutual wills were made by three brothers with the understanding that they should remain operative only while all of them remained married, the subsequent marriage of two of the brothers did not revoke the will of the third who died unmarried. *Matter of Goldsticker*, 123 App. Div. 474, 108 N. Y. Supp. 489 (1908), *affd.* 192 N. Y. 35, 84 N. E. 581, 18 L. R. A. (N. Y.) 15, 15 Ann. Cas. 66.

Where two persons execute their wills in like manner, each giving his residuary or a definite amount to a third person, either testator may, without notice, revoke his will in the lifetime of both or after the death of the other. No obligation not to revoke is created by the mere execution of such wills, and in a case two persons enter into a contract by which they agree that each will, by will, to the other, a definite amount, if either revokes his will without notice, the other may compel a specific performance of the contract, or may recover damages for the breach of the contract. *Edson v. Parsons* (1895), 85 Hun 263, 10 N. Y. Supp. 1036, *affd.* 155 N. Y. 555, 50 N. E. 265.

A pre-nuptial agreement to execute mutual wills, is not irrevocable, and does not prevent the execution of wills entirely variant from or repugnant to it. *Matter of Keep* (1888), 1 Connolly 104.

A clause of revocation in a later will will be effectual, although such will makes no disposition of the property disposed of by the former will. *Matter of Thompson* (1850), 11 Paige 453. The effect of a clause revoking all other wills depends upon the intention of the testator gathered from all the instruments. *Van Wert v. Benedict* (1850), 1 Bradf. 114.

Inconsistent later will; effect of.—The revocation of an earlier disposition of a property by a later one, or by a codicil, on the ground of repugnancy, is never anything more than a rule of necessity, and operates only so far as is requisite to give the latter provision effect. *Viele v. Keeler* (1891), 129 N. Y. 190, 199, 29 N. E. 78. A will which makes a full disposition of all the testator's property is inconsistent with the validity of any prior will, and therefor amounts to a revocation of the wills previously executed. *Simons v. Simons* (1857), 26 Barb. 68, 74, *revd.* 24 How. Pr. 611.

The execution of later will.—An instrument which has not been duly executed does not revoke a former will. *Biggs v. Angus* (1885), 3 Dem. 93; *Mairs v. Free* (1877), 3 Redf. 181; *McLokey v. Reid* (1857), 4 Bradf. 334; *Nelson v. Public Administrator* (1852), 2 Bradf. 210. Where a second will, containing no clause revoking any former one was imperfectly published as a will, and the testator subsequently destroyed it with the intention of giving effect to his first will, which was duly published, the court held that the first instrument should be admitted as

the testator's last will and testament. *Matter of Johnston* (1893), 69 Hun 157, 23 N. Y. Supp. 355.

A will cannot be revoked by an instrument executed, as a testamentary paper, in the presence of only one subscribing witness. *Barry v. Brown* (1833), 2 Dem. 309.

In a proceeding for the probate of a will, testimony that the testator had executed a later will, which later will was not produced upon the hearing nor any evidence given as to its contents, except that given by the subscribing witnesses thereto, who testified that when the testator asked them to witness such will he stated, in substance, that it revoked the former will, is not sufficient to sustain a finding that the will offered for probate was revoked by the subsequent will. *Matter of Dake* (1902), 75 App. Div. 403, 78 N. Y. Supp. 29.

Mental condition at time of revocation.—Where a subsequent will has been declared invalid by reason of the incompetency of the testator a clause therein revoking all former wills by him made is of no avail, since if he be incompetent to make the dispositive provisions of such a will, he was equally incompetent to make its revocatory provisions. *Matter of Goldsticker* (1908), 192 N. Y. 35, 84 N. E. 581, 18 L. R. A. (N. S.) 99, 15 Ann. Cas. 66, affg. 123 App. Div. 474, 108 N. Y. Supp. 489. The same mental condition is required in a testator for a valid destruction as for a valid execution of his will. *Matter of Waldron* (1897), 19 Misc. 333, 44 N. Y. Supp. 353.

The tearing up of a will is not to be considered a revocation, if the testatrix was at the same time under such mental excitement as incapacitated her from forming a reasonable and intelligent intention to revoke her will. *Matter of Forman* (1866), 1 Tuck. 205, affd. 54 Barb. 274.

Revocation by codicil.—A codicil will not operate as a revocation beyond the clear import of its language, and an expressed intention to alter a will in one particular negatives an intention to alter it in any other respect. *Wetmore v. Parker* (1873), 52 N. Y. 450; *Burnham v. Comfort* (1888), 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462; *Matter of Willets* (1889), 112 N. Y. 289, 19 N. E. 690; *Redfield v. Redfield* (1891), 126 N. Y. 466, 27 N. E. 1032; *Matter of Tyler's Will* (1911), 128 N. Y. Supp. 731.

A codicil does not operate to revoke or modify a previous bequest beyond the clear import of the language used. *Matter of Hoffman* (1910), 140 App. Div. 121, 124 N. Y. Supp. 1089, mod. 201 N. Y. 247, 94 N. E. 990.

A codicil does not usually supersede the will as would an aftermade will. Its purpose is to alter, explain, qualify or revoke the will in the respects it defines. It is a part of the will, and the two are to be read and executed as one entire instrument. *Bloodgood v. Lewis* (1913), 209 N. Y. 95, 102 N. E. 610.

A codicil does not revoke a will except in so far as is expressly stated in the codicil, or in so far as it is inconsistent with the provisions of the will. Thus, where a will bequeathed the residuary estate to certain charitable institutions and a subsequent codicil left a specific bequest to an institution not named in the will, the will remained as formerly executed except that the residuary estate was reduced by the sum named in the codicil. *Osborn v. Rochester Trust & Safe Deposit Co.* (1912), 152 App. Div. 235, 136 N. Y. Supp. 859, mod. on other grounds (1913) 209 N. Y. 54, 102 N. E. 571, 46 L. R. A. (N. S.) 983, Ann. Cas. 1915 A 101.

A codicil is intended to add to, modify, or revoke, the prior will in the respects which may appear, and it cannot have any other operation than may be necessary to give effect to its provisions as the later expression of the testator's will. *Hard v. Ashley* (1890), 117 N. Y. 606, 613, 23 N. E. 177.

The republication of a will by a codicil makes the will speak from the date of the codicil. *Canfield v. Crandall* (1885), 4 Den. 111, 119.

Inconsistent provisions in codicil.—Where the codicil contains dispositions, in-

istent with the provisions of the will, the latter will be deemed revoked to the
t of the discordant dispositions, and so far as may be necessary to give effect
e provisions of the codicil. *Newcomb v. Webster* (1889), 113 N. Y. 191, 21 N.
; *Barlow v. Coffin* (1861), 24 How. Pr. 54; *Folk v. Stocking* (1887), 27 Wk.
404; *Matter of Flagg* (1887), 10 St. Rep. 694; *Matter of Tyler's Will* (1911),
N. Y. Supp. 731.

ancellation of codicil.—A codicil to a will is canceled where the testator has
n across all its provisions, including the signature and attestation clause,
erous cross marks in lead pencil, and has also written the word "canceled"
o places in the attestation clause and in another place the words "April 19,
" *Matter of Alger* (1902), 38 Misc. 143, 77 N. Y. Supp. 166.

revocation of codicil does not revoke will.—The testatrix duly made and executed
l and subsequently a codicil which only modified the former by making an
donal bequest of one thousand dollars before creating and providing for
iduary estate. Apparently the will and codicil were, physically, detached
separate instruments. Subsequently the codicil was intentionally destroyed
thereby revoked, but the will was fully preserved, and, after the death of
estatrix, found in an appropriate place for custody and duly admitted to
te. It was held that this did not operate as a revocation of the will. While
l and existing codicil are to be regarded as a single and entire instrument for
urpose of determining testamentary intention and disposition, the destruction
evocation of a codicil to a will does not necessarily or ordinarily operate as a
ation of the will. *Osburn v. Rochester Trust & S. D. Co.* (1913), 209 N. Y.
2 N. E. 571, 46 L. R. A. (N. S.) 983, Ann. Cas. 1915 A 101.

en codicil revoked by revocation of will.—If a will and a codicil thereto are
sarily interdependent or so involved as to be incapable of separate existence,
evocation of the will, *ipso facto*, revokes the codicil. *Matter of Francis*
, 73 Misc. 143, 132 N. Y. Supp. 695.

Instrument purporting to be a codicil and published as such cannot be ad-
d to probate where the will to which it refers has been revoked. *Matter of*
s (1911), 71 Misc. 382, 130 N. Y. Supp. 187.

ect of codicil to will revoked.—The effect of a codicil to a will which has been
ed by a later will is to revive and republish the earlier will as of the date of
codicil and to impliedly, if not expressly, revoke the intermediate will, so that
codicil and earlier will constitute the final testamentary disposition of the
a. *Matter of Campbell* (1902), 170 N. Y. 84, 62 N. E. 1070.

revocation by deed.—Revocation may be made by a deed, duly executed, convey-
ll of the testator's property in trust. *Matter of Backus* (1900), 49 App. Div.
3 N. Y. Supp. 544; *Nottbeck v. Wilks* (1857), 4 Abb. Pr. 315, 320; *Arthur v.*
ar (1850), 10 Barb. 9, 21.

ent to destroy.—There must be an intent to destroy the will for the purpose
vocation. A lunatic can have no such intent. *Smith v. Wait* (1848), 4 Barb.
Matter of Forman (1869), 54 Barb. 274; *Dominick v. Dominick* (1887), 20 Abb.
286. But the intention is of no consequence, unless carried out by some
mounting to a cancellation or a revocation. *Clark v. Smith* (1861), 34 Barb.
Leaycraft v. Simmons (1854), 3 Bradf. 35, 44.

essential element of a revocation of a will by destruction is the testator's
t, and unless this is established the will must be probated, without regard
attempted destruction. In *re Kathan's Will* (1913), 141 N. Y. Supp. 705, 715.

revocation by writing across pages of will.—Where a will and codicil are written
o sheets of legal cap paper containing the usual margin, the action of the
or in writing lengthwise of the pages in the blank margin space the words
will and codicil is revoked," together with the date and his signature, does

not operate as a revocation, especially when it appears that no portion of the body of the will or codicil was canceled or obliterated. *Matter of Akers* (1902), 74 App. Div. 461, 77 N. Y. Supp. 643, *affd.* 173 N. Y. 620, 66 N. E. 1103.

Where testator's will consisted of six pages, the writing on four pages of which had been marked through with ink lines and a marginal note written on each of such four pages in testator's handwriting declared such lines void, held no revocation and the entire will as executed must be admitted to probate. *Gugel v. Vollmer* (1883), 1 Dem. 484.

Revocation by interlineation.—The inserting of words with a lead pencil apparently for the purposes of indicating changes to be made in the preparation of a new will does not show intention of revoking the will before the new will was executed. *Matter of Raisbeck* (1906), 52 Misc. 279, 102 N. Y. Supp. 967.

Writing words null and void; intent to revoke.—Where, after due execution of an instrument in writing purporting to be the last will of one Daniel Heatley Barnes, every sentence containing any disposition of property was in some part intersected by the words: "Null and Void. Daniel Heatley Barnes, Oct. 30th, 1910" written with a red pencil and in the testator's handwriting, and there is no extrinsic evidence of the transaction except that the paper was in the custody of the testator at his death, probate will be denied on the ground of cancellation with intent to revoke. *Matter of Barnes* (1912), 76 Misc. 382, 136 N. Y. Supp. 940.

A mere indorsement by a testator upon the back of his will and his signature, to the effect that the will is revoked, is insufficient. *Matter of Miller* (1906), 50 Misc. 70, 100 N. Y. Supp. 344.

Obliteration of signature.—A will will not be denied probate for the mere obliteration of the testator's signature by a number of vertical lines drawn through the same; especially where there was no apparent reason for the revocation of the will and it appears that the vertical strokes over the signature were made by a firm, vigorous hand and could not have been made by the testator who wrote with a trembling hand. *Matter of Hopkins* (1902), 73 App. Div. 559, 77 N. Y. Supp. 178, *revd. on other ground*, 172 N. Y. 360, 65 N. E. 173, 65 L. R. A. 95, 92 Am. St. Rep. 746. A testator may cancel and revoke his will by drawing ink lines through the signature, *animo revocandi*. *Matter of Brookman* (1895), 11 Misc. 675, 33 N. Y. Supp. 575.

The total excision of the signature of a will by the testator indicates an intention on his part to revoke the will. *Matter of Francis* (1911), 73 Misc. 148, 132 N. Y. Supp. 695.

Where the portions of a will which bore the signatures of the testator and the witnesses were so torn that the signatures were almost entirely removed, and it appears that the mutilation was made, by a third person, by the direction and consent of the testator, during his lifetime, but not at the time when the direction was given nor in the presence of the testator, and the will remained in the testator's possession to the time of his death, the removal of the signatures did not constitute a revocation. *Matter of Hughes* (1908), 61 Misc. 207, 114 N. Y. Supp. 929.

Erasure.—A duly executed will, giving a certain sum to each of two persons named, having been altered by the testatrix's merely erasing the name of one and the word "each" is not "revoked or altered" within the meaning of this section, and will be admitted to probate as originally executed. *Matter of Kissam* (1908), 59 Misc. 307, 110 N. Y. Supp. 158.

Erasures, interlineations and additions made to a will after its execution do not change the will unless it is re-executed with all the statutory formalities, and the

ould be probated as though alterations had not been made. *Matter of Acker-*
908), 129 App. Div. 584, 114 N. Y. Supp. 197.

re a testator having an only son, James W. Smith, devised certain real
 to his "son James W. Smith," and thereafter erased from the clauses con-
 the devise the name "James W Smith," leaving the word "son," it was
 at neither the will, nor the devises to James W. Smith, were revoked. *Clark*
h (1861), 34 Barb. 140.

ng up of a will although afterwards pieces were collected by testator's wife
 wed together, so as to be legible, is a revocation. *Sweet v. Sweet* (1863),
 451. It is essential to a revocation of a will by tearing it, that the act
 be done in the presence of the testator. *Matter of Hughes* (1908), 61 Misc.
 N. Y. Supp. 929.

of the "injury or destruction" of the will, by two witnesses, is only required
 he act has been performed by some other person, in the testator's presence,
 his direction and consent. *Bulkley v. Redmond* (1853), 2 Bradf. 281.

uction by person other than testator.—Where a will has been lost or de-
 , under circumstances showing that it was not done with the knowledge or
 of the testator, it may be established as his will, whether the loss or de-
 on took place before or after his death. *Schultz v. Schultz* (1866), 35 N. Y.
 Am. Dec. 88. It is not fraudulent for a person to destroy a will at the re-
 of the testator. *Timon v. Claffy* (1865), 45 Barb. 438, affd. 41 N. Y. 619.

that will was cut in two parts by some one other than the testatrix does
 constitute a revocation. *Matter of Ackels* (1898), 23 Misc. 321, 52 N. Y. Supp.

ough a testatrix had directed her brother, who was the custodian of her
 d a beneficiary thereunder, to produce it and destroy it, and he falsely
 ed her that he had destroyed it, there is no revocation and the instrument
 admitted to probate. *Matter of Evans* (1906), 113 App. Div. 373, 98 N. Y.
 042.

ption.—*Matter of Percival* (1913), 79 Misc. 567, 584, 141 N. Y. Supp. 180.

ption is the extinction or satisfaction of a legacy by some act of a testator,
 is equivalent to a revocation of the bequest or indicates the intention to
 and the rule of ademption is applied where the testator stands in *loco*
 s. The rule of ademption is not applicable to devises of realty. *Burnham*
Fort (1888), 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462, affg. 37 Hun 216;
n v. Astor's Executors (1857), 16 N. Y. 9.

re the will expresses the purposes for which a legacy is given and the testator
 rds, in his lifetime, furnishes the legatee money for the same purpose; this
 demption. *Langdon v. Astor's Executors* (1857), 16 N. Y. 9, 36.

emption of destruction by testator.—Where it appears that a testator's will
 ot seen in his possession and control, and at his death, after proper search
 d not be found, the presumption is that it was destroyed by the testator
revocandi, and this presumption stands in the place of positive proof. *Coll-*
Collyer (1888), 110 N. Y. 481, 486, 18 N. E. 110, 6 Am. St. Rep. 405. *Betts v.*
n (1830), 6 Wend. 173; *Hard v. Ashley* (1895), 88 Hun 103, 34 N. Y. Supp.
olland v. Ferris (1853), 2 Bradf. 334; *Matter of Nichols* (1886), 40 Hun 387;
y v. Redmond (1853), 2 Bradf. 281. The presumption that a fact, continuous
 character, continues to exist until the contrary is proved, and that there is a
 ption that an instrument shown to have been executed continues in existence,
 application to an ambulatory instrument like a will or codicil; as to such
 ument the presumption is the other way. *Matter of Kennedy* (1901), 167
 63, 168, 60 N. E. 442.

ere the will is in the possession of the testatrix during her lifetime and

she has executed no other instrument revoking it and it cannot be found after her death, the law presumes that she has revoked it in one of the other ways set forth in the statute, *i. e.*, by burning, tearing, cancelling, obliterating or destroying it. Where, however, the will is not in her possession nor under her control and there is no evidence that it was destroyed by another person in her presence, there is no such presumption." *Matter of Gethins* (1916), 97 Misc. 561.

Where a will which in terms revoked all prior wills was delivered to the testatrix and it cannot be found after her death or its whereabouts accounted for, it is presumed that it was destroyed by her with an intention to revoke it. *Matter of Bennett* (1915), 166 App. Div. 637, 152 N. Y. Supp. 46.

Where an instrument offered for probate came directly from the safe of the decedent and there are no grounds to suspect that it has been tampered with and the signature is canceled by pen marks and below it in decedent's handwriting are the words "Am going to make a new will"; and where several important changes in the family of decedent have occurred since the paper was drawn, it will be presumed that the will was revoked. *Matter of Miller* (1906), 51 Misc. 156, 100 N. Y. Supp. 849.

Where a will, duly executed, was found on the death of the testatrix, in her bureau drawer, with her signature and the name of the legatee and proponent partially obliterated, it was held that there was a legal presumption that the will had been canceled and revoked by the testatrix. *Matter of Clark* (1869), 1 Tuck. 445. See also *In re Philip's Will* (1892), 19 N. Y. Supp. 13.

Presumption as to interlineation.—There is no presumption that an unexplained interlineation fair upon the face of an instrument offered for probate as a last will was fraudulently made after the will was executed, and the burden of proof is upon the contestant to show the fact. *Matter of Rose* (1916), 96 Misc. 404.

Evidence, declarations of testatrix.—Declarations of a testatrix made subsequent to the execution of a will, are incompetent to prove the execution or revocation of the will. *Matter of Burbank* (1905), 104 App. Div. 312, 93 N. Y. Supp. 866, *affd.* 185 N. Y. 559, 77 N. E. 1183.

Declarations of a testatrix that interlineations in her last will were made after the instrument was executed should be disregarded particularly where they are not shown to have been made at any particular time. *Matter of Rose* (1916), 96 Misc. 404.

Evidence as to contents of paragraphs cut from will by testatrix; attempted cancellation of particular clauses of will; effect of failure to establish contents of portion of clauses cut from will.—Where in a proceeding for the probate of a will it appears that the testatrix during her lifetime had cut and completely removed a paragraph containing a money legacy, and also a part of the residuary clause, and that these portions of the will have not been found, evidence by a neighbor of the testatrix based upon a conversation with her about three months after the date of the will, as to the contents of the missing parts, is hearsay, incompetent and no part of the *res gestæ*. Even if the testimony of the neighbor of the testatrix had been competent, it was insufficient to establish the contents of the missing clauses of the will, where the only other testimony was that of the attorney who drew the will, who could only remember that one clause contained a money legacy for some amount "in the thousands" in favor of a certain beneficiary. Since attempted cancellation of particular clauses of a will by their obliteration is ineffectual to revoke such clauses, the remaining portion of the will may be probated, even if the contents of the obliterated parts cannot be ascertained, unless it can be seen that the missing parts will affect or alter the remaining parts. If the contents of the portion of the residuary clause cut from the will in question cannot be ascertained, then there will be intestacy as to this portion of the residue,

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for a lapsed or ineffectual gift of a portion of the residue does not fall into or become a part of the remaining residue. If the money legacy cut from the will fails because its amount and donee cannot be ascertained, such unknown amount will sink into the residue as in the case of a lapsed legacy. *Matter of Kent* (1915), 169 App. Div. 388, 155 N. Y. Supp. 894, revg. 89 Misc. 16, 152 N. Y. Supp. 557.

Section cited.—*Matter of Horton* (1914), 163 App. Div. 213, 216, 148 N. Y. Supp. 18, reargument denied 163 App. Div. 970, 148 N. Y. Supp. 1121.

§ 35. **Revocation by marriage and birth of issue.**—If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 43.

A will is deemed revoked under this section although a legatee thereunder dies after the execution thereof and during the lifetime of the testator and the will for that reason does not dispose of the testator's whole estate. *Matter of Rossignot* (1906), 50 Misc. 231, 100 N. Y. Supp. 623.

Marriage and the birth of a child is an implied revocation of a will previously made, disposing of the testator's whole estate, where there is no provision in the will for such new relatives. This rule applies as well to a case where the testator had children by a former wife who are provided for in the will, as where he was without children at the time it was executed. *Havens v. Van Denburgh* (1845), 1 Den. 27; *Matter of Gall* (1887), 5 Dem. 374. But a subsequent marriage or subsequent birth of a child alone, will not amount to a revocation. *Bursh v. Wilkins* (1820), 4 Johns. Ch. 506.

A will under the terms of which the children born of the new marriage are provided for by the testator as "such child or children of mine as may survive me," and in fact they receive greater provision under the will than they would receive had testator died intestate, will not be revoked by the subsequent marriage of the testator and birth of children to that marriage. *Matter of Lally* (1910), 136 App. Div. 781, 121 N. Y. Supp. 467, affd. 198 N. Y. 608, 92 N. E. 1089.

A will which in terms provides that it is to be regarded as canceled the day the testator enters matrimony is not effectually "canceled," within the meaning of section 34, ante, by his marriage. *Matter of Steiner* (1915), 89 Misc. 66, 152 N. Y. Supp. 725.

Marriage and parenthood do not raise a presumption of an intent to revoke, but are in themselves a revocation, unless express provision be made in view of the new duties arising from the changed relation. *Matter of Del. Genovese* (1915), 169 App. Div. 140, 154 N. Y. Supp. 806.

Issue must be born of subsequent marriage in order to effect the revocation of a prior will under this section. *Matter of Andrest* (1916), 96 Misc. 389, 160 N. Y. Supp. 505.

Merely accumulation of property in addition to that possessed at the date of the ante-nuptial will cannot be considered as a "provision" made by the testator for the new dependents upon him as a husband and father. *Matter of Del. Genovese* (1915), 169 App. Div. 140, 154 N. Y. Supp. 806.

A will made, without knowledge of the existence of a living child, is not revoked,

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even at common law, by the discovery of its existence. *Ordish v. McDermott* (1877), 2 Redf. 460.

The will of a widow made pursuant to an oral agreement with her bachelor brother for the execution of mutual wills is revoked by her subsequent marriage. *Near v. Shaw* (1912), 76 Misc. 303, 137 N. Y. Supp. 77.

The question whether an ante-nuptial will has been revoked by a subsequent marriage and birth of issue must be determined by the state of facts and the condition of the testator's property at the date of the will. Hence, proof of the acquisition of additional property after the making of such a will cannot avail to prevent its revocation under the statute. *Matter of Del. Genovese* (1915), 169 App. Div. 140, 154 N. Y. Supp. 806.

Evidence to rebut presumption of revocation.—The presumption of revocation by marriage and birth of issue may be repelled by circumstances showing that the testator intended the will to stand notwithstanding the change in his family. The prohibition in the statute against the reception of other evidence to rebut the presumption of revocation is effective to prevent the taking of evidence of the death of a legatee for that purpose. *Matter of Rossignot* (1906), 50 Misc. 231, 100 N. Y. Supp. 623.

Where the law presumes a revocation from a change in the testator's family or property after making his will, parol evidence of actual intention to the contrary is not admissible to rebut this presumption. *Adams v. Winne* (1838), 7 Paige, 97, 99.

§ 36. Will of unmarried woman.—A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 44.

Application.—Power conferred on married women to execute a will does not affect the application of this section. *Brown v. Clark* (1879), 77 N. Y. 369; *Loomis v. Loomis* (1868), 51 Barb. 257; *Croner v. Cowdrey* (1893), 139 N. Y. 471, 476, 34 N. E. 1061, 36 Am. St. Rep. 716. The expression of the statute "deemed to be revoked" is positive, and does not create a mere presumption in favor of revocation, subject to be explained. *Lathrop v. Dunlop* (1875), 4 Hun 213, affd. 63 N. Y. 610.

A will revoked by a subsequent marriage of the testatrix may be declared null and void on final accounting. *David's Estate* (1868), 1 Tuck. 107.

Where an unmarried woman made her will while a resident of New Jersey, and after marrying in that state removed with her husband to this state where she died, it was held that the question of the validity of the will was governed by the law of this state; that such will was revoked by the subsequent marriage. *Matter of Coburn* (1894), 9 Misc. 437, 30 N. Y. Supp. 383.

Although a will made by an unmarried female is to be revoked by her subsequent marriage, such subsequent marriage does not operate to prevent an instrument, executed before marriage, and established by the marriage settlement, from taking effect upon the property settled, according to the very terms of the settlement itself. *McMahon v. Allen* (1855), 4 E. D. Smith 519, 552.

A will made by an unmarried woman in contemplation of marriage is deemed revoked by her subsequent marriage, although it makes provision for her intended husband. *Matter of Mann* (1906), 51 Misc. 315, 100 N. Y. Supp. 1100.

Remarriage.—The will of a married woman is not revoked by her subsequent remarriage. *Matter of Burton* (1893), 4 Misc. 512, 25 N. Y. Supp. 824.

The will of a widow made pursuant to an oral agreement with her bachelor brother for the execution of mutual wills is revoked by her subsequent marriage. *Near v. Shaw* (1912), 76 Misc. 303, 137 N. Y. Supp. 77.

This section is not restricted in its application to women who have never been married, but applies to a woman who at the time of executing the will is not in

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a state of marriage; and so includes a widow. *Matter of Will of Kaufman* (1892), 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292.

A will executed by a married woman is not revoked by her subsequent remarriage after an intervening widowhood. *Matter of McLarney* (1897), 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664, affg. 90 Hun 361, 35 N. Y. Supp. 893.

§ 37. Bond or agreement to convey property devised or bequeathed not a revocation.—A bond, agreement, or covenant, made for a valuable consideration, by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 45.

Effect of contract to convey land previously devised.—Where the testator entered into written contracts for the sale of parts of a tract of land devised by his will, it was held that the contracts were a revocation of the devise, *pro tanto*, in equity, though not at law. *Walton v. Walton* (1823), 7 Johns Ch. 258, 11 Am. Dec. 456; *Gaines v. Winthrop* (1835), 2 Edw. Ch. 571. See generally *Holly v. Hirsh* (1892), 135 N. Y. 590, 32 N. E. 709; *Knight v. Weatherwax* (1838), 7 Paige 182; *Roome v. Phillips* (1863), 27 N. Y. 357, 364.

Validity of contracts disposing of property.—There is no law, except that which protects the right of dower, to prevent a man from making a contract in his lifetime affecting the disposition of his property after his death, but such contracts should be in writing, or established by disinterested witnesses, and should be fair and equitable. *Middleworth v. Ordway* (1908), 191 N. Y. 404, 84 N. E. 291, affg. 117 App. Div. 913, 102 N. Y. Supp. 1143.

Where a testator, after devising his real estate to his wife subject to the payment by her of certain legacies, entered into a contract for the sale of the real estate, and his widow, the purchase price having been paid, executed the deed, the legacies are not a lien on the real estate. The lien is transferred to the purchase money. *Guelich v. Clark* (1874), 3 T. & C. 315.

Where a testatrix, having devised certain lands, entered into an executing contract to sell and placed the deed in escrow to be delivered on the payment of the consideration by the vendee, and the vendor died and later on the same day the vendee paid the consideration and received the deed, the devisee of the lands was entitled to the consideration paid by the vendee as against the legatee of the personal property. *Van Tassel v. Burger* (1907), 119 App. Div. 509, 104 N. Y. Supp. 273.

Contract by a testatrix a few months after the execution of her will to sell lands devised, held not to revoke the devise. *Nutzhorn v. Sittig* (1901), 34 Misc. 486, 70 N. Y. Supp. 287.

§ 38. Charge or incumbrance not a revocation.—A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained, shall pass and take effect, subject to such charge or incumbrance.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 46.

Application.—Section does not apply to actual conversion of real property devised into personal property, subsequent to making the will, by selling and conveying testator's interest in the land and taking back a purchase-money mortgage. *Adams v. Winne* (1838), 7 Paige 97.

A conveyance made subsequent to a devise of land, is not a revocation, or satisfaction of a devise of other lands to the grantee. But if the conveyance be of a portion of the same land, it is a revocation *pro tanto*. *Arthur v. Arthur* (1850), 10 Barb. 9; *Walton v. Walton* (1823), 7 Johns. Ch. 258, 11 Am. Dec. 456. A change in the property of the testator, subsequent to the execution of his will, operates as a revocation of the devises in the will, just so far as the alteration in the property has had the effect to place it beyond the operation of the provisions of the will, and no further. *Vandemark v. Vandemark* (1857), 26 Barb. 416, 418. See also cases cited under section 37, ante.

Leases for years, mortgages or conveyances in trust for the payment of debts and then in trust for the benefit of the grantor, are revocations of a will only *pro tanto*. But any alteration of the estate by the testator, or of his interest therein, or any modification of it which converts it into a different estate from the one the testator had at the time of the devise, even though the testator take back the estate in an altered condition by the same instrument, is a revocation of a will or devise. *Herrington v. Budd* (1848), 5 Den. 321, 323.

§ 39. Conveyance, when not to be deemed a revocation.—A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 47.

Revocation of devise.—After the execution of a will containing a devise to a daughter of the testator, she, in consideration of the payment to her of a sum of money, signed a written instrument which stated that the sum paid was to be in lieu of the devise. It was held that the writing did not revoke the devise. *Burnham v. Comfort* (1888), 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462.

It is only where the estate or interest in the property specifically devised is wholly diverted that the devise is revoked. *Van Tassel v. Burger* (1907), 119 App. Div. 509, 512, 104 N. Y. Supp. 273; *Vreeland v. McClelland* (1851), 1 Bradf. 393.

Trust deed in conformity with a will and codicil and executed at the same time as the latter held not to have been intended as a revocation of the will and codicil. *Wade v. Holbrook* (1876), 2 Redf. 378.

The satisfaction of a legacy, by an advancement made by the testator in his lifetime is not a revocation of the bequest or an alteration of the will, within the meaning of the statute, where the testator has declared in the will itself that the legacy should not be payable in the event of an advancement, to be made and characterized in a specified manner, and that event has happened. *Langdon v. Astor's Executors* (1857), 16 N. Y. 9.

The ademption of a legacy of personal estate is not usually called revocation. *Langdon v. Astor's Executors* (1857), 16 N. Y. 9, 39.

Section cited.—*Matter of Hildenbrand* (1914), 87 Misc. 471, 474, 150 N. Y. Supp. 1067.

§ 40. Conveyance, when to be deemed a revocation.—But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 48.

Application.—When the testator in his lifetime wholly divests himself of the property previously devised or bequeathed, the revocation is effectual although he does it by making a conversion such as he directed in the will, and leaves the fund not otherwise disposed of. *Dowd's Will* (1879), 8 Abb. N. C. 118, 58 How. Pr. 107. A contract made by the testator wholly inconsistent with the previous testamentary disposition of his property will operate as a revocation thereof. *Walker v. Steers* (1891), 38 N. Y. St. Rep. 654, 14 N. Y. Supp. 398.

Devise of all real property.—Where a devise is made in general terms of all the testator's real property, it operates as a disposition of such real estate as he may have at the time of his death. *Brown v. Brown* (1852), 16 Barb. 569, 574; *Ellison v. Miller* (1851), 11 Barb. 332, 334.

Sale before will takes effect.—If a testatrix devise real estate, and sell the same before the will takes effect, the proceeds thereof become personal estate, and the money received by the testatrix cannot be substituted for the land devised. *Philson v. Moore* (1880), 23 Hun 152; citing *Beek v. McGillis* (1850), 9 Barb. 35, 53; *Vandemark v. Vandemark* (1857), 26 Barb. 416.

A devise of real estate is revoked by a sale thereof during the lifetime of the testator. *Hoffmann v. Steubing* (1906), 49 Misc. 157, 98 N. Y. Supp. 706; *Rose v. Rose* (1849), 7 Barb. 174.

Where a testator devises all his real estate to his wife for life, directing a sale thereof, after her decease, and a division of the proceeds among his nephews and nieces, and he subsequently sells a portion of the land, in his lifetime, taking a purchase money mortgage, this operates as a revocation of the devise. *McNaughton v. McNaughton* (1866), 34 N. Y. 201; *Brown v. Brown* (1852), 16 Barb. 569; *Barstow v. Goodwin* (1853), 2 Bradf. 413.

Sale operates as revocation of devise.—Where a testatrix, having devised specific real property in trust, rents and profits to be paid to her son for the life of his wife, and in fee to him if living at his wife's death, with contingent remainders over, gave and devised the residue of her estate, real and personal, to another son with contingent remainders over, and afterwards sold the premises specifically devised, receiving cash and a purchase-money mortgage for the balance, and thereafter expended for her own benefit part of the moneys received, the sale effected a revocation of the specific devise, and the mortgage and the moneys unexpended passed at her death to her residuary legatee. *Matter of Sinnott* (1914), 163 App. Div. 817, 148 N. Y. Supp. 637, affd. 214 N. Y. 667, 108 N. E. 1108.

Section cited.—*Matter of Hildenbrand* (1914), 87 Misc. 471, 474, 150 N. Y. Supp. 1067.

§ 41. Canceling or revocation of second will not to revive first.—If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that

it was his intention to revive and give effect to his first will; or unless after such destruction, canceling or revocation, he shall duly republish his first will.

Source.—R. S., pt. 2, ch. 6, tit. 1, Article 3, § 53.

The phrase "second will" should not be construed to mean in any case simply a codicil to the first will. It evidently refers to a testamentary instrument which assumes to dispose of the testator's entire estate. *Matter of Simpson* (1878), 56 How. Pr. 125, 131.

"A later will is not necessarily a revocation of a prior will, unless by it the prior will is in terms revoked and canceled, or by the later will a disposition is made of all of the testator's property, or the same is so inconsistent with the former will that the two cannot stand together, or that the former will is revoked *pro tanto*." *Matter of Cunnion* (1911), 201 N. Y. 123, 126, 94 N. E. 648, Ann. Cas. 1912 A, 834, affg. 135 App. Div. 864, 120 N. Y. Supp. 266.

A destruction or loss of a second will with the intention of revoking it, containing a clause revoking a prior will, does not revive the prior will. *Matter of Wear* (1909), 131 App. Div. 875, 116 N. Y. Supp. 304; *Matter of Barnes* (1902), 70 App. Div. 523, 75 N. Y. Supp. 373.

Probate of a will will be denied where it is proved that subsequently another will was duly executed and published, which in terms revoked the former one, although the subsequent will has never been offered for probate and has been lost or destroyed. The destruction of a subsequent will does not revive a former will. *Matter of Wylie* (1914), 162 App. Div. 574, 145 N. Y. Supp. 133.

In order to revive the former will, it must be republished with the same formalities that are required in the execution of a will. *Matter of Brewster* (1902), 72 App. Div. 587, 76 N. Y. Supp. 283; *Matter of Kuntz* (1914), 163 App. Div. 125, 148 N. Y. Supp. 382.

A testatrix who executed a will revoking former wills by destroying the later will in the presence of one of the witnesses to the original will, and by declaring to him alone that she desires the first will to be probated at her death, does not revive the prior will. *Matter of Kuntz* (1914), 163 App. Div. 125, 148 N. Y. Supp. 382.

Destruction of subsequent will will not permit a republication of a former will by declaration to persons, not witnesses thereof, that such instrument was his will. *Matter of Stickney* (1898), 31 App. Div. 382, 52 N. Y. Supp. 929, affd. in 161 N. Y. 42, 55 N. E. 396, 76 Am. St. Rep. 246, citing *Jackson v. Potter* (1812), 9 Johns. 312; *Matter of Forbes* (1893), 24 N. Y. Supp. 841; *Matter of Simpson* (1878), 56 How. Pr. 125; *Lewis v. Lewis* (1854), 11 N. Y. 220; *Baskin v. Baskin* (1867), 36 N. Y. 416; *Matter of Phillips* (1885), 98 N. Y. 267.

Revocation of codicil.—Where a will has been modified by a codicil creating an additional legacy, the mere revocation of the codicil does not restore the will to its original form and tenor. *Osburn v. Rochester Trust and Safe Deposit Co.* (1913), 209 N. Y. 54, 102 N. E. 571, modfg. 152 App. Div. 235, 136 N. Y. Supp. 859.

Presumption of destruction *animo revocandi*.—"If a will, shown once to have existed and to have been in the testator's possession, cannot be found after his death, the presumption is that he destroyed it, *animo revocandi*, but this presumption may be rebutted by evidence." *Matter of Cunnion* (1911), 201 N. Y. 123, 126, 94 N. E. 648, Ann. Cas. 1912 A, 834, affg. 135 App. Div. 864, 120 N. Y. Supp. 266.

§ 42. Record of wills in county clerk's office.—A will of real property, which has been, at any time, either before or after this chapter takes effect

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proved in the supreme court, or the court of chancery, or before a court of the state with the certificate of proof thereof annexed thereto, or proved thereon, or an exemplified copy thereof, may be recorded in the office of the clerk or the register, as the case requires, of any county of this state, in the same manner as a deed of real property. Where the will relates to real property, the executor or administrator, with the will proved, must cause the same, or an exemplified copy thereof, to be so recorded, in each county where real property of the testator is situated, within twenty days after letters are issued to him. An exemplification of the record of such a will, from any surrogate's or other office where the will has been so recorded, either before or after this chapter takes effect, may be in like manner recorded in the office of the clerk or register of any county. Such a record or exemplification, or an exemplification of the will itself, must be received in evidence, as if the original will was proved and proved.

Code Civ. Pro. § 2633, as amended by L. 1881, ch. 535; L. 1882, ch. 399; derived from L. 1869, ch. 748, § 1.

Evidences.—Recording deeds of real property, Real Property Law § 291. Records heretofore proved and exemplified received in evidence after thirty years, Civil Procedure (Surrogates' Code) § 2623.

Application of section to wills proved previous to enactment, see Wilson v. Van Hook (1902), 38 Misc. 486, 77 N. Y. Supp. 980; Jefferson v. Bangs (1913), 178 N. Y. Supp. 1054, 144 N. Y. Supp. 1054, affd. 169 App. Div. 102, 154 N. Y. Supp. 439; Matter of Millard (1890), 118 N. Y. 244, 23 N. E. 376, 6 L. R. A. 667.

Section cited in relation to jurisdiction of surrogate's court to give judicial notice to a will of real estate. Matter of Marcial (1891), 37 N. Y. St. Rep. 89.

County clerk's index of recorded wills.—Upon recording a will or its exemplification, as prescribed in the last section, the clerk or register must enter it in the same books, and substantially in the same manner, as if it were a deed recorded in his office.

Code Civ. Pro. § 2634; derived from L. 1846, ch. 182, §§ 3, 4.

Recording will proved in another state or foreign country.—Where real property situated within this state, or an interest therein, is devised to or bequeathed to a person who is subject to a power of disposition by a will duly executed in conformity with the laws of this state, of a person who was at the time of his death, a resident elsewhere within the United States, or in a foreign country, and such will has been admitted to probate within the state or territory, or foreign country, where the decedent so resided, and is filed and recorded in the proper office as prescribed by the laws of that state or territory or foreign country, a copy of such will or of the record thereof, together with the proofs or of the records thereof, or if the proofs are not on file or recorded in such office, of any statement, on file or recorded in such office, of the substance of the proofs, authenticated as prescribed in section 2633 of this chapter, or if no proofs and no statement of the sub-

stance of the proofs be on file or recorded in such office, a copy of such will or of the record thereof, authenticated as prescribed in said section forty-five, accompanied by a certificate that no proofs or statement of the substance of proof of such will, are or is on file or recorded in such office, made and likewise authenticated as prescribed in said section forty-five, may be recorded in the office of the surrogate of any county in this state where such real property is situated; and such record in the office of such surrogate or an exemplified copy thereof shall be presumptive evidence of such will and of the execution thereof, in any action or special proceeding relating to such real property. (*Thus amended by L. 1909, ch. 240, § 13, in effect April 22, 1909.*)

Source.—Code Civ. Pro. § 2703, as amended by L. 1888, ch. 495; L. 1897, ch. 605; L. 1900, ch. 633; originally derived from L. 1864, ch. 311, as amended by L. 1872, ch. 680, and L. 1878, ch. 324.

Proof of execution and validity of foreign will.—Where the record does not show that the subscribing witnesses signed the will at the request of the testator, it was held that the will could not be recorded; and that the defect was not cured by appearing before the proper officer and testifying to such fact, several months after the admission of the will, as such testimony formed no part of the proof on which probate was granted. *Meiggs v. Hoagland* (1902), 68 App. Div. 182, 74 N. Y. Supp. 234; *Matter of Langbein* (1882), 1 Dem. 448, 2 Civ. Pro. Rep. (Browne) 226.

The testimony of one of two witnesses to a foreign will is insufficient. *Matter of Hagar* (1905), 48 Misc. 43, 96 N. Y. Supp. 96. But it was held in *Matter of Coope* (1907), 53 Misc. 509, 103 N. Y. Supp. 431, that a foreign will should be admitted to record, although proof of its execution rests upon the testimony of a single witness.

Where a will was admitted to probate in another state and but one witness appeared and was examined as to its execution, and there was no proof either as to the absence of the other witnesses or of their handwriting or any secondary proof whatever in reference to said witnesses, and the attestation clause did not state that any witness signed at the request of the testator, it was held that the will was not executed according to the laws of this state. *Lockwood v. Lockwood* (1889), 51 Hun 337, 3 N. Y. Supp. 887, 2 L. R. A. 425.

It must be shown that the will was executed according to the laws of this state; and the proofs of such a will were fatal where, in the testimony of the witnesses who were described as subscribing witnesses, it did not appear that they signed the will at the request of the testatrix, or in her presence, or that the will was in fact signed by them. *Estate of Shearer* (1882), 1 Civ. Pro. Rep. 455; *Matter of Langbein* (1882), 1 Dem. 448, 2 Civ. Pro. Rep. (Browne) 226.

Proof of probate.—It should appear by the exemplified copy of the foreign record, that the will was admitted to probate in a court duly constituted under the laws of the state where decedent resided. *Estate of Shearer* (1882), 1 Civ. Pro. Rep. 455.

A person relying on the decree of a foreign probate court admitting a will to probate, must prove that the steps necessary to enable the foreign court to acquire jurisdiction of the subject-matter and of the parties were duly had and taken according to the course of the law of the foreign jurisdiction. *Matter of Law* (1900), 56 App. Div. 454, 67 N. Y. Supp. 857.

Evidence of record.—Where a will is proved in another state affecting real property in this state, the existence of a power of sale in such a will, in respect to

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y in this state, is to be evidenced by the record of the will in this state. *v. Hooley* (1893), 67 Hun 370, 22 N. Y. Supp. 215. record is only presumptive evidence of the will and its due execution; and assumption may be overcome by the fact that at the time the will was d to probate it had not been shown that the subscribing witnesses became the request of the testator. *Meiggs v. Hoagland* (1902), 68 App. Div. 182, K. Supp. 234; *Matter of Langbein* (1882), 1 Dem. 448, 2 Civ. Pro. Rep. e) 226. The exemplified copy is only presumptive evidence. *Lockwood v. od* (1889), 51 Hun 337, 3 N. Y. Supp. 887, 2 L. R. A. 425. der that the record of a foreign will may be presumptive evidence of its on, it is not necessary that the record show that the will was probated in ility with our law, but merely that it was executed in conformity therewith. a foreign record, filed here which shows that on probate only one of the scribing witnesses was examined, is presumptive evidence of the will and ution thereof. *Bradley v. Krudop* (1908), 128 App. Div. 200, 112 N. Y. Supp.

tement in the certificate that "our statute does not require that the evi- f the witnesses thereof should be preserved in writing" is not the statement d by this section, to the effect that, "if no proofs or statement of substance f of such will" be on file; there must be a certificate showing such fact. of Nash (1902), 37 Misc. 706, 76 N. Y. Supp. 453. lary letters.—No authority to issue such letters can be gathered from the ons of this section. *Spratt v. Syms* (1905), 104 App. Div. 232, 93 N. Y. Supp.

. Authentication of papers from another state or foreign country in this state.—To entitle a copy of a will admitted to probate or ers testamentary or of letters of administration, granted in any state or in any territory of the United States, and of the proofs or statement of the substance of the proofs of any such will, or of the of any such will, letters, proofs or statement, to be recorded or used state as provided in article seventh of title third of chapter eighteenth code of civil procedure or in section forty-four of this chapter, copy must be authenticated by the seal of the court or officer by which m such will was admitted to probate or such letters were granted, or the custody of the same or of the record thereof, and the signature dge of such court or the signature of such officer and of the f such court or officer if any; and must be further authenticated by a ate under the great or principal seal of such state or territory, e signature of the officer who has the custody of such seal, to ect that the court or officer by which or whom such will was admitted ate or such letters were granted, was duly authorized by the laws h state or territory to admit wills to probate or to grant letters entary or of administration and to keep the same and records f; that the seal of such court or officer affixed to such copy is genuine, at the officer making such certificate under such seal of such r territory verily believes that each of the signatures attesting such s genuine; and to entitle any certificate concerning proofs accom- g the copy of the will or of the record so authenticated, to be

recorded or used in this state, as provided in said article or section, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine. To entitle a copy of a will admitted to probate or of letters testamentary, or of letters of administration, granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state, as provided in said article or section, such copy must be authenticated in the manner prescribed by the laws of such foreign country, and must be further authenticated by a certificate of a judge of a court of record or by the chief officer of the department of justice of such foreign country to the effect that such authentication is in conformity with the laws of such foreign country, and that the court or officer by which or by whom such will was so admitted to probate, or such letters were granted, was duly authorized by the laws of such foreign country to admit wills to probate, or to grant letters testamentary or of administration, and to keep the same and records thereof; and the signature and official character of such judge or court of record or of such chief officer of the department of justice shall be attested by a consular officer of the United States, resident in such foreign country, under the seal of his office; and to entitle any certificate concerning proofs accompanying the copy of the will or of the records so authenticated, to be used and recorded in this state, as provided in said article or section, such certificate concerning the proofs must be similarly authenticated and attested. (*Thus amended by L. 1909, ch. 304.*)

Source.—Code Civ. Pro. § 2704, as amended by L. 1888, ch. 495; L. 1897, ch. 603; L. 1902, ch. 472; L. 1905, ch. 347.

Compliance with this section in authentication of papers on which letters are issued. *Matter of Connell* (1915), 92 Misc. 324, 155 N. Y. Supp. 397.

In an application for ancillary letters testamentary, the facts conferring jurisdiction should be stated directly, and not be left to inference. *Matter of Winington* (1881), 1 Civ. Pro. Rep. 267.

Failure to authenticate foreign letters of administration, in compliance with this section, so as to qualify the complainant to sue under section 1836-a of the Code of Civil Procedure, is a ground for staying the suit, but not for dismissing the bill. *Lecouturier v. Ickelheimer* (1913), 205 Fed. 682.

§ 46. **Validity of purchase notwithstanding devise.**—The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise

property made by the latter, unless within four years after the testator's death, the will devising the same is either admitted to probate as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in prison upon conviction of a criminal offense, for a term less than for life, or without the state; or, if the will was concealed by one or more of the devisees of the testator, the limitation created by this section does not begin to run after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the surrogate.

Case.—Code Civ. Pro. § 2628; derived from R. S., pt. 2, ch. 1, Article 5, § 3. *Case in good faith.*—As to when a devise is directed against the claim by a purchaser in good faith from an heir-at-law, see *Corley v. McElmeel* (1896), 127 N. Y. 228, 43 N. E. 628.

bona fide purchaser gets a good title from an heir, if the will be not probated within four years. *Werner v. Wheeler* (1911), 142 App. Div. 358, 367, 127 N. Y. 58.

Concealment of the will, such as is intended by the statute, is such as leaves the devisees ignorant of their rights under the will and deprives them of knowledge of its existence; to establish concealment of a will within the meaning of the statute there must be some act, arrangement or contrivance of an affirmative character the purpose or design of which is to prevent its discovery. *Fox v. Fee* (1901), 167 N. Y. 44, 60 N. E. 281.

Provision as to concealment does not apply where the devisees or some one of them have knowledge and possession of the will, and it is taken from such possession clandestinely by an heir and secreted or destroyed; it only applies to a concealment, which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence. *Cole v. Gourlay* (1880), 79 N. Y. 58.

Application.—The provision that the limitation shall not begin to run until the expiration of one year from the removal of the disability, has no application to a devisee not born until years after testator's death. *Fox v. Fee* (1901), 167 N. Y. 44, 60 N. E. 281.

§ 47. Validity and effect of testamentary dispositions.—The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent.

Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death. Wherever a decedent, being a citizen of the United States, wherever resi-

dent, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws. (*Amended by L. 1911, ch. 244.*)

Source.—Code Civ. Pro. § 2694.

References.—Suits by and against foreign executors and administrators. Code Civil Procedure §§ 1814–1837.

The object of this section is to designate the laws governing the validity and effect of testamentary dispositions. *Matter of McMulkin* (1886), 5 Dem. 295, 5 N. Y. St. Rep. 349.

Application of section.—*Matter of Schober* (1915), 90 Misc. 230, 154 N. Y. Supp. 309.

Law governing disposition of real property.—It seems that a will of a non-resident not executed according to the laws of this state, is not operative upon real estate here, though if valid in the jurisdiction where it was probated, and established by decree there, it is effectual to dispose of personalty here. *Matter of Law* (1900), 56 App. Div. 454, 67 N. Y. Supp. 857.

Real property within this state passes under a foreign will after it has been admitted to probate here, and is controlled by the law of this state. *Matter of Barandon* (1903), 41 Misc. 380, 84 N. Y. Supp. 937.

Whether a trust created by a will as to realty situated in another state is valid or not can only be determined by the courts of that state. *Butler v. Green* (1892), 65 Hun 99, 107, 19 N. Y. Supp. 890, modifying 16 N. Y. Supp. 888.

Construction of foreign will transferring real property within this state.—The Code of Civil Procedure, section 1866, expressly authorizes an action to determine the validity and construction, or effect, of a will under the laws of this state, of a testamentary disposition of real property situated within it, and though the will was made in another state, its interpretation and effect, so far as it relates to the real property within this state, is to be determined by the courts of this state, and their decision is conclusive. *Monypeny v. Monypeny* (1911), 202 N. Y. 90, 95 N. E. 1, revg. 136 App. Div. 677, 121 N. Y. Supp. 590.

The construction and effect of the will of a non-resident decedent in so far as it involved an exercise of a power of appointment conferred by the will of her father, a resident of this state in his lifetime, and involving property situated in this state, is governed by the law of this state, the domicile of the donor of the power and the situs of the property. *Matter of New York Life Insurance and Trust Co.* (1913), 200 N. Y. 585.

A married woman who, although separated from her husband for many years, has not been divorced from him, has no domicile separate from his, and her will, although it states that she resides in this state must be construed according to the law of the state of his residence, where the property disposed of is situated in such other state. *Jones v. Jones* (1894), 8 Misc. 660, 30 N. Y. Supp. 177.

Claim of dower in property situate in this state is governed by the law of this state. *Roessle v. Roessle* (1914), 163 App. Div. 344, 148 N. Y. Supp. 659.

Domicile of legatee.—While the laws of a testator's domicile govern as to the formal requisites essential to the validity of his will, the capacity of the testator and the construction of the instrument, yet the validity of particular bequests depends, unless expressly prohibited by the law of the testator's domicile, upon the law of the domicile of the legatee. *Congregational Unitarian Soc. v. Hale* (1898), 29 App. Div. 396, 51 N. Y. Supp. 704; *Chamberlain v. Chamberlain* (1871), 43 N. Y. 424.

The validity of provisions of a will relating to a corporation devisee holding, in-

vesting, accumulating and applying the property devised, is for the courts of the domicile of the corporation to determine. *St. John v. Andrews Institute* (1908), 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708, modfg. 117 App. Div. 698, 102 N. Y. Supp. 808. Motion to amend remittitur granted, (1908), 192 N. Y. 382, 85 N. E. 143.

Where by the *lex domicilii* the will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee, except where the law of the domicile of the testator in terms forbids bequests for any particular purpose or in any particular manner, in which latter case the bequest would be void everywhere. *Chamberlain v. Chamberlain* (1871), 43 N. Y. 424.

Law governing administration.—As a general rule, the laws of a foreign state, where the parties interested were domiciled, governing the administration and application of assets, will be regarded and respected in another jurisdiction, unless they are in conflict with the rights of its citizens or from reasons of inconvenience or public policy it will seem unwise to recognize them. *Sherwood v. Judd* (1855), 3 Bradf. 419. The administration of the estate of a deceased person is to be governed by the laws of the state authorizing such administration. *Lawrence v. Elmendorf* (1848), 5 Barb. 73.

The administrator *de bonis non* in a county of this state, of a decedent who was domiciled in Paris and died there, may bring an action with respect to his personal estate within this state, although by the laws of France the personal estate of a decedent devolves upon his heirs at law to the exclusion of all other persons. A debt due from a resident or a non-resident decedent is deemed personal property to be administered upon within this state. *Homans v. N. Y. Life Ins. Co.* (1907), 55 Misc. 574, 106 N. Y. Supp. 929.

The place of domicile is the place of the principal administration, and other administrations are merely ancillary. The law of the place of ancillary administration governs as to the payment of debts there, but the distribution among the next of kin or legatee is made according to the *lex domicilii*. *Churchill v. Prescott* (1855), 3 Bradf. 233; *Suarez v. Mayor* (1844), 2 Sandf. Ch. 173.

Resident sojourning abroad.—The court of the proper surrogate has jurisdiction of the probate of a will drawn according to the laws of this state and executed in accordance with said laws in France where it appears that, although the testatrix had been sojourning abroad for many years and died there, she had never intentionally relinquished her residence and domicile in this state. *Matter of Cleveland* (1899), 28 Misc. 369, 59 N. Y. Supp. 985.

Where a testator is a citizen of this state, but temporarily residing in France, our laws govern the construction of a will executed by him in France of property situated both there and in this country. *Caulfield v. Sullivan* (1881), 85 N. Y. 153.

Law governing disposition of personal property.—The validity of bequests of personal property, and all questions of succession thereto or rights therein, must as a general rule be determined by the laws of the state and by the courts of the state in which the testator is domiciled at his death, when the property, or those having possession and control thereof, were within its jurisdiction. *White v. Howard* (1871), 46 N. Y. 144. It is a universal principle of jurisprudence, at this day in civilized countries, that the succession of personal or movable property, wherever situated, is governed exclusively by the law of the country where the testator was domiciled at the time of his death. *Suarez v. Mayor* (1844), 2 Sandf. Ch. 173.

The laws of the state of the residence of the foreign testator determine the disposition of the personal estate. *Wright v. Mercen* (1901), 34 Misc. 414, 69 N. Y. Supp. 936. The prohibition of the statute which limits the distribution of estates of personalty to the brothers' and sisters' children against the participation of other

collateral relatives in the distribution, does not apply to the will of a non-resident whose property is in a foreign country. *Simonson v. Waller* (1895), 14 Misc. 95, 35 N. Y. Supp. 201, *revd. on other grounds* 9 App. Div. 503, 41 N. Y. Supp. 662.

Personal property is subject to the law of the owner's domicile in respect to its transmission by will or by succession upon the owner dying intestate. An action cannot be maintained to declare invalid a testamentary disposition of personal property in this state, made in and by a resident of another state, lawful and valid at the place of the testator's domicile, but which would be invalid if the will had been one governed by the laws of this state although the beneficiaries may be domiciled here. *Cross v. United States Trust Co.* (1892), 131 N. Y. 330, 15 L. R. A. 606, 30 N. E. 125.

The law of the domicile of a decedent governs the distribution of his personal property, whether to heirs, distributees or legatees. *Matter of Barandon* (1903), 41 Misc. 380, 84 N. Y. Supp. 937.

The law of domicile must prevail in the interpretation of wills relating to personal property. *N. Y. Life Ins. & Trust Co. v. Viele* (1899), 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238; *Dupuy v. Wurtz* (1873), 53 N. Y. 556. The general principle that a disposition of personal property, valid at the domicile of the owner, is valid everywhere, is of universal application. It had its origin in international comity. *Dammert v. Osborn* (1893), 140 N. Y. 30, 35 N. E. 407. See also *Matter of Cruger* (1901), 36 Misc. 477, 73 N. Y. Supp. 812; *Matter of Ruppenner* (1896), 15 Misc. 654, 37 N. Y. Supp. 429, *affd.* 9 App. Div. 422, 41 N. Y. Supp. 212; *Matter of Braithwaite* (1887), 19 Abb. N. C. 113; *Holmes v. Remsen* (1820), 4 Johns. Ch. 461; *Vroom v. Van Horne* (1844), 10 Paige 549.

A bequest by a resident of this state at the time of his death, to found an institution in another state, is ineffectual for any purpose if void for uncertainty under the laws of this state. *Bascom v. Albertson* (1866), 34 N. Y. 584.

Where a testator, a resident at the time of his death, by his will directed that his personal property and the proceeds of his real estate be invested in real estate in the state of Ohio, upon trusts invalid by the laws of this state, the devise in trust was invalid. *Wood v. Wood* (1836), 5 Paige 596.

A leasehold estate for years in lands situated in this state owned by a resident of another state will be considered as personal property, and as such, as to its transmission by last will and testament, controlled by the law which governed the person of its owner. *Despard v. Churchill* (1873), 53 N. Y. 192.

§ 48. Application of certain sections in this article.—Section twenty-five hundred and fourteen of the code of civil procedure is applicable to the provisions of sections twenty-three to twenty-five, both inclusive, and sections forty-two to forty-seven, both inclusive, of this chapter. (*Added by L. 1909, ch. 240, § 16.*)

ARTICLE III.

DESCENT AND DISTRIBUTION.

- Section 80. Definitions and use of terms; effect of article.
- 81. General rule of descent.
 - 82. Lineal descendants of equal degree.
 - 83. Lineal descendants of unequal degree.
 - 84. When father inherits.
 - 85. When mother inherits.

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86. When collateral relatives inherit; collateral relatives of equal degree.
87. Brothers and sisters and their descendants.
88. Brothers and sisters of father and mother and their descendants and grandparents.
89. Illegitimate children.
90. Relatives of the half-blood.
91. Relatives of husband or wife.
92. Cases not hereinbefore provided for.
93. Posthumous children and relatives.
94. Inheritance, sole or in common.
95. Alienism of ancestor.
96. Advancements of real and personal estates.
97. How advancement adjusted.
98. Distribution of personal property of decedent.
99. Advancements of personal estates.
100. Estates of married women.
101. Liability of heirs and devisees for debt of decedent.
102. Liability of heir or devisee not affected where will makes specific provision for payment of debt.
103. Action against husband for debts of deceased wife.
104. Application of certain sections in this article.

D. Definitions and use of terms; effect of article.—1. The term “real property” as used in this article, includes every estate, interest and right, and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seized or held thereof, or in any manner entitled thereto; leases for years, estates for the life of another person; and real property held in trust, not devised for the benefit of a beneficiary. “Inheritance” means real property as herein defined, and as distributed according to the provisions of this article.

The expressions “Where the inheritance shall have come to the intestate on the part of the father” or “mother,” as the case may be, mean in every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent.

When in this article a person is described as “living,” it means living at the time of the death of the intestate from whom the descent came; when described as having “died,” it means that he died before such intestate. This article does not affect a limitation of an estate by deed or will, or by the courtesy or dower.

Repealed.—Former Real Prop. L. (L. 1896, ch. 547) § 280; originally revised from ch. 2, ch. 2, §§ 20, 21, 27, 28, 29.

Repealed.—Solidators’ note.—This article embraces Article 9 of the Former Real Property Law, known as the “Statute of Descents” and sections 2732-2734 of the Code of Procedure, known as the “Statute of Distribution.”

Repealed.—Real property defined, Real Property Law, § 12; General Construction Law, § 40.

Repealed.—The charge reserved in a conveyance of land is an hereditament, devisable, assignable and assignable, like other incorporeal hereditaments, and as such is real property. *Cruger v. McClaughry* (1868), 51 Barb. 642, *affd.* *Cruger v. McLaury*, 41 N.Y. 219.

The property in a pew in the church being indefinite as to its duration and also issuing out of realty is an incorporeal hereditament and will descend to the heirs at law and not to the personal representatives. *McNabb v. Pond* (1856), 4 Bradf. 7.

Tenancy by curtesy was a common-law estate, and it has been adopted in this state without modification. Our statute of descent provides that the estate of a husband by the curtesy shall not be affected by the statute. *Carr v. Anderson* (1896), 6 App. Div. 6, 39 N. Y. Supp. 746.

An estate for years at common law was personal property. The statutes of this state have for some purposes modified its character, and an estate for years is denominated an estate in land. It is a chattel real and is not classified as real estate in the chapter of "Title to property by descent." Such an estate goes to the personal representatives of the deceased as an asset for distribution and vests in the executors as a part of the personal estate. *Matter of Despard v. Churchill* (1873), 53 N. Y. 192.

Leases for years are expressly excepted from the term "real property," as defined by this section. They are deemed assets and under section 2712 of the Code of Civil Procedure go to the personal representatives for distribution as a part of the personal estate. *Schmitt v. Stoss* (1913), 207 N. Y. 731, 100 N. E. 1119.

On part of father or mother.—Where an intestate took a parcel of land from his father by descent, conveyed it to his mother for value and subsequently received it from her by devise, it must be deemed to have come to him on the part of his mother. *Adams v. Anderson* (1898), 23 Misc. 705, 53 N. Y. Supp. 141; *Wheeler v. Clutterbuck* (1873), 52 N. Y. 67.

The word "relatives" is broader than the term "next of kin," and may include a husband or wife. *Heller v. Teale* (1914), 216 Fed. 387, 398.

§ 81. General rule of descent.—The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father.
3. To his mother; and
4. To his collateral relatives, as prescribed in the following sections of this article.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 281; originally revised from R. S., pt. 2, ch. 2, § 1.

The term lineal descendants includes an illegitimate child afterwards legitimized by the subsequent marriage of its parents. *Miller v. Miller* (1882), 91 N. Y. 315, 43 Am. Rep. 669. So of an adopted child. *Dodin v. Dodin* (1897), 16 App. Div. 42, 44 N. Y. Supp. 800; *affd.* 162 N. Y. 635 (1900), 57 N. E. 1108; *Gilliain v. Guaranty Trust Ct.* (1906), 111 App. Div. 656, 97 N. Y. Supp. 758, *affd.* 186 N. Y. 127, 116 Am. St. Rep. 536, 78 N. E. 697.

The children of a decedent's illegitimate daughter, though born in lawful wedlock, are not his "lineal descendants," within the meaning of section 221 of the Tax Law. *Matter of Roebuck* (1913), 79 Misc. 589, 140 N. Y. Supp. 1107.

Adopted children are lineal descendants of their foster parents. They are in the line of descent from him through the command of the Domestic Relations Law, the same as if that line had been established by nature. *Matter of Cook* (1907), 187 N. Y. 253, 79 N. E. 991.

A daughter of an alien residing in Ireland, she being a citizen, may inherit land which her father inherited from a citizen. *Haley v. Sheridan* (1905), 107 App. Div. 17, 94 N. Y. Supp. 864, *modg.* 46 Misc. 506, 95 N. Y. Supp. 42.

As to descent to the father, see *Matter of Hohman* (1885), 37 Hun 250.

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Descent to mother.—*Hulburt v. Southerland* (1914), 163 App. Div. 241, 148 N. Y. Supp. 379.

Curtesy, being a common law right is not affected by this section. *Matter of Starbuck* (1909), 63 Misc. 156, 116 N. Y. Supp. 1030, *affd.* 137 App. Div. 866, 122 N. Y. Supp. 584, *affd.* 201 N. Y. 531.

Section cited.—*Hadcox v. Cody* (1915), 213 N. Y. 570, 574, 108 N. E. 84; *Matter of McCarty* (1910), 141 App. Div. 816, 820, 126 N. Y. Supp. 699; *Matter of Campbell* (1914), 87 Misc. 83, 86, 150 N. Y. Supp. 416.

§ 82. **Lineal descendants of equal degree.**—If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 282; originally revised from R. S., pt. 2, ch. 2, § 1.

§ 83. **Lineal descendants of unequal degree.**—If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 283; originally revised from R. S., pt. 2, ch. 2, §§ 3, 4.

Application of section.—*Hadcox v. Cody* (1915), 213 N. Y. 570, 574, 108 N. E. 84, *modfg.* 157 App. Div. 901, 142 N. Y. Supp. 1121.

Section cited.—*Hadcox v. Cody* (1915), 213 N. Y. 570, 574, 108 N. E. 84.

§ 84. **When father inherits.**—If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 284; originally revised from R. S., pt. 2, ch. 2, § 5, as amended by L. 1830, ch. 320, § 13.

Application of section considered, see *Righter v. Ludwig* (1902), 39 Misc. 416, 80 N. Y. Supp. 16; *Matter of Hohman* (1885), 37 Hun 250, 254; *Harring v. Coles* (1853), 2 Bradf. 349.

The term "descendants," as used in the Revised Statutes from which this section was derived, was intended to be confined to the issue, and not to be extended to collateral relatives. *Van Beuren v. Dash* (1864), 30 N. Y. 393.

The phrase "the inheritance came to the intestate on the part of his mother" contemplates that the property may have come to a deceased son, on the part of his mother, by some other means than by descent or mere operation of law, it may

have come by devise or gift from his grandfather on his mother's side. *Torrey v. Shaw* (1839), 3 Edw. Ch. 356, 363.

To father for life.—Where a grandfather conveyed premises to his granddaughter in consideration of love and affection, and one dollar, she to have a life estate in the same, the reversion to go to her daughter, and the granddaughter died leaving one child who later died intestate, the father of the latter takes only an estate for life in the reversion, the property having come to his daughter *ex parte materna*. *Morris v. Ward* (1867), 36 N. Y. 587, 3 Transc. App. 148.

When father takes entire estate.—Where a grandchild takes property from his maternal grandparent at a time when his mother is dead, and dies without issue, unmarried and intestate, leaving a father surviving but neither brother, sister nor a descendant of a brother or sister, the father takes the entire property whether real or personal. *Williams v. Post* (1913), 158 App. Div. 818, 143 N. Y. Supp. 1027.

§ 85. When mother inherits.—If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 285; originally revised from R. S., pt. 2, ch. 2, § 6.

Life interest of mother of intestate.—A conveyance of such life interest, reserving the right to maintenance creates an equitable lien upon the property for such maintenance which cannot be divested by the death of the grantee. *Tucker v. Tucker* (1907), 122 App. Div. 308, 106 N. Y. Supp. 713.

Where an intestate, seized in fee of real estate, left her surviving a husband, mother, one brother, but no children or descendants of deceased children, and no father, the inheritance descended to the mother for life, reversion to the brother, subject to the husband's curtesy, if any. *Berger v. Waldbaum* (1904), 46 Misc. 4, 93 N. Y. Supp. 352, *affd.* 110 App. Div. 915, 96 N. Y. Supp. 1114.

The term "descendants," as used in the Revised Statutes, from which this section was derived, was intended to be confined to the issue, and not to be extended to collateral relatives. *Van Beuren v. Dash* (1864), 30 N. Y. 393.

Reversion to brothers and sisters.—Under this section the reversion vests in the brothers and sisters living at the time of the intestate's death and is not suspended by the outstanding life estate. *Barber v. Brundage* (1900), 169 N. Y. 368, 62 N. E. 417, *affg.* 50 App. Div. 123, 63 N. Y. Supp. 347.

As descent to a half-brother, subject to the mother's life estate, see *Wheeler v. Clutterbuck* (1873), 52 N. Y. 67.

Descent of fee to mother to the exclusion of brothers and sisters of the half blood. *Conkling v. Brown* (1870), 8 Abb. Pr. N. S. 345, 355.

Where a deceased daughter has a brother and sister living, the fee of the daughter's estate does not descend to the mother. *Tilton v. Vail* (1889), 53 Hun 324, 17 Civ. Pro. Rep. 194.

§ 86. When collateral relatives inherit; collateral relatives of equal degree.—If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives

of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 286; originally revised from R. S., pt. 2, ch. 2, § 7.

What collateral relatives included.—Where an intestate leaves as his nearest relatives a great uncle, great aunts and the descendants of the latter, the great uncle will inherit to the exclusion of the females of the same degree and their descendants, as at common law, since the New York statute includes no other collateral relatives than brothers, sisters, uncles, nieces and their descendants. *Hunt v. Kingston* (1893), 3 Misc. 309, 23 N. Y. Supp. 352, 19 L. R. A. 377.

Cousins.—Where surviving relations are all cousins, they are entitled to equal parts of what descended to them respectively. *Kelly v. Kelly* (1872), 5 Lans. 443, 446.

Second cousins.—*Douglass v. Dougless* (1911), 70 Misc. 412, 128 N. Y. Supp. 912.

Children of collateral relatives.—Section applies so as to provide that children of a collateral relative take in equal parts and do not divide the part their parent would have taken if living. *Hyatt v. Pugsley* (1856), 33 Barb. 373.

A mistake of parties as to their respective shares under this section is not a sufficient ground for amending a judgment. *Beer v. Orthaus* (1908), 125 App. Div. 574, 109 N. Y. Supp. 997.

§ 87. **Brothers and sisters and their descendants.**—If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 287; originally revised from R. S., pt. 2, ch. 2, §§ 8, 9.

Reference.—Adopted children take by descent as natural children. Domestic Relations Law, § 114.

Effect.—Under the statute prior to the Revised Laws of 1813 no representation was allowed among collaterals beyond brothers' and sisters' children. This principle of representation among the descendants of brothers and sisters was changed by the Revised Statutes so as to extend to the lineal descendants of a brother or sister however remote. *Hannan v. Osborn* (1834), 4 Paige 336; *Pond v. Bergh* (1843), 10 Paige 140, 148.

Section construed with section 98, post, as to representation among collateral relatives. *Matter of Butterfield* (1914), 211 N. Y. 395, 105 N. E. 830, affg. 161 App. Div. 506, 146 N. Y. Supp. 671; *Matter of Davenport* (1902), 172 N. Y. 454, 65 N. E. 275, affg. 67 App. Div. 191, 73 N. Y. Supp. 653; *Matter of De Voe* (1905), 107 App. Div. 245, 94 N. Y. Supp. 1129, affd. 185 N. Y. 536, 73 N. E. 1185.

The descent between brothers and sisters is immediate and the alienage of the

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father does not impede the descent between children. This rule was not changed by the statute of 1786, which enabled the father to inherit in default of lineal heirs. That statute changed the order of descent, immediately and in default of a father capable of inheriting, the brothers and sisters still taking immediately and not through the father. *Luhrs v. Elmer* (1880), 80 N. Y. 171.

Descent to naturalized brother to exclusion of alien brothers and sisters. *Leary v. Leary* (1874), 50 How. Pr. 122.

As to descent to nephews, nieces, grandnephews and grandnieces, both as to real and personal property, see *Matter of Vedder* (1891), 40 N. Y. St. Rep. 119, 15 N. Y. Supp. 798; modified, 62 Hun 275 (1891).

Grandnephew and grandniece take real estate. *Matter of Hadley* (1904), 43 Misc. 579, 89 N. Y. Supp. 545.

§ 88. Brothers and sisters of father and mother and their descendants and grandparents.—If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

5. If there be no such brothers or sisters of such father or mother, nor any descendants of such brothers or sisters, the inheritance, if it shall have come to the intestate on the part of his father, shall descend to his father's parents, then living, in equal parts, and if they be dead, then to his mother's parents, then living, in equal parts; but if the inheritance shall have come to the intestate on the part of his mother, it shall descend to his mother's parents, then living, in equal parts, and if they be dead, to his father's parents, then living, in equal parts. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to his living grandparents in equal parts.

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Source.—Former Real Prop. L. (L. 1896, ch. 547) § 288, as amended by L. 1904, ch. 106; originally revised from R. S., pt. 2, ch. 2, §§ 10-13.

Section construed with section 98, post, as to representation among collateral relatives. *Matter of Butterfield* (1914), 211 N. Y. 395, 105 N. E. 830, affg. 161 App. Div. 506, 146 N. Y. Supp. 671; *Matter of Davenport* (1902), 172 N. Y. 454, 65 N. E. 275, affg. 67 App. Div. 191, 73 N. Y. Supp. 653.

The rule of the common law that on the descent of a newly purchased inheritance the blood of the father is to be preferred is not applicable when the descent is to brothers and sisters, or their descendants. The rule is abolished in every case of descents for which the statute provides. *Brown v. Burlingham* (1852), 5 Sandf. 418; *Valentine v. Wetherill* (1859), 31 Barb. 655.

Application.—This section relates to real property of which the decedent died seized. *Matter of Fay* (1912), 77 Misc. 514, 137 N. Y. Supp. 983.

Descent to brothers and sisters.—*Wells v. Seeley* (1888), 47 Hun 109.

Brothers and sisters of the half-brother are included in a statutory provision for descent to brothers and sisters, unless a contrary intention appears. *Matter of Milliman* (1916), 94 Misc. 7, 158 N. Y. Supp. 995.

Descent to cousins on maternal side.—When on the death of an intestate there are no brothers and sisters or their descendants, and no heirs entitled to take under any of the preceding sections, but only the descendants of a brother and sister of the intestate's mother and a paternal aunt and descendants of a paternal uncle, real property which came to the intestate from his mother goes to the cousins on the maternal side to the exclusion of collaterals on the paternal side. *Matter of McMillan* (1908), 126 App. Div. 155, 110 N. Y. Supp. 622, affd. 193 N. Y. 651, 86 N. E. 1127.

Where the estate of an intestate did not come to him on the part of either father or mother and he left only one maternal aunt and descendants of uncles and aunts on both sides, the descendants of the deceased uncles and aunts are entitled to share in the distribution of his estate according to their respective stocks. *Matter of Peck* (1908), 57 Misc. 535, 109 N. Y. Supp. 1083.

There is no presumption that there were heirs in the absence of allegation or proof that the persons named were all the heirs and that there were no collateral heirs of the intestate. *Greenblatt v. Hermann* (1894), 144 N. Y. 13, 38 N. E. 966.

Property coming to intestate on part of his mother.—Where an intestate took a parcel of land from his father by descent, conveyed it to his mother for value and subsequently received it from her by devise, it must be deemed to have come to him on the part of his mother, and descends to those of her blood. The statutory provision excluding those not of the blood of the particular ancestor, refers only to the immediate ancestor from whom the inheritance is received, and does not refer to a remote ancestor who was the original source of title. *Adams v. Anderson* (1898), 23 Misc. 705, 53 N. Y. Supp. 141.

For descent of property coming originally from the father's side and descending from one child to another and thence to the brother of the father and the brother of the widow, see *Knowlton v. Atkins* (1892), 134 N. Y. 313, 31 N. E. 914.

The provision of this section, prescribing the manner of descent where an estate has come to the intestate "on the part of his father," is not founded on feudal principles nor governed by feudal rules and only the immediate descent and the immediate ancestor of the person last seized are intended. *Hyatt v. Pugsley* (1861), 33 Barb. 373.

Transfer of property descended from the father to the mother.—A committee of two incompetent children, a brother and a sister, whose father died intestate owning certain real property, conveyed the property to their mother pursuant to statute at its full value. The mother executed a mortgage for the purchase price. She died devising the property to the two children. Subsequently both children

died intestate and without issue. It was held, that no fraud was practised on the children and the purchaser acquired a valid title; that the sale was valid as to the heirs of such children, there being no evidence that the transfer was collusive, or made with intent to effect a change of inheritance from the heirs of their father to the heirs of their mother; that an undivided one-half of the property was devised by the mother to each child subject to the mortgage. *Ferry v. Dunham* (1909), 136 App. Div. 61, 119 N. Y. Supp. 722.

Pleading; property coming to decedent on part of father or mother.—Complaint, in an action by heirs to recover value of land conveyed by decedent's sister under power of attorney upon ground that decedent was of unsound mind when she executed power is defective, if it fails to allege whether or not the property came to decedent on the part of either her father or her mother. *Towner v. Trustees of Diocese of Long Island* (1913), 174 N. Y. St. Rep. 784, 140 N. Y. Supp. 784.

§ 89. **Illegitimate children.**—If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 289; originally revised from R. S., pt. 2, ch. 2, §§ 14, 19; L. 1858, ch. 547.

References.—Effect of marriage of parents of illegitimate child, Domestic Relations Law, § 24. Effect of adoption, *Id.* § 114.

See also annotations to section 98, post, heading "Illegitimate children."

The term "illegitimate," as used in this section, means a child begotten and born out of wedlock, and is to receive its common-law signification. *Bollermann v. Blake* (1881), 24 Hun 187; *Miller v. Miller* (1879), 18 Hun 507.

The word "relatives" is broader than the term "next of kin," and may include a husband or wife of an illegitimate. *Heller v. Teale* (1914), 216 Fed. 387, 398.

At common law no one could claim relationship, heirship, or kinship to or through an illegitimate. *Heller v. Teale* (1914), 216 Fed. 387, 396.

At common law, a person of illegitimate birth, not having inheritable blood, can neither inherit lands himself, nor transmit them by descent to any other person, excepting his own legitimate offspring, or persons otherwise capable of inheriting, claiming by inheritance from or through them. *St. John v. Northrup* (1856), 23 Barb. 25.

The purpose of this section and section 26, ante, was to recognize a simple rule of justice, that the child of the mother should inherit the mother's property, and not, in its innocence, bear all the punishment for the sins of the parent. *Bunce v. Bunce* (1891), 27 Abb. N. C. 61, 65.

Effect of section.—The statute makes all those who would inherit or receive property, through the lines of descent and distribution, by a relationship established on the part of the mother of the decedent, competent and entitled to receive the property to the same extent and by the same channels of inheritance as if the deceased had been legitimate. *Heller v. Teale* (1914), 216 Fed. 387, 399.

The original enactment of this provision did not affect any right or title vested at that time in the lawful heirs or next of kin of any person theretofore deceased. *Ferrie v. Public Administrator* (1855), 3 Bradf. 249.

Descent to mother of illegitimate.—*Kiah v. Grenier* (1874), 56 N. Y. 220.

If an illegitimate child dies intestate and without issue, his mother inherits from him. *Rosseau v. Rouss* (1904), 180 N. Y. 116, 122, 72 N. E. 916.

Inheritance by illegitimates from collaterals is impossible. But the converse does not follow. *Heller v. Teale* (1914), 216 Fed. 387, 398.

Descent to relatives.—Where the mother is living, at the time of the death of an illegitimate intestate, the case provided for in the statute, in which the relatives of the intestate on the part of the mother shall inherit, does not arise, and the common law rule must govern. And if the mother of the intestate is an alien, so that she cannot inherit the lands, the brother of the intestate cannot receive the inheritance through her. *St. John v. Northrup* (1856), 23 Barb. 25.

Illegitimate child may inherit real property from father where he has been legitimized by the subsequent marriage of his parents under the law of the state where they were married and domiciled. *Miller v. Miller* (1882), 91 N. Y. 315, 43 Am. Rep. 669.

"When an illegitimate child has by the subsequent marriage of his parents become legitimate by virtue of the laws of the state or country where such marriage took place and the parents were domiciled, he is thereafter legitimate everywhere and is entitled to all of the rights flowing from that status, including the right to inherit, notwithstanding the fact that he was born in another country." *Olmsted v. Olmsted* (1908), 190 N. Y. 458, 464, 83 N. E. 569.

An illegitimate child cannot receive, by descent, the real estate of the ancestor of her deceased mother. *Matter of Mericlo* (1882), 63 How. Pr. 62.

Section cited.—*Douglass v. Douglass* (1911), 70 Misc. 412, 128 N. Y. Supp. 912; *Matter of Barringer* (1899), 29 Misc. 457, 61 N. Y. Supp. 1090.

§ 90. Relatives of the half-blood.—Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 290; originally revised from, R. S., pt. 2, ch. 2, § 15.

Reference.—See also section 98 (9), post, and annotations.

The word "ancestor," as used in this section is not confined to lineal ancestors, but may mean a collateral ancestor, including an uncle. *Farmers' Loan & Trust Co. v. Polk* (1915), 166 App. Div. 43, 151 N. Y. Supp. 618.

The word "ancestor" as used in the above section does not necessarily mean a progenitor, but may mean other relatives, and particularly the relative from which the intestate acquired his inheritance. *Matter of Reeve*, 38 Misc. 409, 77 N. Y. Supp. 936 (1902); *Conkling v. Brown* (1870), 8 Abb. Pr. N. S. 345, 350, ante.

The term "ancestor," as used in this section, means the immediate ancestor from whom the intestate received the estate, and not some remote ancestor. In re *Simpson's Estate* (1913), 144 N. Y. Supp. 1099; *Valentine v. Wetherill* (1860), 31 Barb. 655, 659.

Application.—In re *Simpson's Estate* (1913), 144 N. Y. Supp. 1099.

Where a sister inherits lands from her brothers "they are ancestors" from whom the estate is derived within the meaning of this section, and the lands so inherited by the sister descend to her brother of the half blood and to the descendants of a deceased brother of the half blood under the circumstances aforesaid. *Cornell v. Child* (1915), 170 App. Div. 240, 156 N. Y. Supp. 449.

Inheritance by descent.—Although the undivided interest of an heir in the real estate of a deceased ancestor is not separately ascertained in particular parcels

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thereof until a final decree of partition, setting them off to him, yet his estate in such parcels is derived, not from the decree but by descent within the statute. *Adams v. Smith* (1887), 20 Abb. N. C. 60.

Brothers and sisters of the half-blood.—Where lands descend to the brothers and sisters of the father of the intestate, those of the half-blood take equally with those of the whole blood. *Beebee v. Griffing* (1856), 14 N. Y. 235. As to descent to a half-brother subject to the mother's life estate, see *Wheeler v. Clutterbuck* (1873), 52 N. Y. 67.

Where a testatrix gave to her daughter the net income of her estate for life, remainder to the "heirs" of said daughter upon her death, and the only heir of the life tenant at the time of her decease was her half sister, a daughter of her father by his first wife, the half sister is entitled to the remainder, to the exclusion of the brothers and sisters of the testatrix and their descendants. The provision of this section that relatives of the half blood shall not inherit from an intestate, if they are not of the blood of the ancestor from whom the property descends, has no application to the will aforesaid, for the remainderman takes under the will itself and not directly by descent or distribution from the life tenant. *Stack v. Leberman* (1915), 169 App. Div. 92, 154 N. Y. Supp. 490.

Maternal and half-blood cousins.—A decedent who died intestate seized of a farm which descended to him from his father left no widow or descendant, no brother or sister nor descendant of a deceased brother or sister, no paternal uncle or aunt nor descendant of any such deceased uncle or aunt. Held, that under this section of the Decedent Estate Law the decedent's maternal and half-blood cousins took the inheritance. *Matter of Milliman* (1916), 94 Misc. 7, 158 N. Y. Supp. 995.

"Of the blood" of the intestate.—The half brother of an intestate, who is also her cousin by reason of the fact that the intestate's father married his deceased wife's sister, and also the descendants of the deceased half brother, being nieces of the half blood, are "of the blood" of the intestate and inherit her real estate to the exclusion of other cousins who are descendants of a deceased aunt of the intestate. *Cornell v. Child* (1915), 170 App. Div. 240, 156 N. Y. Supp. 449.

Section cited.—*Matter of Wadsworth* (1908), 58 Misc. 489, 111 N. Y. Supp. 630; *Righter v. Ludwig* (1902), 39 Misc. 416, 80 N. Y. Supp. 16.

§ 91. **Relatives of husband or wife.**—When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 290-a, as added by L. 1901, ch. 481.

Construction.—This section does not create a new class of heirs at law, but in operation is tantamount to a gift from the state of its escheats or rights of what is known as caducary succession. The donees of the state stand in no better position than the state and may not contest the probate of the wife's will in order to promote the state's escheat. The statute cannot be construed as a release from the state, as the husband's heirs at law have not a title to support the release. *Matter of Leslie* (1915), 92 Misc. 663, 156 N. Y. Supp. 346.

A grandson of a former husband of the decedent from whom she received some part of the estate undertaken to be disposed of by her will, relying upon this fact and section 91 of the Decedent Estate Law, must show: *First*, that the inheritance or

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some part of it came from the deceased husband; *second*, that he is an heir at law of said deceased husband; *third*, that the decedent died intestate, and *fourth*, that there is no person entitled to inherit from the decedent under any of the preceding sections of the statute. *Matter of Leslie* (1916), 175 App. Div. 108.

§ 92. Cases not hereinbefore provided for.—In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 291; originally revised from R. S., pt. 2, ch. 2, § 16.

Common law rule applies to the granduncles, grandaunts and their descendants of the intestate. *Hunt v. Kingston* (1893), 3 Misc. 309, 23 N. Y. Supp. 352, 19 L. R. A. 377.

See also cases cited under sections 88, 89, ante.

§ 93. Posthumous children and relatives.—A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 292; originally revised from R. S., pt. 2, ch. 2, § 18.

Reference.—Effect of birth of posthumous child upon validity of will, Decedent Estate Law, § 26.

Posthumous children are placed on the same footing, with respect to property devised and to property coming by descent, as other children of the same parent. This is upon the principle that a child *en ventre sa mere* shall be considered *in esse* for most purposes of property. There is a complete annihilation, in law, of the time that elapses between the death of the father and the birth of a previously begotten child. *Mason v. Jones* (1848), 2 Barb. 229, *affd.* 3 N. Y. 375, 5 How. Pr. 118; *Rockwell v. Geery* (1875), 4 Hun 606.

§ 94. Inheritance, sole or in common.—When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 293; originally revised from R. S., pt. 2, ch. 2, § 17.

Joint or several rights of property.—While real property descending to several persons is held by them as tenants in common, they have no joint right of property; their freeholds are several. *Cole v. Irvine* (1844), 6 Hill 634.

§ 95. Alienism of ancestor.—A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 294; originally revised from R. S., pt. 2, ch. 2, § 22.

References.—Right of alien to take and hold real property, Real Property Law, § 10. L. 1913, ch. 152 amended Real Property Law, § 10, and repealed §§ 12-14, thus removing restrictions upon rights of aliens as to real property.

At common law an alien could take land by devise or by grant; but our statute provides that a devise to an alien of any interest in land shall be absolutely void

and that the land thus devised shall descend to the heirs of the testator. *Marx v. McGlynn* (1882), 88 N. Y. 357. Where an heir traces the descent of the land through aliens, who having no inheritable blood were incapable not only of taking by inheritance, but through whom it could not be transmitted, could not have inherited real estate in New York: *McCarthy v. Marsh* (1851), 5 N. Y. 263.

By the common law rule of descents the alienage of a common grandfather does not impede descent between cousins, the children of brothers who were citizens and capable of transmitting by descent. The rule that the descent between brothers is immediate, and not impeded by the alienage of their father, holds also between one of the brothers and the representative of the other, and also between the representatives of both of them. *McGregor v. Comstock* (1850), 3 N. Y. 408.

Application of common law. *Jackson v. Green* (1831), 7 Wend. 333; *Jackson v. Simmons* (1833), 10 Wend. 9.

The section is intended to remove the impediment of alienism in the transmission of an inheritance in regard to all of deceased individuals through whom the blood of the last owner of the land is to be traced to the heir. In the words of the revisers the provision is intended to change a very harsh rule of the common law by which a person not an alien himself may be debarred from inheriting. *McCarthy v. Marsh* (1851), 5 N. Y. 263.

Application of section.—*Douglass v. Douglass* (1911), 70 Misc. 412, 128 N. Y. Supp. 912.

Section applies only to deceased ancestors. *Renner v. Müller* (1879), 57 How. Pr. 229; *Larreau v. Davignon* (1866), 5 Abb. Pr. N. S. 367.

This section does not enable a person to deduce title through an alien ancestor still living. Hence, the nephew of a person dying intestate and seized of a state of inheritance, although a naturalized citizen, is not capable of inheriting the estate, if the father be an alien and living at the time of the decease of the person last seized. *People v. Irvin* (1839), 21 Wend. 127.

The statute requires not only a person capable of inheriting but also an ancestor possessed of some title which is the subject of transmission at the moment of his death. *McCormack v. Coddington* (1906), 184 N. Y. 467, 73 N. E. 979.

Citizenship of heir claiming inheritance. *Lynch v. Clarke* (1844), 1 Sandf. Ch. 583.

"When in the course of descent, a title comes to an alien living, who, but for his alienage, would have been the heir, it will not pass through him, but will pass by him to the next one who is competent." *Renner v. Müller* (1879), 57 How. Pr. 229, 243.

Alienism is an impediment to taking lands by descent only when it comes between the stock of descent and the person claiming to take; if some of the persons who answered the description of heirs are incapable of taking by reason of alienage they are disregarded, and the whole title vests in those heirs competent to take, provided they are not compelled to trace their inheritance through an alien. *Luhrs v. Elmer* (1880), 80 N. Y. 171.

The Revised Statutes enabled only those to inherit who would be entitled to the estate by the ordinary law of descent on the death of the person last seized, but for the alienism of some person through whom the title is deduced. It does not enable a person to take an estate by inheritance who deduces title by descent through a living alien relative of the deceased who would himself inherit the estate were he a citizen. *McLean v. Swanton* (1856), 13 N. Y. 535.

A daughter of an alien residing in Ireland, she being a citizen, may inherit land which her father inherited from a citizen. *Haley v. Sheridan* (1905), 107 App. Div. 17, 94 N. Y. Supp. 864, mod'g. 46 Misc. 506, 95 N. Y. Supp. 42.

The collateral relatives, who are the heirs of a citizen who has died intestate,

seized of real estate which she acquired by purchase, though some of them be resident citizens and others non-resident aliens, take such real property by descent in the same manner as if they were all resident citizens; but the real estate of which the intestate died seized, acquired by descent, descends to the heirs who are resident citizens to the exclusion of heirs who are non-resident aliens. An heir who is a resident citizen is entitled to inherit even though compelled to trace his right through two non-resident alien ancestors. *Callahan v. O'Brien* (1893), 72 Hun 216, 25 N. Y. Supp. 410.

The term "ancestor," as used in the statute, "may mean forefather or progenitor in a given case, but may, and must in some cases, mean other relatives; in other words, that relative of the deceased from whom the intestate acquires his inheritance." *Matter of Reeve* (1902), 38 Misc. 409, 414, 77 N. Y. Supp. 936.

"The word 'ancestor,' as used in this statute, has been made the subject of much discussion whether it should be construed to mean lineal ancestors only, or whether collateral ancestors were also intended, and it was finally held to embrace both lineal and collateral ancestors. They are ancestors of the estate, not of the blood (*McCarthy v. Marsh* [1851], 5 N. Y. 263)." *Renner v. Müller* (1879), 57 How. Pr. 229, 241.

§ 96. **Advancements of real and personal estates.**—If a child of an intestate shall have been * advanced by * him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, is an advancement.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 295; originally revised from R. S., pt. 2, ch. 2, §§ 23–26; R. S. pt. 2, ch. 1, tit. 2, § 127.

Consolidators' note.—Sections 96, 97 and 99 relating to advancements of real and personal estates are in *pari materia* and must be read together. See 79 N. Y. 246 (1879). The provisions of all three sections were taken from the Revised Statutes and inserted in the former Real Property Law and the Code of Civil Procedure in former revisions of the statutes. Section 99 is by its terms inapplicable in a case where there is any real property of the intestate to descend to his heirs.

Reference.—Advancement of personal estate, section 99, ante.

* So in original.

Application and construction.—The provision as to advancement applies only in case of entire intestacy; so held where part of decedent's will has been declared invalid even though such parts relate to real property. *Messmann v. Egenberger* (1899), 46 App. Div. 46, 61 N. Y. Supp. 556; *Matter of Turfler* (1892), 1 Misc. 58, 23 N. Y. Supp. 135; *Burnham v. Comfort* (1885), 37 Hun 216, *affd.* 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462; *Thompson v. Carmichael* (1845), 3 Sandf. 120; *Kent v. Hopkins* (1895), 86 Hun 611, 33 N. Y. Supp. 767; *Hayes v. Hilbert* (1877), 3 Redf. 28. Such set-off is allowed only against children. *Matter of the Accounting of Morgan* (1887), 104 N. Y. 74, 9 N. E. 861.

This section together with §§ 97 and 99 are in *part materia* and must be read together. History of this section reviewed. *Beebe v. Estabrook* (1879), 79 N. Y. 246.

The word "advancement," in its limited statutory meaning, is applicable only to cases of intestacy and to moneys advanced by a parent to a child in anticipation of such child's future share of the parent's estate. *Matter of Cramer* (1904), 43 Misc. 494, 89 N. Y. Supp. 469.

"Advances" and "advancements" distinguished.—Although the words "advances" and "advancements" are sometimes improperly considered as interchangeable, there is a clear distinction between them. To advance money is to pay it before it is due, or to furnish it for a certain specified purpose with the understanding that it, or some equivalent, is to be returned. An advancement is an irrevocable gift by a parent to a child, in anticipation of such child's future share in the parent's estate should the parent die intestate.

Payment by a testator of a note on which his son was an endorser, held to constitute an "advance," within the meaning of his will providing that "Any advances which I may make to my said son George . . . shall . . . be deducted from the payment of said sum of \$500 as so much paid thereon." *Ebeling v. Ebeling* (1908), 61 Misc. 537, 115 N. Y. Supp. 894.

The word "children" in this section is used to designate all the descendants of the intestate entitled to share in the distribution. *Beebe v. Estabrook* (1879), 79 N. Y. 246.

After-born children; right to recover advancements.—In no case can a child, born after the making of a will by his father, recover of any brother or sister, born before the will was made, any portion of any advancement his father made in his lifetime to such brother or sister. *Sanford v. Sanford* (1872), 61 Barb. 293, 5 Lans. 486.

What constitute advancements.—When a parent conveys land to his child without asking or receiving any consideration therefor, the presumption is that it is an advancement, though the deed recites a money consideration and contains an acknowledgment of the payment of it. Small inconsiderable sums of money occasionally given to a child to spend are not to be regarded as advancements. But a considerable sum of money given to a son to enable him to start in business is *prima facie* an advancement. *Sanford v. Sanford* (1872), 61 Barb. 293, 5 Lans. 486. An advancement made to a son for the purpose of establishing him in business must be considered an advancement within the contemplation of the statute. *McRae v. McRae* (1855), 3 Bradf. 199.

Where a devise was made to a child after such an advancement had been made to her, it is to be presumed that the testator took into consideration such advancement when determining the amount of her devise, and to have intended to cancel any obligation which might otherwise arise therefrom. *Arnold v. Haronn* (1887), 43 Hun 278.

Where a testator, after bequeathing a certain sum to his niece, provided that "Whatever in the way of money or property of any kind my said legatees or either of them may receive or may have received from me in my lifetime, is hereby de-

to be an absolute gift and in no sense an advancement and shall in no way be considered as reducing or affecting any of the legacies herein given," it was held that notes, on which the testator had loaned money to the niece, which he had renewed and on which he had received payment, should be offset against the Matter of Cramer (1904), 43 Misc. 494, 89 N. Y. Supp. 469.

Effect of conveyances.—Where a parent procures a third person to convey property for a consideration, moving from himself, the presumption is that it is an advancement, the same as where he makes the conveyance himself. *Piper v. Barse* 2 Redf. 19.

Advancement can be made by conveyance to the wife of the heir. Where such an advancement is made directly to the heir it is presumed to have been an advancement, where it is made to his wife the burden of proof is upon the defendants to show that it was actually an advancement. *Palmer v. Culbertson* (1894), 143 N. Y. 38 N. E. 199.

Gifts to children are not advancements.—A gift to one entitled as a child to share in the estate of the donor will not be held to be an advancement, when it expressly appears to have been the intention of the father that the gift should not be considered an advancement. *Matter of Accounting of Morgan* (1887), 104 N. Y. 74, 9 N. E. 861. It is the legal duty of a father to support and educate his children during their minority, and advancements made to them for such purposes will not be deemed advancements within the meaning of this section. *Vail v. Vail* (1850), 10 Barb.

Advancements by will.—If a will does not direct advances to be charged against the several children, although the testator took receipts from them acknowledging such advances to have been made from his estate, they will not be considered in dividing the estate. *Campbell v. Campbell* (1879), 18 Hun 217; approved in *Ritch v. Hawxhurst* (1889), 114 N. Y. 512, 21 N. E. 1009. Where the advancement made is of stocks that are valueless at the time it is made, it will be considered no advancement under the statute. *Went v. Gilbert* (1877), 2 Redf. 465.

Advancements by will.—If a testator provided that "Whatever obligations shall be found that I hold against my sons for whatever I have let them have heretofore shall be considered as property and shall be considered as their legacy, in whole or in part, as the same may be," it was held that it was not the intent of the testator that notes held by his son should be treated as a gift or advancement, but that they should be treated as a legacy to an amount equal to the legatee's share in the estate and added to the residue. *Ritch v. Hawxhurst* (1889), 114 N. Y. 512, 21 N. E.

Advancements by will.—An advancement bears interest from the time of the probate of the will; unless otherwise directed by the will an advancement does not bear interest during the lifetime of the testator, from the time of the making of the advancement. *Verplanck v. Went* (1877), 10 Hun 611. Advancements as such never draw interest, for they are no part of the estate to be administered upon. *Matter of Keenan* (1895), 122 N. Y. 368, 38 N. Y. Supp. 426.

Effect of agreement of advancement.—An agreement by a widow that in consideration of her withdrawal of a contest of her husband's will a certain sum be deposited in trust for the benefit of a niece, to be paid to the latter upon the widow's death, to be "as an advance upon account of such share and reckoned accordingly," the sum so advanced must be regarded as an advancement. But where such widow died testate by a will, and providing therein for such niece in various ways, but making no mention of the sum formerly advanced to her nor expressing any intention that such sum should be deducted from the niece's share, the provisions of the agreement as to the advancement must be regarded as referring to a deduction in case of the testator dying intestate, and that by making the will she intended to cancel the

advancement so made. *Bowron v. Kent* (1908), 190 N. Y. 422, 83 N. E. 472, revg. 120 App. Div. 74, 105 N. Y. Supp. 138.

To ascertain the value of a life estate in land given as an advancement of land in which the life estate was reserved must be deemed to have been given at the time of the death of the intestate, when the gift would first vest in possession. *Palmer v. Culbertson* (1894), 143 N. Y. 213, 38 N. E. 199.

Payments made by an executor out of the proceeds of an estate to carry out the intention of the testator to make equal advancements among her children will be upheld, and where eight out of nine heirs had received advancements different in amount, it was error to adjudge that each received an equal undivided one-ninth part of the estate. *Hobart v. Hobart* (1870), 58 Barb. 296.

In the absence of an express direction in the will, no more can be deducted from the share of the legatee than the principal sum advanced. *Oakey ex parte* (1850), 1 Bradf. 281.

Proof of advancement.—It is not necessary to show that the advancement is made in full of the heir's share in both real and personal estate; it is sufficient to show that the advancement was in full of his share in the land of his father, leaving him to share with the other children in the personal estate. *Palmer v. Culbertson* (1894), 143 N. Y. 213, 38 N. E. 199.

It is necessary to prove not only the making by the intestate of the conveyance by way of advancement, but also that such advancement was equal or superior to the amount of the share which each child would be entitled to receive; and the burden of such proof is upon those disputing the claim of such child. *Bell v. Champlain* (1872), 64 Barb. 396.

A verbal agreement between father and son, that the son should have a certain piece of land in full for his share as heir of the father may, if followed by possession and enjoyment of the same, establish an advancement. *Parker v. McCluer* (1867), 5 Abb. Pr. N. C. 97, 36 How. Pr. 301.

The declaration, oral or written, of a parent, his entries and charges in his books, or any explicit memorandum made by him, are proper evidence upon questions of advancement, after it has been proved that a child has received money or property of such parent, to show that such money or property was neither intended as an absolute gift on the one hand, nor to create a debt on the other. But this is their only effect. The fact that a child has received property from a parent must be shown according to the ordinary rules of evidence. *Hicks v. Gildersleeve* (1856), 10 Abb. Pr. 1, 5.

Evidence held insufficient to show that a conveyance from a father to his sons was intended as an advancement. *Weathermax v. Woodin* (1880), 20 Hun 518.

Where one of the issues in a partition action is as to whether transfers of certain property made to two of the defendants by their deceased mother in her lifetime were gifts or advancements, her declarations that they were gifts are inadmissible. *Johnson v. Cole* (1904), 178 N. Y. 364, 70 N. E. 873.

Charge or deduction of advancements.—The rule is that advancements made in real estate shall go first against the real estate descended, and be charged upon the shares of heirs and against those who represent those shares; while, on the other hand, advancements made in personal estate or money shall be first accounted for in the distribution of the personalty, and be charged upon the next of kin as such, and upon the shares which they represent. *Terry v. Dayton* (1860), 31 Barb 519.

The provisions that advances are to be deducted from the distributive portion, do not apply where any real property descends. *Thompson v. Carmichael* (1845), 3 Sandf. Ch. 120.

Ademption.—An advancement will not be considered an ademption where the devise is of real estate; an ademption applies only to legacies. *Burnham v. Com-*

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fort (1885), 37 Hun 216, aff'd. 108 N. Y. 535, 15 N. E. 710, 2 Am. St. Rep. 462.

Although a gift to a child be not expressed to be in lieu of money, if the gift or provision be certain and not merely contingent, if no other object be pointed out and if it be of the same nature as the legacy, then it will be deemed an ademption of the legacy *in toto*. *Benjamin v. Dimmick* (1878), 4 Redf. 7.

§ 97. How advancement adjusted.—When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

Source.—Former Real Prop. L. (L. 1896, ch. 547) § 296.

Section to be construed with §§96, 99. *Beebe v. Estabrook* (1879), 79 N. Y. 246.

§ 98. Distribution of personal property of decedent.—If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; and if all the brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so

that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

8. If the deceased leave a mother, and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. No representation shall be admitted among collaterals after brothers and sisters descendants. This subdivision shall not apply to the estate of a decedent who shall have died prior to May eighteenth, nineteen hundred and five. (*Thus amended by L. 1909, ch. 240, § 14, in effect April 22, 1909.*)

13. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him.

15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

L. 1909, ch. 18. Distribution of personal property. § 98.

15-a. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be allotted to a surviving child of the husband or wife of the deceased, or if there be more than one, it shall be distributed equally among them.

Subdivision added by L. 1913, ch. 489.)

16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, and no child or children of the husband or wife of the deceased, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article or in chapter eighteen of the code of civil procedure; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person. (*Subdivision amended by L. 1913, ch. 489.*)

Source.—Code Civ. Pro. § 2732, as amended by L. 1893, ch. 686; L. 1901, ch. 410; L. 1905, ch. 539, § 2.

References.—Legitimation of child by marriage of parents, Domestic Relations § 23. Rights of adopted children in distribution of personal property of their parents, *Id.* § 114.

General.—The manner in which unbequeathed assets after the payment of debts and expenses shall be distributed is provided for by this section, *et seq.* *See* *Frederick v. Lefevre* (1875), 59 N. Y. 434, 447; *Clark v. Cammann* (1899), 160 N. Y. 329, 54 N. E. 709; *Matter of Trumble* (1910), 199 N. Y. 454, 466, 92 N. E. 1073; *Man v. Elmira C. & N. R. Co.* (1895), 85 Hun 188, 32 N. Y. Supp. 579, *affd.* 100 N. Y. 765, 49 N. E. 1099; *Matter of McMillan* (1908), 126 App. Div. 155, 110 N. Y. Supp. 622, *affd.* 193 N. Y. 651, 86 N. E. 1127.

Residuary legatees take at the time designated for distribution and not at the time of actual distribution or when it is required by law. *Matter of Coolidge* (1904), 85 App. Div. 295, 83 N. Y. Supp. 299, *affd.* 177 N. Y. 541 (1905), 69 N. E. 110.

The statute of distributions directs in whom the property of a deceased person is to be distributed on his decease, and the mere possession of such property by a person not authorized by the statute to take it, will not raise a presumption that such person is entitled to it. In order to prevent the statute from taking effect, a title derived from a will or other mode of transfer must be shown. *Sheldon v. Button* (1875), 59 N. Y. 110.

History and origin of statute of distributions.—*Matter of Youngs* (1911), 73 App. Div. 335, 132 N. Y. Supp. 689; *Hurtin v. Proal* (1855), 3 Bradf. 414.

The term "next of kin" (the husband or widow not being included within those persons) includes collaterals and their representatives or descendants. *Heller v. Heller* (1914), 216 Fed. 387, 400.

The mother, sisters and brother of a decedent are included in the words "next of kin." *Matter of Brennan* (1914), 160 App. Div. 401, 404, 145 N. Y. Supp. 440.

The word "relatives" is broader than the term "next of kin," and may include the husband or wife. *Heller v. Teale* (1914), 216 Fed. 387, 398.

The words "brother or sister, nephew or niece," are grammatically disjunctive,

and "brothers and sisters, and their representatives," of necessity must be construed distributively. *Doughty v. Stillwell* (1850), 1 Bradf. 300.

The words "legal representatives" are usually taken to mean executors or administrators. *Dwight v. Gibb* (1911), 145 App. Div. 223, 129 N. Y. Supp. 961, *affd.* 208 N. Y. 153, 101 N. E. 851.

Representation never changes or advances the degree, though where the degrees are unequal it operates, when declared by the statute, to give the representatives of a deceased person the share he would have taken if living. *Hurtin v. Proal* (1855), 3 Bradf. 414.

Administration and distribution.—There can be no legal distribution without administration. *Black's Est.* (1869), 1 Tuck. 145. Where it appears on a settlement of an administrator's account, that there is a sum to be distributed to an estate of which no administrator has been appointed, there is no person to whom the share can be decreed to be paid, and no direction as to its payment can be made. *In re Lane's Estate* (1890), 2 Con. 266, 20 N. Y. Supp. 78.

Title to the goods of an intestate can be made only through the medium of an administrator; and the next of kin have no legal title to the assets, but they have a vested interest in the surplus of the estate, after the payment of the debts, which cannot be taken away by legislative act. *Ferrie v. Public Administrator* (1855), 3 Bradf. 249.

An assignee of a distributive share can procure upon a judicial settlement of the administrator's account a decree directing payment to him; but the same will be made subject to the equities existing between his assignor and the decedent. *Eltinge v. Hull* (1882), 2 Dem. 562.

Two administrators, one in a foreign jurisdiction.—Where there are two administrators of an estate, one in the place of the domicile of the testator and the other in a foreign jurisdiction, whether the courts of the latter will decree distribution of the assets or remit them to the jurisdiction of the domicile is a question, not of jurisdiction, but of judicial discretion, depending upon the circumstances of the particular case. *Matter of Braithwaite* (1887), 19 Abb. N. C. 113, 10 N. Y. St. Rep. 170.

Jurisdiction of surrogate.—A surrogate has no jurisdiction to determine whether a share in an estate should be paid over to one of the distributees or to a creditor of such distributee. *Matter of Redfield* (1893), 71 Hun 344, 25 N. Y. Supp. 3.

The surrogates' court upon the distribution of an estate has full power to determine whether certain parties are within a certain class to whom a bequest is made. *Crouse v. Wilson* (1893), 73 Hun 353, 26 N. Y. Supp. 923.

Law of domicile of deceased governs.—Personal estate, wherever situated, is to be distributed according to the laws of distribution of the domicile of the deceased. *Shultz v. Pulver* (1832), 3 Paige 182, *affd.* 11 Wend. 361; *Vroom v. Van Horne* (1844), 10 Paige 549, 42 Am. Dec. 94; *Suarez v. Mayor* (1844), 2 Sandf. Ch. 173; *Public Administrator v. Hughes* (1850), 1 Bradf. 125; *Graham v. Public Administrator* (1856), 4 Bradf. 127; *Holmes v. Remsen* (1820), 4 Johns. Ch. 460, 8 Am. Dec. 581; *Matter of Ruppaner* (1895), 15 Misc. 654, 37 N. Y. Supp. 429, *affd.* 9 App. Div. 422, 41 N. Y. Supp. 212.

Where the husband and wife lived in this state and the wife died in another state it was held that the question as to the distribution of her personal estate arising between her administrator and his, must be determined by the laws of that state. *Burr v. Sherwood* (1854), 3 Bradf. 85.

Where testatrix, having made a will in New York, removed to Rhode Island, pretermitted children are entitled to take as if no will had been made; but since, under the laws of Rhode Island, the last domicile of deceased, a surviving husband takes all of his wife's personal property, he will take to the exclusion of such

Children. In re Witter's estate (1891), 15 N. Y. Supp. 133, 2 Connol. 530. It is to be assumed that the law of another state regarding the distribution of an intestate's personal estate does not differ from the law of New York, when no evidence to the contrary is given. Bull v. Kendrick (1886), 4 Dem. 330.

A widow, in an action against her husband's executrix to secure a portion of his estate, alleged that the deceased, at the time of his death, was domiciled in Florida, although a resident of this state; that he left only personal property, all of which, at the time of his death was physically situated here. The plaintiff claimed that the disposition of the personal estate should be governed by the laws of Florida. The answer alleged that the decree of the surrogate, admitting the decedent's will to probate in this state, thereby determining that the deceased, at the time of his death, was a resident of this state, was *res adjudicata* as to the question of decedent's domicile; that since decedent died in this state, and all of his personal property was here at that time, the law of Florida has no application, and that there is a defect of parties in that all the legatees under the will were not named. It was held, that the decree of the surrogate was only conclusive upon the question of residence and not upon the question of domicile; and that disposition of the decedent's personal property must be governed by the laws of his domicile at the time of his death. Flatauer v. Loser (1913), 156 App. Div. 591, 141 N. Y. Supp. 951.

See also section 23, ante, and cases cited.

Proof of consanguinity.—One claiming a distributive share in the personal estate of a deceased person must establish his consanguinity by proof and admissions are not enough on such an issue. Proof of the declarations of members of the same family as to the relationship of its members is competent where the declarants are dead or beyond the jurisdiction of the court. On such an issue the court may properly inspect the parties and consider physiological resemblances or dissimilarities but such evidence should be considered only as corroborative of other competent evidence. Matter of McGerry (1911), 75 Misc. 98, 134 N. Y. Supp. 957. In determining lineal consanguinity, each step up or down from the deceased counts as one degree; and in determining collateral consanguinity, the rule is to start from the intestate to the common ancestor and then down to the person whose kinship with the deceased is sought to be ascertained. Common and statute-law touching on question reviewed. Matter of Marsh (1893), 5 Misc. 428, 26 N. Y. Supp. 718.

Where there is no provision by the statute of distribution, the next of kin next in degree as reckoned by the civil law is entitled to the surplus, and to preference as to right of administration. Swezey v. Willis (1851), 1 Bradf.

Where any part of an estate passes to the heirs-at-law or next of kin of the decedent by reason of intestacy as to such portion, the heirs-at-law and next of kin are to be determined as of the testator's death. Grinnell v. Howland (1906), 51 N. Y. Supp. 132, 135, 100 N. Y. Supp. 765.

Dower.—Testator having left no descendant, parent, brother or sister, nephew or niece, his widow who survives him became entitled under subdivision 3 of this section to the whole of the personal estate of which he died intestate, and she was entitled since died intestate the residue of the personalty must be paid to the personal representatives of her estate. Matter of Crum (1916), 98 Misc. 160.

As to the right of a widow to a distributive share in a bequest in lieu of dower the statutory allowance, see Matter of Mersereau (1902), 38 Misc. 208, 77 N. Y. Supp. 329. Subd. 5 cited in showing that a widow is not included in the term next of kin. United State Trust Co. v. Miller (1908), 57 Misc. 500, 109 N. Y. Supp.

Where an intestate dies leaving surviving him a widow and no descendants, brother or sister, nephew or niece, the widow under subd. 3 takes the entire personality. *Matter of Hardin* (1904), 97 App. Div. 493, 89 N. Y. Supp. 978, *affd.* 181 N. Y. 513, 73 N. E. 1124.

Amount of personal estate held to be such as to entitle widow to whole surplus after payment of debts. *Nichols v. Smith* (1914), 164 App. Div. 304, 310, 150 N. Y. Supp. 410; *Matter of Briasco* (1919), 69 Misc. 278, 126 N. Y. Supp. 1001.

Where a testator, whose only heirs are his widow and daughter, creates a trust fund for the benefit of his wife, but makes no disposition of the remainder, he dies intestate as to such remainder and it passes to them as undisposed of property, and upon the death of the daughter without issue her interest passes to the widow. *Pomroy v. Huicks* (1904), 180 N. Y. 73, 72 N. E. 628.

A husband and no descendants being left by a wife, there is nothing in the statute of distributions to disturb the common-law rule under which the husband takes absolutely all unbequeathed assets. *Matter of Green* (1909), 63 Misc. 638, 118 N. Y. Supp. 747.

Father.—Where a grandchild takes property from his maternal grandparent at a time when his mother is dead, and dies without issue, unmarried and intestate, leaving a father surviving but neither brother, sister nor a descendant of a brother or sister, the father takes the entire property whether real or personal. *Williams v. Post* (1913), 158 App. Div. 818, 143 N. Y. Supp. 1027.

A recovery for negligence causing death is exclusively for the benefit of the decedent's next of kin where he leaves no wife. The term "next of kin" includes all those entitled under the statute of distributions of personal property to share in unbequeathed assets after the payment of debts and expenses, other than a surviving wife or husband. *Carpenter v. Buffalo General Electric Co.* (1913), 155 App. Div. 655, 140 N. Y. Supp. 559.

Where the deceased leaves no widow or children, the father as next of kin is entitled to money recovered in a negligence action under the statute. *Coghlan v. 3rd Ave. Ry. Co.* (1896), 16 Misc. 677, 39 N. Y. Supp. 113, *affd.* 7 App. Div. 124, 39 N. Y. Supp. 1098; *Gurofsky v. Lehigh Valley R. R. Co.* (1907), 121 App. Div. 126, 105 N. Y. Supp. 514, *affd.* 197 N. Y. 517, 90 N. E. 1159. When the widow and the father only are left, the latter is under subd. 7 of this section entitled to share equally with the widow, the proceeds of a judgment in such action. *Matter of Snedeker v. Snedeker* (1900), 164 N. Y. 58, 58 N. E. 4. As to the distribution of damages recovered in an action for causing death by negligence, see *Lipp v. Otis Bros. & Co.* (1900), 161 N. Y. 559, 56 N. E. 79; *Meyer v. Hart* (1897), 23 App. Div. 131, 48 N. Y. Supp. 904.

Divorced wife.—A woman who has procured from the courts of this state a decree of absolute divorce from her husband, is not, at the time of his death his widow within the meaning of that term as used in the statute of distribution, and is not entitled to a distributive share of his personal estate. *Matter of Ensign* (1885), 37 Hun 152, *affd.* 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717.

Distribution among next of kin.—Where three nephews and the child of a deceased nephew constitute the sole next of kin of an intestate, each is entitled to one-fourth of the estate. *Matter of Prote* (1907), 54 Misc. 495, 104 N. Y. Supp. 581, *affd.* 133 App. Div. 928, 118 N. Y. Supp. 1136. Where the next of kin are nephews and nieces, and children of deceased nephews and nieces, the children take the share which their respective parents would have taken, if living. *Matter of Fleming* (1905), 48 Misc. 589, 98 N. Y. Supp. 306; *Matter of Dunning* (1905), 48 Misc. 482, 96 N. Y. Supp. 1110.

Personal property which proves to be undisposed of by will or which fails to vest under it goes to the next of kin. *Wood v. Keyes* (1840), 8 Paige 365.

Where an intestate leaves an aunt and children of deceased uncles and aunts, but no wife or descendant, parent, sister or brother, the aunt takes the personality as the nearest next of kin. *Matter of Gooseberry* (1877), 52 How. Pr. 310.

Where the only next of kin are a mother and a half-sister, they take equally. *In re Bell's Estate* (1895), 68 N. Y. St. Rep. 241, 34 N. Y. Supp. 191.

A cestui que trust, entitled to the income of a fund for life, is not for that reason to be excluded from the number of the next of kin entitled to the ultimate ownership of the trust fund, where there is no valid disposition over of the fund after the expiration of the life interest. *Brown v. Richter* (1898), 25 App. Div. 239, 49 N. Y. Supp. 368, revg. 21 Misc. 755, 48 N. Y. Supp. 137.

Next of kin of husband under subdivision 16. *Matter of Watson* (1916), 97 Misc. 538, affd. 175 App. Div. —, 161 N. Y. Supp. 875.

Descendants or next of kin of unequal degree.—See *Matter of Farmers' Loan & Trust Co.* (1910), 68 Misc. 279, 125 N. Y. Supp. 78.

Representation among collaterals.—Under subd. 12, where a married woman dies leaving surviving her no husband, brother, sister, ancestor or descendant but leaves a nephew and niece, the only children of a previously deceased brother, and no other children or descendants of brothers or sisters, and also two uncles and two aunts and many children and descendants of deceased uncles and aunts, her personal property is to be divided between the nephew and niece and the surviving uncles and aunts, all of whom are of equal degree of consanguinity to the decedent, and as the uncles and aunts of the decedent would not be heirs in case the property were real estate, the children and descendants of the deceased uncles and aunts are not entitled to take. *Matter of Davenport* (1901), 67 App. Div. 191, 73 N. Y. Supp. 653, affd. 172 N. Y. 454, 65 N. E. 275. The provisions of subd. 3 have not been affected or impaired by the provisions of subd. 12, declaring that representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate. *Matter of Hardin* (1904), 44 Misc. 441, 90 N. Y. Supp. 95, affd. 97 App. Div. 493, 89 N. Y. Supp. 978, affd. 181 N. Y. 513, 72 N. E. 1124.

The present law under subd. 12 is exactly the same as the original Revised Statutes except that the word descendants has been substituted for the word children. Under its provisions the children of deceased first cousins are precluded from the distribution where first cousins of the intestate are living. *Matter of Schlosser* (1909), 63 Misc. 166, 116 N. Y. Supp. 796, affd. 136 App. Div. 898, 120 N. Y. Supp. 1145.

Testator left no widow, parents, brothers or sisters, but left nephews, nieces, the issue of deceased nephews and nieces, and the issue of deceased uncles and aunts; the nephews and nieces and the issue of deceased nephews and nieces were cited; held under subd. 12 of this section the issue of deceased uncles and aunts took by representation shares which their ancestors would have taken if living, and were entitled to be cited. *Matter of Healy* (1899), 27 Misc. 352, 58 N. Y. Supp. 927.

Where the estate of an intestate did not come to him on the part of either father or mother and he left only one maternal aunt and descendants of uncles and aunts on both sides, the descendants of deceased uncles and aunts are entitled to share in the distribution of his estate according to their representative stocks. *Matter of Peck* (1908), 57 Misc. 535, 109 N. Y. Supp. 1083.

On examination and review of the statutes and authorities, *held*, that this section expressly provides for representation in distribution in cases of descendants of brothers and sisters, and enables them to take to the exclusion of uncles and aunts and their descendants. *Matter of Butterfield* (1914), 211 N. Y. 395, 105 N. E. 830.

The brothers and sisters referred to in subdivision 12 are those of the intestate. *Matter of Oatley* (1914), 83 Misc. 655, 657, 146 N. Y. Supp. 796.

Where a decedent left no relatives in the direct line of ascent or descent, and her nearest collateral relations were an aunt of the half-blood of the decedent's father, and another aunt of the full blood on the side of the mother, it was held that the two aunts were entitled to share equally. *Hallett v. Hare* (1835), 5 Paige 315.

No representation among collaterals after brothers' and sisters' children. *Doughty v. Stillwell* (1850), 1 Bradf. 300.

Representation among collaterals after brothers' and sisters' children is not allowed. The aunt of an intestate will take to the exclusion of the children and grandchildren of deceased uncles and aunts. *Matter of Youngs* (1911), 73 Misc. 335, 132 N. Y. Supp. 689.

The statute deprives the grandchild of a brother of a decedent of all interest in the personal estate. *Woodward v. James* (1889), 115 N. Y. 346, 359, 20 N. E. 477, 22 N. E. 150.

Amendments of subdivision 12 by L. 1903, ch. 367, and L. 1905, ch. 539.—The object of chapter 367 of the Laws of 1903 and of chapter 539 of the Laws of 1905, is to prefer sisters and brothers of the intestate and all their direct lineal descendants to the remotest degree as distributees over all other kindred not in closer blood relationship to the deceased and so to conform the distribution of personalty to the descent of realty. *Matter of Butterfield* (1914), 161 App. Div. 506, 146 N. Y. Supp. 671, *affd.* 211 N. Y. 395, 105 N. E. 830.

Subdivision 12, as amended by L. 1898, ch. 319, must be construed with subdivisions 5 and 10; and where an intestate, leaving personal property only, is survived by a nephew and niece, the children of a deceased brother, two uncles, two aunts and many descendants of deceased uncles and aunts, the nephew and niece, the two uncles and the two aunts are all of the same degree of kinship, to wit, the third, and it is unnecessary to invoke the rule of representation, and the estate should be distributed equally among them. *Matter of Davenport* (1902), 172 N. Y. 454, 65 N. E. 275, *affg.* 67 App. Div. 191, 73 N. Y. Supp. 653. The remarks in the opinion in this case "should only be applied to the circumstances there under consideration, viz., that the nephew and niece and uncle and aunt took to the exclusion of cousins." *Matter of Ebbets* (1904), 43 Misc. 575, 89 N. Y. Supp. 544, *affd.* (sub. nom. *In re De Voe*) 107 App. Div. 245, 94 N. Y. Supp. 1129.

Under the amendment by L. 1898, ch. 319, the descendants of brothers and sisters are entitled absolutely to all the personal estate of an intestate who leaves no widow or descendants to the exclusion of the descendants of uncles and aunts. *Matter of Hoes* (1907), 119 App. Div. 283, 104 N. Y. Supp. 529.

The amendment of 1898 does not change the law that where the intestate leaves no widow, child, descendant, father, mother, brother, or sister, the next of kin of equal degree and the legal representatives of the deceased next of kin of that degree without the former limitation take the entire personal estate. *Matter of Davenport* (1901), 36 Misc. 475, 73 N. Y. Supp. 810.

Under subdivision 12, as amended in 1898, where an intestate is survived by nephews and nieces and by grandnephews who are the children of a deceased nephew and niece, all of such persons having sprung from the intestate's deceased brother, the grandnephews are entitled to receive their parents' share of the personal estate. *Matter of Ebbets* (1904), 43 Misc. 575, 89 N. Y. Supp. 544, *affd.* (sub. nom. *In re De Voe*) 107 App. Div. 245, 94 N. Y. Supp. 1129.

Uncles and aunts are in the same degree with nephews and nieces, and in default of nearer kindred, share equally. *Hurtin v. Proal* (1855), 3 Bradf. 414.

Surviving grandparents share per capita in the distribution of decedent's estate.

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ve (1879), 17 Hun 457. An intestate leaves him surviving only a paternal
ner, and a brother who was a minor. The grandfather was not entitled
in the distribution of the estate. *Matter of Marsh* (1893), 5 Misc. 423,
Supp. 718.

nephews are entitled to share in the distribution of personal estate with
Matter of De Voe (1906), 107 App. Div. 245, 94 N. Y. Supp. 1129, *affd.*
536, 77 N. E. 1185.

estate died leaving two nephews, five nieces, one grandaunt, the only
representative of a deceased brother of the intestate, and one grand-
the only surviving representative of a deceased sister; held under subd.
ended in 1898, the grandnephew and grandnieces were entitled to take by
ation their parents' share. *Matter of Hadley* (1904), 43 Misc. 579, 89 N. Y.

and a grandnephew of an intestate take in exclusion of an aunt of the
of the intestate. *Matter of Clowes* (1914), 163 App. Div. 961, 148 N. Y.

—Under subd. 12 cousins cannot share in the estate of a deceased person
sentation, nor can either share as next of kin where the decedent leaves
and aunts who are one degree nearer. *Matter of Nichols* (1908), 60 Misc.
N. Y. Supp. 277. Where the surviving next of kin are first cousins and the
of deceased first cousins, under subd. 12, the first cousins are entitled to
onal estate to the exclusion of such children. *Adee v. Campbell* (1879),
52. Second cousins, though they are not next of kin of decedent, are en-
letters of administration. *Matter of Blake* (1908), 60 Misc. 627, 113 N.
944.

a testator died in 1915 leaving him surviving no next of kin nearer than
and children of deceased cousins, the cousins take the entire personal
and an application by the children of deceased cousins to intervene in a
g to probate the will upon a claim that petitioners would be entitled to
decedent's estate if it were found that he died intestate must be denied.
Matter of Polansky (1915), 90 Misc. 273, 154 N. Y. Supp. 669.

the decedent has left no nearer kin than cousins and descendants of de-
cousins, the cousins take to the exclusion of the descendants of deceased
Matter of Barry (1909), 62 Misc. 456, 116 N. Y. Supp. 798.

a testatrix left her surviving only a grand-nephew, four great-grand-
and certain first cousins, children of deceased uncles, the first cousins are
at law or next of kin of the testatrix within the meaning of the statute
not entitled to intervene in proceedings to have the will admitted to pro-
Matter of Butterfield (1914), 161 Ap. Div. 506, 146 N. Y. Supp. 671, *affd.*
395, 105 N. E. 830.

an intestate leaves him surviving no widow, descendant, brother or sister,
ndants of a brother or sister, and no uncle or aunt, his first cousins share
s next of kin in the surplus of his estate under subdivision 5 of this sec-
Matter of Oatley (1914), 83 Misc. 655, 146 N. Y. Supp. 796.

cousins and second cousins, being of unequal degree of kinship to a de-
cannot both share in the estate. *Matter of Oatley* (1914), 83 Misc. 655,
N. Y. Supp. 796.

an intestate leaves him surviving no widow, descendant, brother or sister,
ndants of a brother or sister, and no uncle or aunt, his first cousins share
as next of kin in the personal estate. Second cousins are one degree
removed from the deceased and, hence, not entitled to take. *Matter of*
1914), 83 Misc. 655, 146 N. Y. Supp. 796.

perpes instead of per capita.—A will of a testator whose estate was of per-

sonalty, and who had no relatives except his sister and the children and grandchildren of four other brothers and sisters, whose number of children varied greatly, provided that testator's residuary estate should go to his heirs in portions according to the laws and statutes of this state, the same as if he had died intestate. Other portions of the will bequeathed scholarships to educational institutions, and provided that testator's "heirs" should have the benefit thereof, if qualified to enter the institution. Testator had been as friendly towards his grandnephews and grandnieces as towards his other nieces; he was not a lawyer, and wrote the will himself; along with the will was found a paper on which he had written the names of his relatives, including his grandnephews and grandnieces, who were described as his heirs, and after a group containing the names of the children and grandchildren of each deceased brother and sister appeared the fraction "1-5." *Held*, that the residuary estate should be divided *per stirpes* among all of testator's relatives according to the laws of descent, and not according to this section, under which the division would have been *per capita*, and the grandnephews and grandnieces would have been excluded, if testator had died intestate. *Armstrong v. Galusha* (1899), 43 App. Div. 248, 60 N. Y. Supp. 1.

Where the next of kin of a decedent are all the children of her deceased brothers and sisters, they take *per capita* and not *per stirpes*, notwithstanding subd. 12. *Fletcher v. Severs* (1890), 30 N. Y. St. Rep. 826, 10 N. Y. Supp. 6.

Where a testator having divided his estate into shares placed three shares in trust for the benefit of each of three daughters during their lifetime, with a provision that upon the death of any daughter the corpus of her share was to be paid "to the child or children of such deceased daughter," and in the default of children "to my other children named in this will, and to their legal representatives, in equal proportions," and at the death of a daughter without descendants there were living children of another deceased daughter and grandchildren but no children of another deceased daughter, two of the grandchildren being the children of a daughter and five the children of a son, so that the survivors are of unequal degrees of kindred, the grandchildren take their parents' share *per stirpes* and do not share equally. *Dwight v. Gibb* (1912), 150 App. Div. 573, 135 N. Y. Supp. 401, *affd.* 208 N. Y. 153, 101 N. E. 851.

Relatives of half-blood.—Where the surviving next of kin are a brother and sister and four grandchildren of a deceased half-brother, the personal estate should be distributed between the brother and sister, and the grandchildren of the deceased half-brother have no interest therein. *Matter of Suckley* (1877), 11 Hun 344. The children of a decedent's husband, by a former wife, cannot claim through a half-sister who died in the lifetime of her mother; they are not of kin to the decedent. *Gazlay v. Cornwall* (1874), 2 Redf. 139.

Where decedent died intestate leaving only nieces and nephews of the half blood and of the whole blood, the former were held to be next of kin "in equal degree to the deceased" with the latter; and that they all take equal shares of the personal estate. *Matter of Southworth* (1888), 6 Dem. 216, 14 N. Y. St. Rep. 486.

Where the mother and a sister of the half-blood are the only persons interested in the estate of a decedent, the personalty should be divided equally between them. *In re Bell's Estate* (1895), 34 N. Y. Supp. 191.

Brothers and sisters of the half-blood are entitled equally with those of the whole blood to a share in the personal estate of the intestate without regard to the ancestor from whom it was derived. And, if such personal property has been invested in land by the intestate, the land descends in the same manner. *Champlin v. Baldwin* (1829), 1 Paige 562.

See also section 90, *ante*, and cases cited.

After-born children.—As to distribution to after-born children, see *Van Cortlandt v. Laidley* (1891), 59 Hun 161, 11 N. Y. Supp. 148; *Matter of Huiell* (1887), 6 Dem. 352, 15 N. Y. St. Rep. 715; *Matter of Witter* (1891), 2 Connolly 530, 15 N. Y. Supp. 133.

Illegitimate children.—The statutes passed between 1895 and 1899 legitimatizing children of parents who have subsequently married do not divest vested interest or rights. *Matter of Barringer* (1899), 29 Misc. 457, 61 N. Y. Supp. 1090. Relatives of an illegitimate whose mother is dead take through her in preference to the next of kin of the father. *Matter of Lutz* (1904), 43 Misc. 230, 88 N. Y. Supp. 556.

An illegitimate child of a deceased sister of an intestate is not entitled to share in the personal estate. *Matter of Lauer* (1912), 76 Misc. 117, 136 N. Y. Supp. 325.

At common law no one could claim relationship, heirship, or kinship to or through an illegitimate. *Heller v. Teale* (1914), 216 Fed. 387, 396.

Inheritance by illegitimates from collaterals is impossible. But the converse does not follow. *Heller v. Teale* (1914), 216 Fed. 387, 398.

Where a deceased illegitimate child left only descendants of brothers and sisters of her mother, they are "relatives of the deceased on the part of the mother," within the meaning of subdivision 9 of this section, and are entitled to inherit. *Heller v. Teale* (1914), 216 Fed. 387, 400.

The statute makes all those who would inherit or receive property, through the lines of descent and distribution, by a relationship established on the part of the mother of the decedent, competent and entitled to receive the property to the same extent and by the same channels of inheritance as if the deceased had been legitimate. *Heller v. Teale* (1914), 216 Fed. 387, 399.

Where an intestate's mother, who died before the intestate was an illegitimate child, and the intestate left next of kin upon her paternal side, those who by their relationship to the deceased mother would have been entitled to share in the estate of the intestate if the mother had been legitimate and not entitled so to share notwithstanding her illegitimacy. *In re Belcher* (1909), 149 N. Y. Supp. 479.

See also section 89, ante, and cases cited.

Rights of inheritance by adopted children.—Where an adopted child died unmarried and intestate, leaving no one surviving except the brothers and sisters of his deceased foster mother, and his natural father; the natural father is excluded as a next of kin, and the brother and sisters of the decedent's foster mother are entitled to an award in an action to recover for the decedent's death. See *Carpenter v. Buffalo General Electric Co.* (1913), 213 N. Y. 101, 106 N. E. 1026.

Where foster parents die without issue their adopted child is their sole next of kin under the statute. *United States Trust Co. v. Hoyt* (1912), 150 App. Div. 621, 632, 135 N. Y. Supp. 849.

Procedure upon erroneous distribution after misconstruction of the provisions of statute.—Where it was decreed that the estate be paid to the descendants of deceased cousins, and such payment has been made, the matter is one which should be reviewed by appeal and not by a motion to open and modify the decree. The error, if it existed, is an error of the substance and not a clerical error and a motion to open the decree would be an attempt to review the decision upon the merits. *Matter of Schlosser* (1909), 63 Misc. 163, 116 N. Y. Supp. 794.

When the descendants of uncles and aunts have by error in the construction of subdivision 12 been allowed to share in the estate, the surrogate has power to correct his decree so far as it affects the shares of those collateral relatives who have not appeared and taken the benefits of the decree. *Matter of Hoes* (1907), 119 App. Div. 288, 104 N. Y. Supp. 529.

Section cited.—*Matter of Bartholick* (1894), 141 N. Y. 166, 170, 36 N. E. 1; *Matter*

of Lally (1910), 136 App. Div. 781, 121 N. Y. Supp. 467, *affd.* 198 N. Y. 608, 92 N. E. 1089; *Matter of Taylor* (1911), 144 App. Div. 634, 636, 129 N. Y. Supp. 378, *revd.* 204 N. Y. 135, 97 N. E. 502, *revd.* 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350; *Stenson v. Flick Construction Co.* (1911), 146 App. Div. 66, 68, 130 N. Y. Supp. 555; *Irving v. Rees* (1911), 146 App. Div. 703, 706, 131 N. Y. Supp. 523; *Farmers' Loan & Trust Co. v. Polk* (1915), 166 App. Div. 43, 48, 151 N. Y. Supp. 618; *Reynolds v. Reynolds* (1915), 167 App. Div. 90, 94, 152 N. Y. Supp. 661; *Coghlan v. Third Avenue R. R. Co.* (1896), 16 Misc. 677, 39 N. Y. Supp. 113, *affd.* 7 App. Div. 124, 39 N. Y. Supp. 1098; *Steglich v. Schneider* (1910), 66 Misc. 390, 123 N. Y. Supp. 336, *affd.* 140 App. Div. 910, 125 N. Y. Supp. 1145; *Matter of Maley* (1911), 73 Misc. 195, 198, 132 N. Y. Supp. 492; *Matter of Fay* (1912), 77 Misc. 514, 137 N. Y. Supp. 983; *Matter of Kroog* (1914), 84 Misc. 676, 679, 147 N. Y. Supp. 887; *Tredwell v. Tredwell* (1914), 86 Misc. 104, 108, 148 N. Y. Supp. 391; *Matter of Campbell* (1914), 87 Misc. 33, 86, 150 N. Y. Supp. 416; *Matter of Murphy* (1914), 87 Misc. 564, 151 N. Y. Supp. 475; *Matter of Greco* (1915), 90 Misc. 241, 243, 154 N. Y. Supp. 306; *Matter of Redfield* (1916), 94 Misc. 20, 24, 158 N. Y. Supp. 1004; *Foryciarz v. Prudential Ins. Co.* (1916), 95 Misc. 306, 309, 158 N. Y. Supp. 834.

§ 99. **Advancements of personal estates.**—If any child of such deceased person have been advanced by the deceased, by settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section, would be distributed to such child, as his share of such surplus and advancement, such child and his descendants shall be excluded from any share in the distribution of the surplus. If such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs.

Source.—Code Civ. Pro. § 2733, as amended by L. 1893, ch. 686.

Reference.—Advancements of real and personal estates, section 96, *ante*.

Advancement is a term used in law dictionaries and in our statutes to designate money or property given by a father to his children, as a portion of his estate and to be taken into account in the final distribution thereof. "Advances" is not the proper term for money or property thus furnished. The latter phrase in legal parlance has a different and far broader signification. *Chase v. Ewing* (1868), 51 Barb. 597; *Ebeling v. Ebeling* (1908), 61 Misc. 537, 115 N. Y. Supp. 894.

Application.—The statute relating to advancements does not apply to cases of testacy but only to those of partial or total intestacy; the presumption is that the testator, in disposing of all his property by will, would be likely to refer to any advancements made and their proper charge, and that in the absence of any such reference it would be assumed that the disposition of his will would be made with reference to such advancements. *Estate of Quinn* (1880), 2 Law Bull. 58; *Clark v. Kingsley* (1885), 37 Hun 246; *Hays v. Hibbard* (1877), 3 Redf. 28.

Satisfaction of a legacy by advancements cannot be allowed against a widow for the statute provides for it only in cases of children. *Matter of Morgan* (1887), 104 N. Y. 74, 9 N. E. 861. But in *Kintz v. Friday* (1886), 4 Dem. 540, it was held that the section applies to dispositions of the estates of unmarried women and widows as well as of male decedents.

This section relates to advancements with which trustees have nothing to do, and which is something to be held disposed of before the trustees, as such, take possession of the estate. *Matter of Holbrook* (1902), 39 Misc. 139, 78 N. Y. Supp. 972.

The provision as to advancements where there is no real estate of the intestate refers only to lands in this state. *McRae v. McRae* (1855), 3 Bradf. 199.

Where an intestate made an advancement to his son for the purpose of establishing him in business, and the son died before his father, it was held that the advancement had been made with "a view to a portion or settlement in life," within the meaning of the statute, and should be charged on the share to which the descendants of the deceased son succeeded. *McRae v. McRae* (1855), 3 Bradf. 199.

The word children used in this section includes all the descendants of the intestate who are entitled to share in the estate, *pari materia*. *Beebe v. Estabrook* (1879), 79 N. Y. 246.

Collateral relatives.—There is no rule or principle of law by which money advanced to collateral relatives can, in any event, be held to partake of the nature of advancements or to be followed by the legal consequences which belong to them. *Matter of Cramer* (1904), 43 Misc. 494, 89 N. Y. Supp. 469.

What are not advancements.—A gift to one entitled as a child to share in the estate of the donor, will not be held to be an advancement when it expressly appears to have been the intention of the father that the gift should not be considered as such. *Matter of Accounting of Morgan* (1887), 104 N. Y. 74, 9 N. E. 861.

Where a father gave a son a sum of money to enable the latter to purchase an interest in a patent-right, and to secure the redemption of the same took back a chattel mortgage upon the patent, executed by the son and the owner of the remaining interest therein, it was held that the transaction was a loan and not an advancement. *Bruce v. Griscom* (1876), 9 Hun 280, *affd.* 70 N. Y. 612.

An advancement made in stocks, and charged on the testator's books at an estimated value, may be regarded as no advancement, if the stocks be proved to have been valueless at the time the charge was made. *Marsh v. Gilbert* (1877), 2 Redf. 465.

Where a testator provided that advances to his children or on their account should be a charge on their shares of his estate, it was held that an advance to his son-in-law, made without the consent or privity of his wife, could not be charged against her share. *Ex parte Oakey* (1850), 1 Bradf. 281.

Where a son gave interest bearing notes to his father for money received and paid interest thereon until they were surrendered by his father, it was held that the transaction constituted a loan and not an advancement. *Matter of Bennington* (1910), 67 Misc. 363, 124 N. Y. Supp. 829.

Transfer of shares of stock by a testator prior to the execution of his will held not to constitute advancements. *De Caumont v. Bogert* (1885), 36 Hun 382.

Satisfaction of legacy by advancements.—*Matter of Weiss* (1902), 39 Misc. 71, 78 N. Y. Supp. 877.

A gift by way of advancement, in order to work a satisfaction of the legacy need not in all respects be identical with the latter. If they are substantially the same, some variance in the time of payment, or other trifling difference, will not vary the application of the rule. *Hine v. Hine* (1863), 39 Barb. 507.

A gift by the testator to a legatee of property constituting a legacy, accompanied by a charge of the same as such in his books is an advancement which will avoid the legacy. *Langdon v. Astor* (1857), 16 N. Y. 9.

A legacy to a child, regarded as his portion, is a distributive disposition to such child of such portion of his estate as the testator thinks fit. If the testator during his life advances that which he has judged to be the due portion of the legacy, the law presumes that he has satisfied the portion; and this presumption must prevail until overcome by evidence of the contrary intent on the part of the testator. *Hine v. Hine* (1863), 39 Barb. 507.

Interest.—An advancement stands upon the same footing as any other debt due the estate; the time the debt is due being fixed as the day the will takes effect, its collection being deferred to the day of distribution of the legatee's share; and hence bears interest only from the time of the probate of the will. It forms a portion of the assets of the estate, the legatee receiving his share of it upon the distribution of his share. *Verplanck v. De Went* (1877), 10 Hun 611.

Proof.—An advancement must be made out by proof that the property was given as a portion of the estate, to be taken into account on final distribution. Whether the gift be one designed as an advancement is also a question of intention, and is generally presumed when property is received by a son from his father. *Alexander v. Alexander* (1886), 1 N. Y. St. Rep. 508.

An advancement may be established by parol; so a verbal agreement between father and son, that the son should have a certain piece of land in full for his share as heir of the father is, if followed by possession and enjoyment of the same, an advancement. *Parker v. McCluer* (1867), 5 Abb. Pr. N. C. 97, 36 How. Pr. 301; *Chase v. Ewing* (1868), 51 Barb. 597.

Where a testator, after the execution of a will, advances money to a legatee, it may be shown by oral evidence that it was intended as a satisfaction, in whole or in part of the legacy. But if the will is silent on the subject of advances, it cannot be shown by oral evidence that an advancement made prior to the execution of the will was intended as a satisfaction in whole or in part of a legacy. *Clark v. Kingsley* (1885), 37 Hun 246.

On the question of advancement or ademption of a legacy, when raised by the executor against the claim of the legatee the burden is on the executor to prove satisfaction. *Piper v. Barse* (1874), 2 Redf. 19.

The question, whether the amount of a marriage settlement made by a father upon his daughter should be charged absolutely or contingently against her as an advancement of the share which he subsequently willed her in his residuary estate, depends upon his intentions as gathered from his will and construed in the light of the surrounding circumstances. *Miller v. Coudert* (1901), 36 Misc. 43, 72 N. Y. Supp. 441, modified, 73 App. Div. 538, 77 N. Y. Supp. 296.

Entries in books belonging to a firm of which the testator was a member was evidence of advancements where a clause in the will provided for the deduction of advancements evidenced by "entries in my books of account"; but where indirectly charged to the child, there must be proof *altunde* of an actual advancement. *Lawrence v. Lindsay* (1877), 68 N. Y. 108; *Benjamin v. Dimmick* (1878), 4 Redf. 7; *Langdon v. Astor* (1857), 16 N. Y. 9. A mere entry by a testator in one of his books is not evidence of an advancement to a child, unless the fact of such advancement be established *altunde*. *Marsh v. Brown* (1879), 18 Hun 319; *Dougherty v. Dougherty* (1873), 7 Alb. L. J. 347.

Where to prove an advancement made by the testator to a son the executors put in as evidence an entry made by testator in one of his books, the child is entitled under § 829 of the Code of Civil Procedure, to testify in reference to such advancement, and explain or deny such entry. *Marsh v. Brown* (1879), 18 Hun 319.

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Entries by testator in his books of the details of an advancement made to a child become, on being identified, incorporated into that portion of a will referring to such advancement, to enable the court to determine the testator's intention. *Thorne v. Underhill* (1882), 1 Dem. 306.

Where two years after the making of a will, the testator entered on his books against his children a memorandum of a settlement in full of advancements made to them, no advancements were chargeable to them on the division of the property. *Webster v. Gray* (1889), 54 Hun 113, 7 N. Y. Supp. 266.

Counterclaim.—Where a legatee is directed by the will to account for advancements, he may set up a counterclaim against the testator, and the executors may adjust the account. *Gilman v. Gilman* (1875), 4 Hun 69, 6 T. & C. 211, affd. 63 N. Y. 41, revd. on another point (1876), 66 N. Y. 631.

§ 100. *Estates of married women.*—The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more.

Source.—Code Civ. Pro. § 2734, as amended by L. 1893, ch. 686; originally derived from R. S., pt. 2, ch. 6, tit. 3, § 79.

References.—As to rights and liabilities of married women, *Domestic Relations Law*, §§ 50–59.

Husband's right in estate of deceased wife.—Where a wife dies intestate and without descendants, her husband takes solely by virtue of his marital right all her personalty, and to the extent thereof is liable for her debts and failing to administer is presumed to have assets sufficient to pay them. *Matter of Thomas* (1901), 33 Misc. 729, 68 N. Y. Supp. 1116.

At common law the husband was entitled to retain the entire estate of his deceased wife; and the statutory enactments have not taken away such right of the husband, except when his wife leaves descendants surviving or a will of her personal property; his right does not depend upon the right to administration upon her estate, and if she makes a will he is entitled to the portion as to which, by the lapsing of legacies or otherwise, she dies intestate. *Robins v. McClure* (1885), 100 N. Y. 323, 3 N. E. 663, 53 Am. Rep. 184; *Barnes v. Underwood* (1872), 47 N. Y. 351; *Matter of Green* (1909), 63 Misc. 638, 118 N. Y. Supp. 747; *Romig v. Sheldon* (1910), 124 N. Y. Supp. 26, affd. 142 App. Div. 925, 127 N. Y. Supp. 1141. See also *Fry v. Smith* (1882), 10 Abb. N. C. 224; *Kearney v. Missionary Society of St. Paul* (1879), 10 Abb. N. C. 274.

When a married woman, possessed of a separate personal estate, dies without descendants and without having made any disposition of it during her lifetime or by way of testamentary appointment, the title thereto vests in the surviving husband. *Austin v. Metropolitan Street Ry. Co.* (1905), 108 App. Div. 249, 95 N. Y. Supp. 740.

Where a husband as life tenant under his wife's will, which contained no residuary clause, was given full power to sell and dispose of her residuary estate and from the part thereof undisposed of at his death the testatrix made certain bequests, the husband took a life estate in testatrix's entire estate with full power of disposal, and, upon her death, by virtue of his marital rights, became vested with the undisposed part thereof, subject to the payment of said bequests. *Phillips v. Wisner* (1912), 75 Misc. 278, 132 N. Y. Supp. 1006, affd. 152 App. Div. 911, 137 N. Y. Supp. 1138.

Where a married woman dies before her husband, intestate and without descendants and while a resident of a state where the common law prevails, her choses in action which her husband had never reduced to possession during his lifetime will pass to his and not to her next of kin. *Matter of Nones* (1899), 27 Misc. 165, (In re Negus) 58 N. Y. Supp. 377.

Where a wife, leaving no descendants, dies intestate as to her whole estate except that she wills the use of it to her husband for life, he takes all her personalty, the life estate by virtue of her will and the remainder by virtue of his marital rights. *Matter of McLeod* (1900), 32 Misc. 229, 66 N. Y. Supp. 255.

Upon the death of a wife, intestate and without descendants, the title of her personal property of all kinds at once passes to and vests in her surviving husband, notwithstanding the statutory provisions which have secured to the wife during coverture the same rights to her separate property and the disposition thereof that she would have enjoyed if unmarried. This title is derived solely from the *jus mariti*. *Gerber v. State Bank* (1915), 167 App. Div. 263, 152 N. Y. Supp. 698.

Where a husband and wife live apart and his wife agrees that she will not call upon her husband for support and will make no demands whatever upon him, and he, in turn, agrees not to make any claim of any kind against his wife and releases her from any and all claims whatsoever, upon the wife's death the husband is entitled to the same distributive share in her estate that he would have had if the parties had been living together and no such agreement had been made between them. Nor are his rights affected by his commission of acts that would have given his wife grounds for procuring an absolute divorce against him, where no such divorce had in fact been obtained. *Jardine v. O'Hare* (1910), 66 Misc. 33, 122 N. Y. Supp. 463.

Necessity for administration.—The case of *Barnes v. Underwood* (1872), 47 N. Y. 351, must be regarded as overruled so far as it is in conflict with the doctrine that a husband may hold the personal property of his wife, by virtue of his marital rights, without administration, when she dies intestate without leaving descendants. *Tompkins v. Rice* (1890), 55 Hun 563.

Where a wife dies intestate without descendants, and without leaving any debts, the husband, although of sufficient financial responsibility to pay her debts, if she should have any, cannot recover in his individual capacity, without administration, moneys on deposit in the name of the wife at the time of her death. *Gerber v. State Bank* (1915), 167 App. Div. 263, 152 N. Y. Supp. 698.

Insurance moneys.—Where a husband procures insurance on his life in favor solely of his wife, and she dies before him without issue of that marriage, her interest does not pass to her personal representatives, but to the husband. He has a right to assign, transfer or will it as any other chose in action, and if he fails to do so his personal representatives may enforce the obligation of the insurer. *Walhelm v. Hancock, Mutual Life Ins. Co.* (1894), 8 Misc. 506, 28 N. Y. Supp. 766; *Matter of Warner* (1890), 32 N. Y. St. Rep. 897, 11 N. Y. Supp. 894, 2 Con. 347.

A policy of insurance on the life of testatrix's husband, payable to her, but if she be not alive at the time of his death to her children, passes by a residuary clause of her will, she being childless and her husband surviving her; such policy is, with other personal property, bequeathed by the residuary clause, subject to the control and disposition of the executors and may be transferred by them without the consent of the husband. *Harvey v. VanCott* (1893), 71 Hun 394, 25 N. Y. Supp. 25, *affd.* *Harvey v. Wright*, 149 N. Y. 579, 43 N. E. 987. Insurance moneys derived from policies payable to wife of decedent never belonged to the estate of the latter but were the property of the wife solely. *Matter of Gordan*

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(1891), 39 N. Y. St. Rep. 909, 15 N. Y. Supp. 502, *affd.* 131 N. Y. 658, 30 N. E. 867.

Loan.—Where a husband and wife each furnished half the amount of a loan and took as security thereunder a bond and mortgage payable to them jointly, upon the death of one of them the interest of the deceased vests, not in the survivor, but in the personal representatives of the deceased. *Matter of Albrecht* (1892), 136 N. Y. 91, 32 N. E. 632, 18 L. R. A. 329, 32 Am. St. Rep. 700.

When conviction of husband of manslaughter not equitable bar to right of succession.—Where it is stipulated as a fact that a man at the time he killed his wife intended to kill another person, his conviction of manslaughter on the trial of an indictment for killing his wife is not an equitable bar to his right of succession to her estate under the Statute of Distributions. *Matter of Wolf* (1914), 88 Misc. 433, 150 N. Y. Supp. 738.

Section cited.—*Heller v. Teale* (1914), 216 Fed. 387, 394; *Meyer v. Hart* (1897), 23 App. Div. 131, 136, 48 N. Y. Supp. 904; *Irving v. Rees* (1911), 146 App. Div. 703, 706, 131 N. Y. Supp. 623; *Foryciarz v. Prudential Ins. Co.* (1916), 95 Misc. 306, 309, 158 N. Y. Supp. 834; *Matter of Harvey* (1877), 3 Redf. 214, 217.

§ 101. **Liability of heirs and devisees for debt of decedent.**—The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by, the decedent.

Source.—Code Civ. Pro. § 1843; derived from R. S., pt. 3, ch. 8, tit. 3, § 32.

References.—Action by creditor against debtor's next of kin, legatee, heir or devisee, Code of Civil Procedure, §§ 1837–1860.

At common law land which descended or was devised was not chargeable with contract debts of the testator, nor was the heir or devisee personally liable therefor. *Deyo v. Morss* (1898), 30 App. Div. 56, 51 N. Y. Supp. 785.

Contractual obligation.—The terms “simple contract” and “specialty” as used in this section comprise every kind of contractual obligation, and an action may be maintained thereunder based on a transaction in which there existed a fiduciary relation between the parties. *De Crano v. Moore* (1900), 50 App. Div. 361, 64 N. Y. Supp. 3. A cause of action for medical service rendered decedent is one arising out of contract within the meaning of this section. *Adams v. Hilliard* (1891), 37 N. Y. St. Rep. 314, 14 N. Y. Supp. 120.

The statutory liability of a testator as the stockholder of a bank is one arising by “simple contract” within the meaning of this section so as to impose the liability upon a devisee to the extent of the real property devised. *Richards v. Gill* (1910), 138 App. Div. 75, 122 N. Y. Supp. 620.

A power of sale to pay debts does not indicate an intention to charge the debts upon the real estate. *Clift v. Moses* (1889), 116 N. Y. 144, 22 N. E. 393.

The remedy of the creditor is founded solely upon the provision of the statute, and it is confined to an action against the heirs or devisees. *Rogers v. Patterson* (1894), 79 Hun 483, 29 N. Y. Supp. 963, *affd.* 150 N. Y. 560, 44 N. E. 1128. As to remedies and proof of claims generally, see *Read v. Patterson* (1892), 134 N. Y. 128, 31 N. E. 445.

The heirs or next of kin of a deceased person can only be made liable upon his contracts or for his debts in the cases and in the manner prescribed by statute. *Selover v. Coe* (1875), 63 N. Y. 438. The debts of a decedent can be ordered to be paid by his heirs or devisees only in the manner provided by statute. *Platt v. Platt* (1887), 105 N. Y. 488, 497.

Such an action is an equitable action, and one *in rem*, and is not an action for the recovery of money only but for the recovery of specific real property. *Mortimer v. Chambers* (1892), 63 Hun 335, 17 N. Y. Supp. 874; *Hentz v. Phillips* (1889), 23 Abb. N. C. 15, 6 N. Y. Supp. 16; *Hauselt v. Patterson* (1891), 124 N. Y. 349, 26 N. E. 937. And not being an action for the recovery of money only an attachment is not authorized. *Avery v. Avery* (1907), 119 App. Div. 698, 104 N. Y. Supp. 290.

Heirs of heirs not liable.—The cause of action created by this section against heirs or devisees to recover an indebtedness existing against the person from whom they acquired the property can only be maintained against the direct heirs and devisees, and cannot be maintained against heirs or devisees of such heirs or devisees. *Green v. Dunlop* (1909), 136 App. Div. 116, 120 N. Y. Supp. 583.

Effect of foreclosure of mortgage.—The interest of an heir at law of a deceased mortgagor in the mortgaged property is subject to be wiped out by a judgment in foreclosure and, in case of a deficiency, judgment may be entered against the administratrix of the deceased mortgagor, she having been made a party to the foreclosure action, and collected out of property coming into her hands in due course of administration. Where the complaint in an action to foreclose the mortgage sought to obtain judgment for deficiency individually against the widow and next of kin of the deceased mortgagor, who was personally liable for the mortgage debt, a demurrer by one of the heirs at law of the deceased mortgagor will be sustained. *Buckley v. Beaver* (1917), 99 Misc. 643.

The heirs must all be sued jointly and they are respectively liable to the extent of the estate which descended to them for the debts of the deceased growing out of his contract; such liability may be enforced either by charging the estate, if it has not been aliened, or if it has by charging the heirs personally; but under no circumstances are the heirs personally liable for debts incurred by the executors. *Hayward v. McDonald* (1885), 7 Civ. Pro. Rep. 100, 1 How. Pr. N. S. 229.

Extent of liability.—A devisee is liable for the testator's debts to the extent of property received by him, but beyond this he does not become personally liable by merely accepting the devise and the rents and profits thereof, though the devise is charged with the debts, unless the will charges the devisee with the duty of personally paying the debts, or unless the devise is upon the condition that the devisee pay the debts. *Clift v. Moses* (1889), 116 N. Y. 144, 22 N. E. 393; *affg.* 44 Hun 312; *Fink v. Berg* (1888), 50 Hun 211, 2 N. Y. Supp. 851.

Where testator charged lands devised to his mother with the support of his daughter, and his devisee subsequently devised the same to the daughter who accepted the devise, her lien was merged in her title and she is liable for her grandmother's debts to the extent of such devise. *Howell v. Randall* (1901), 36 Misc. 35, 72 N. Y. Supp. 52.

The provisions under which the liability of devisees arise do not require as a condition that the legal title shall have passed. *Armstrong v. McKelvey* (1887), 104 N. Y. 179, 10 N. E. 266.

A devisee is entitled to the possession and may lawfully receive the rents and profits of such real estate until his title be divested by an action to enforce a claim against decedent. *Clift v. Moses* (1889), 116 N. Y. 144, 22 N. E. 393.

Although after a decision that a judgment creditor of a testatrix has no lien upon an award made when lands devised by her were subsequently taken by eminent domain, and that the award has become personal property the same as if the devisees had aliened the land, the judgment creditor, suing under section 101 of the Decedent Estate Law to enforce the statutory liability of the devisees, still demands a decree that the plaintiff has a lien upon the award and does not ask for personal judgment against the devisees, such judgment may, nevertheless, be

ed. But in such action the devisees can only be charged with a personal judgment for the amount which they actually received as the net proceeds of the land on condemnation, and hence, where it has been previously held that the land is subject to the lien of the defendants' attorneys, the judgment should be paid to the excess of the award over the amount of the lien. *Lawrence v. Grout* (1894), 140 App. Div. 629, 125 N. Y. Supp. 982.

Heirs are personally liable only when they have transferred the lands descended from the decedent, and then only for an amount not exceeding its value. *Hauselt v. Patterson* (1891), 124 N. Y. 349, 26 N. E. 937. The liability of an heir for the debts of the person from whom he has inherited or taken land by devise is measured by the property which has descended to him; to that extent it is personal, and if the property has been alienated before the commencement of an action by a creditor of the deceased, the creditor may take a personal judgment against the heir for its value. *Rogers v. Patterson* (1894), 79 Hun 483, 29 N. Y. Supp. 963, aff'd. 150 N. Y. 560, 44 N. E. 1128.

Liability for mortgage debt.—The liability of the devisee for a mortgage upon real estate which passed to him should be measured by and not exceed the value of the property. *Hauselt v. Patterson* (1891), 124 N. Y. 349, 26 N. E. 937. A mortgage of land which is subject to a mortgage takes it *cum onere* and is bound to pay the mortgage without resort to the executor or administrator, unless the will contains an express direction to the contrary. *Matter of Kene* (1894), 8 Misc. 102, 10 N. Y. Supp. 1078.

The remedy of the mortgage creditor is not confined to the mortgaged premises, when the heir inherits other lands from the same ancestors he takes them subject to the mortgage debt. Liability of the defendants is not joint nor is the estate which has descended to any one of them subject to the proportion of mortgage debt chargeable to any of the others. Preference of mortgage creditor over other creditors set forth. *Hauselt v. Patterson* (1891), 124 N. Y. 349, 26 N. E. 937.

Debts in another state.—Lands devised which are situated in a state other than that of the testator's domicile, and are not, so far as appears, charged by the laws of that state with the obligation of his debts, do not become liable for the debts of the testator. *Deyo v. Morss* (1898), 30 App. Div. 56, 51 N. Y. Supp. 785.

Trust funds.—The court has power to follow the proceeds of the sale of devisee's property in the hands of a depository in trust for the heirs. *Hentz v. Phillips* (1889), 100 N. C. 15, 6 N. Y. Supp. 16.

Judgment for deficiency in foreclosure was held to come within this section. *Wood v. Fawcett* (1879), 17 Hun 146. But grantees under a trust deed are not liable on a deficiency judgment arising on foreclosure of testator's property unless there is evidence of proof that the trust deed was made to defraud creditors and that at the time of its execution the mortgaged property was not sufficient to pay the mortgagee's debt. *Matteson v. Palser* (1903), 173 N. Y. 404, 66 N. E. 110, mod'g. 56 App. Div. 91, 67 N. Y. Supp. 612.

The heirs of an intestate bondsman and mortgagor, dying seized of the mortgaged premises and other real property but leaving no personal estate, convey the mortgaged premises to one of their number, who agrees with the mortgagee for extension of the time of payment of the bond and mortgage, none of the heirs being thereby discharged from liability for the deficiency on foreclosure, to the extent of their respective interests in the real property that descended to them, where the extension agreement is void for want of consideration, even assuming that the conveyance of the mortgaged premises to one of their number and his subsequent agreement with the mortgagee had the effect of making him the principal debtor and releasing the other heirs his sureties. *Olmstead v. Latimer* (1899), 158 N. Y. 313, 43 L. R. A. 3, 23 N. E. 5.

Improvements or profits.—The liability of an heir or devisee extends only to the real estate itself and not to what is made out of it by either skill or labor. *Obiter Statement in Clift v. Moses* (1889), 116 N. Y. 144, 22 N. E. 393, affg. 44 Hun 312.

Insurance by heirs for their benefit.—When insurance on the real estate is effected by the heirs after the death of their ancestor, it is, it seems, for their benefit solely, notwithstanding the defeasible nature of their estate in consequence of its liability to sale for the ancestor's debts. *Herkimer v. Rice* (1863), 27 N. Y. 163.

Deceased devisee.—Proceedings to collect a proportion of claims against decedent from the estate of a deceased devisee should be made in the ordinary course of administration of such estate, in the same manner in which other debts owing by such deceased devisee are collectible. *Fink v. Berg* (1888), 50 Hun 211, 2 N. Y. Supp. 851. Upon the death of the devisee a creditor is entitled to be made a party to a proceeding to sell her real estate and may prove his debt therein. *Matter of Fielding* (1900), 30 Misc. 700, 64 N. Y. Supp. 569.

Where a devisee of real property alienates the same before her death, her personal representative is liable for the debts of her devisor to the same extent that said devisee was in her lifetime; real property which has been devised, and has descended on the death of the devisee to her heirs, may be subjected to the payment of the devisor's debts in like manner as before the death of said devisee. *Traud v. Magnes* (1883), 49 N. Y. Sup. (17 J. & S.) 309.

Priority of claims.—A judgment recovered by the executor against a devisee on a debt due the testator, is not in equity entitled to priority of satisfaction out of the lands devised as against an execution creditor of the devisee claiming under a prior docketed judgment recovered against the devisee after the testator's death. *Hagadorn v. Hart* (1891), 62 Hun 94, 16 N. Y. Supp. 625, affd. 136 N. Y. 665, 33 N. E. 335.

Parties.—All devisees must be joined in such an action, and an omission to do so is fatal. *Dodge v. Stevens* (1883), 94 N. Y. 209. Devisees cannot be joined in an action against the executors to recover a debt owing by decedent. *Greene v. Martine* (1882), 27 Hun 246.

Failure to recover against defendant as heir at law does not preclude recovery against him as devisee. *Matteson v. Palser* (1903), 173 N. Y. 404, 66 N. E. 110, modfg. 56 App. Div. 91, 67 N. Y. Supp. 612.

A complaint against heirs for the debt of their ancestor, founded on the statute, alleging that the lands descended had been sold, and seeking to reach the proceeds constitutes but a single cause of action. *Hentz v. Phillips* (1889), 23 Abb. N. C. 15, 6 N. Y. Supp. 16. As to averments sufficient to support such an action against the heirs, see *Hentz v. Phillips* (1889), 23 Abb. N. C. 15, 6 N. Y. Supp. 16.

Counterclaim.—In an action against several devisees to charge decedent's real estate with debts, one of such devisees cannot set up a counterclaim on an implied contract. *Mortimer v. Chambers* (1892), 63 Hun 335, 17 N. Y. Supp. 874.

Statute of limitations.—An action against devisees to enforce, to the extent of their interest in the devise, payment of a note made by their testator, is to be deemed an action to recover upon the note, and hence is subject to the six years' statute of limitations, as affected by the statutory provisions relating to the time of commencing actions on claims against decedents. *Adams v. Fassett* (1896), 149 N. Y. 61, 43 N. E. 408.

An action to enforce such a claim is one that falls within § 388 of the Code of Civil Procedure, as one of the limitation of which is not otherwise specifically prescribed in the Code, and must be commenced within ten years. *Mortimer v. Chambers* (1892), 63 Hun 335, 17 N. Y. Supp. 874.

Limitation of action under this section is twenty years, where it is based upon

final sealed instrument of the ancestor. *City Equity Co. v. Bodine* (1910), 100 App. Div. 907, 126 N. Y. Supp. 439.

Section 1844 of the Code of Civil Procedure, prohibits the institution of an action under this section until three years have elapsed after letters of administration are granted. This is a statutory prohibition against the commencement of an action within the meaning of section 406 of the Code of Civil Procedure. The statute of limitation, on a note sought to be charged upon real property which has descended to heirs, is therefore extended by the time which intervenes between the death of the decedent and three years after letters of administration are issued. This section does not create any new liability against heirs but merely provides a method for enforcing an existing liability of the estate against assets which have come into the hands of his heirs. So the statute of nine years for the commencement of an action does not date from the death of the decedent but from the time of a payment on the note. For three years after issuance of letters plaintiff has an enforceable remedy against the real property of decedent by a proceeding under section 2750, Code of Civil Procedure, and immediately after the expiration of such remedy the present remedy becomes available to him. *Hill v. Moore* (1909), 131 App. Div. 365, 115 N. Y. Supp. 1. 198 N. Y. 633, 92 N. E. 1086.

Right of a simple contract creditor of an intestate to institute proceedings to compel the sale of real estate which has descended to and is owned by his heirs is not barred by the statute of limitations until the expiration of nine years from the time of the maturity of the debt. *Mead v. Jenkins* (1883), 29 N. Y. 3.

Statute of limitations in an action against a devisee under this section for breach of trust of the testator as a stockholder of an insolvent bank does not begin to run where the testator contested his liability, until that liability is determined by judgment against his estate establishing the amount of the deficiency with which he is chargeable. *Richards v. Gill* (1910), 138 App. Div. 75, 122 N. Y. Supp. 1.

Existence of debt.—A judgment obtained by a creditor against an executor is no bar to the existence of a debt in an action against a devisee, for there is no privity between the parties. *Burnham v. Burnham* (1900), 46 App. Div. 513, 62 N. Y. Supp. 120, *affd.* 165 N. Y. 659, 59 N. E. 1119.

Cases cited.—*Hamlin v. Smith* (1902), 72 App. Div. 601, 76 N. Y. Supp. 758; *Grout v. Grout* (1906), 112 App. Div. 241, 98 N. Y. Supp. 279; *Lichtenberg v. Lichtenberg* (1913), 156 App. Div. 532, 534, 141 N. Y. Supp. 356; *Duck v. McGrath* (1910), 160 App. Div. 482, 487, 145 N. Y. Supp. 1033, *affd.* 212 N. Y. 600, 106 N. E. 100; *Merrihew v. Parrott* (1915), 168 App. Div. 704, 710, 154 N. Y. Supp. 747; *Lozier* (1888), 48 Hun 50; *Matter of Callaghan* (1893), 69 Hun 161, 164, 1 N. Y. Supp. 378; *Pierando v. O'Rourke* (1888), 1 N. Y. Supp. 369.

§ 102. Liability of heir or devisee not affected where will makes specific provision for payment of debt.—The preceding section and article two of chapter fifteen of the code of civil procedure do not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised.

Source.—Code Civ. Pro. § 1859; derived from R. S., pt. 3, ch. 8, tit. 3, §§ 35, 58.

Application.—Where the cost of redemption of certain stock, pledged by the

testator during his lifetime, is charged upon certain land devised to the testator's three children, the acceptance of the devise by them, if there is no other fund or estate to bear the burden of such redemption, gives the legatee of such stock the right to have the cost of such redemption charged upon the property devised to the testator's children, and the land devised to them will, if necessary, be decreed to be sold for the purpose of securing the necessary fund with which to effect such redemption. *Dunning v. Dunning* (1894), 82 Hun 462, 31 N. Y. Supp. 719, *affd.* 147 N. Y. 686, 42 N. E. 722.

* **Intention of testator.**—The real estate of a decedent is never to be held charged with the payment of debts, unless the intention of the testator so to charge it is expressly declared or can be fairly and satisfactorily inferred from the language and disposition of the will. *Matter of Thompson* (1896), 18 Misc. 143, 41 N. Y. Supp. 1101.

§ 103. **Action against husband for debts of deceased wife.**—If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor. A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband. (*Thus amended by L. 1909, ch. 240, § 15.*)

Source.—Code Civ. Pro. § 2660, in part, as amended by L. 1893, ch. 686; L. 1894, ch. 503; L. 1897, ch. 177.

When husband not liable to account.—Where a married woman dies intestate, leaving no debts unpaid, her husband cannot be called upon to account in respect to her personal property, by her next of kin. *Shumway v. Cooper* (1853), 16 Barb. 556.

Liability of husband's administrator for funeral expenses of wife.—A husband, having received sufficient personal property from the estate of his wife, is liable for her funeral expenses. But where he dies without paying such expenses, his administrator, coming into possession of such property, is not personally liable. *Romig v. Sheldon* (1910), 124 N. Y. Supp. 26, *affd.* 142 App. Div. 925, 127 N. Y. Supp. 1141.

§ 104. **Application of certain sections in this article.**—Section twenty-five hundred and fourteen of the code of civil procedure is applicable to the provisions of sections ninety-eight to one hundred, both inclusive, and section one hundred and three, of this chapter. (*Added by L. 1909, ch. 240, § 16.*)

ARTICLE IV.

EXECUTORS, ADMINISTRATORS AND TESTAMENTARY TRUSTEES.

Section 110. Sales of real estate by executors under authority of will.

111. * Investment of trust funds by executor or administrator.

112. Executors de son tort abolished.

113. Special promise to answer for debt of testator or intestate.

114. Liability of executors and administrators of executors and administrators.

L. 1909, ch. 18. Executors, administrators and testamentary trustees. §§ 110, 111.

- 115. Rights of administrators de bonis non.
- 116. Actions upon contract by and against executors.
- 117. Administrators to have same rights and liabilities as executors.
- 118. Actions of trespass by executors and administrators.
- 119. Actions of trespass against executors and administrators.
- 120. Actions for wrongs, by or against executors or administrators.
- 121. Action or proceeding by executor of executor.
- 122. Appraisal of estate of deceased person.

§ 110. Sales of real estate by executors under authority of will.—Sales of real estate situate within the state of New York, made by executors in pursuance of an authority given by any last will, unless otherwise directed in such will, may be public or private and on such terms as in the opinion of the executor shall be most advantageous to those interested therein.

Source.—L. 1883, ch. 65.

Consolidators' note.—There are many matters of a more or less substantive character relating to executors and administrators, trustees and appraisers in the Code of Civil Procedure which might have been inserted under this article. It has been deemed best, however, to leave these matters in the Code of Civil Procedure until such time as the Code shall be revised. When that time arrives these provisions can be readily assigned to this article.

References.—Sales generally by executors, Code Civil Procedure (Surrogates' Code) §§ 2693-2697.

§ 111. Investment of trust funds.—An executor, administrator, trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon. Any executor, administrator, trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge or payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself.

Source.—Former Personal Prop. L. (L. 1897, ch. 417) § 9; as amended by L. 1902, ch. 295; L. 1907, ch. 669.

Consolidators' note.—This provision is found in section 9 of the Former Personal Property Law and for greater convenience in reference has been transferred to the Decedent Estate Law. The reference to guardians has been transferred to Domestic Relations Law. The portion of the section relating to trustees generally has been allowed to remain in the Personal Property Law.

Investment in bonds and mortgages.—Trustees of express trusts, in the absence of express directions to the contrary, may invest the trust funds in bonds and mortgages on unincumbered real property in this state with 50 per cent. more than the amount loaned thereon. But such permission is always coupled with the implied proviso that such loan is to be in other respects reasonable and proper.

* So in original. See title of section, post.

In re Randolph (1911), 134 N. Y. Supp. 1117, affd. 150 App. Div. 902, 135 N. Y. Supp. 1138.

A trustee is to be held to the highest standards. He cannot loan trust funds to himself or to his wife. A loan on personal security alone is improper. So also is a loan on the faith and credit of real property offered as collateral. There must be both a reasonably solvent maker of the principal obligation and adequate security in order to justify trustees in investing a trust fund in bonds secured by mortgages on real property. In re Randolph (1911), 134 N. Y. Supp. 1117, affd. 150 App. Div. 902, 135 N. Y. Supp. 1138.

Where an executor in violation of the express terms of the will invests trust funds in the real estate of his wife, the account of his administratrix will be surcharged with the sum so invested, with interest. Matter of Horwitz (1915), 90 Misc. 249, 154 N. Y. Supp. 316.

Investment of trust funds under provisions of will in securities other than those mentioned in this section. See Matter of vom Saal (1913), 82 Misc. 531, 145 N. Y. Supp. 307.

Duty of trustees to keep trust funds invested in safe and income-producing securities; when trustee liable for loss resulting from depreciation of value of securities. Villard v. Villard (1916), 219 N. Y. 482, affg. 166 App. Div. 203, 151 N. Y. Supp. 1027.

An unauthorized investment by a trustee or executor is regarded as a devastavit, and the funds are recoverable at once from the recipient; but the act is not necessarily in all cases so corrupt or contrary to the rules of public policy that it is to be considered tortious. The Legislature has authorized investments by trustees in certain securities but it has not expressly prohibited other investments by them. There is a right to contribution between trustees who become liable for the unauthorized or improper investment; but the trustee in such case may recover against the *cestui que trust* who induced the investment to the extent of his interest therein. The testator may lawfully authorize the investment of his property in a business enterprise and there is no law prohibiting him from directing that his executors continue or open and conduct for a given time a speculative account for the benefit of his estate. Where the executor or trustee supposes that he has authority for such an investment, does not attempt to gain any private advantage by the speculation, nor convey trust funds to his individual use, the trustee or executor and the recipients of such funds are not wrongdoers in the sense that their act necessarily involves or implies existence of facts on account of which they should be left without remedy by the court as between themselves. So the recipients in their suit to recover funds so unlawfully invested with them are entitled to a deduction for moneys repaid to such executor or trustee in their representative capacity; nor need it be shown that the money so repaid was actually restored to the estate or the trust fund. Steele v. Leopold (1909), 135 App. Div. 247, 120 N. Y. Supp. 569, mod. 201 N. Y. 518, 94 N. E. 1099.

If an executor disregards the provisions of the will or a rule of law relating to investments, he takes the risk of any loss that may result, without the right to any profit that he may make by reason of such investment. Holden v. N. Y. & Erie Bank, 72 N. Y. 286; Adair v. Brimmer, 74 N. Y. 539; Villard v. Villard (1916), 219 N. Y. 482, affg. 166 App. Div. 203, 151 N. Y. Supp. 1027.

Section cited.—Matter of Klein (1913), 80 Misc. 377, 379, 142 N. Y. Supp. 557.

§ 112. Executors de son tort abolished.—No person shall be liable to an action as executor of his own wrong, for having received, taken or interfered with, the property or effects of a deceased person; but shall be responsible as a wrong-doer in the proper action to the executors, or general

§ 112. Executors, administrators and testamentary trustees.

Special administrators, of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by them, to the estate of the deceased.

Code.—R. S., pt. 3, ch. 8, tit. 3, Article 1, § 17.

Effect and application of section.—The statute takes away no right of action or remedy of property. *Leonard v. Clinton* (1882), 26 Hun 288, 293. But takes away the remedy which a creditor before had against a fraudulent vendee, and transfers the action to the personal representative of the vendor. He may now sue, or oververt the validity of the sale in any other legal form, where that course is necessary for the payment of the debts of the testator or intestate. *Babcock v. ...* (1842), 2 Hill 181, 185; *Henderson v. Brooks* (1874), 3 T. & C. 445, 448.

As to the enactment of this section, an executor or administrator coming from another state and here collecting money or property of the decedent, without taking out letters under the laws of this state, might be sued as executor *ex tort*. But this section has abolished this remedy by action against any one "as executor of his own wrong," and has provided an ample remedy. *Brown v. ...* (1845), 1 Barb. Ch. 189, 195.

Before prior to the Revised Statutes, a person had made a conveyance of goods, fraudulent as to creditors, his executor could not reclaim the goods. The remedy of a creditor was to treat the fraudulent grantee as executor *de son tort*. But under the Revised Statutes the personal representative of the grantor may contest the validity of the sale. *Matter of Raymond* (1882), 27 Hun 508, 511.

When the common-law remedy of a creditor to charge the fraudulent vendee of a deceased debtor as an executor *de son tort* for the purpose of relief was by the statute taken away and the right of action in such cases given to the personal representatives of the decedent, it was through them and their right of action that a creditor at large must necessarily seek relief against the disposition in his name by the deceased debtor of his property in fraud of his creditors." *Nathaniel Bank of West Troy v. Levy* (1891), 127 N. Y. 549, 551, 28 N. E. 592, rev'd. 100 N. Y. St. Rep. 529, 2 N. Y. Supp. 162.

Under this section no one can be liable to account to the next of kin, as an executor of his own wrong. Where persons have received and disposed of the property of a testator, without having been duly appointed his executors, or duly authorized to act as such, they are liable to his personal representatives, when such representatives shall have been appointed; but not to persons claiming as next of kin of the decedent merely. *Muir v. Trustees of the Leake and Orphan House* (1848), 3 Barb. Ch. 477.

Where a note belonging to the estate of an intestate was paid to his widow, and subsequently united with another in taking out letters of administration, and when brought an action upon the note in their representative capacity, it was held that, notwithstanding this section, the letters related back to the time of the testator's death, and, therefore, the payment to the widow was a bar to the action. *Priest v. Watkins* (1842), 2 Hill 225.

An administrator of the vendor may sue the fraudulent purchaser, as a wrongdoer, to recover the value of the property and all damages to the estate of the vendor. *McKnight v. Morgan* (1848), 2 Barb. 171.

An action may be maintained by a creditor of a deceased judgment debtor against the administrator and his assignee to set aside an assignment made by such administrator of assets of the deceased debtor without consideration, and to have the same declared to be assets belonging to the estate, and to be applied to the payment of the debts of the intestate. *Everingham v. Vanderbilt* (1876), 51 How. 7.

A creditor of estate may maintain action against fraudulent vendee.—It is

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the right and duty of an executor or administrator of a deceased debtor, whose estate is insolvent, to impeach a sale of personal property made by the deceased with intent to defraud creditors, and recover the same from the fraudulent vendee. Ordinarily, a creditor of the estate cannot maintain an action against such fraudulent vendee alone, or against him and the executor or administrator, to set aside the fraudulent transfer, and have the property held under it administered as assets to pay debts. But if the executor or administrator collude with the fraudulent vendee, or after reasonable request refuse to take proceedings to impeach his title and reach the property in his hands, a creditor may maintain an action against him and the executor or administrator, for that purpose. Therefore, where a debtor in his lifetime assigned a chose in action with intent to defraud creditors, and, his estate being insolvent, the administrator *denied that the assignment was fraudulent and insisted that it ought not to be set aside*, it was held that a creditor could maintain an action against the assignee and administrator to have the assignment declared void as to creditors, and the chose in action administered as assets to pay debts. *Bate v. Graham* (1854), 11 N. Y. 237; *Everingham v. Vanderbilt* (1876), 51 How. Pr. 177.

Section cited.—*Porter v. Williams* (1853), 9 N. Y. 142, 149; *Matter of Richardson* (1894), 8 Misc. 140, 142, 29 N. Y. Supp. 1079; *Pettibone v. Drakeford* (1885), 37 Hun 628, 632.

§ 113. Special promise to answer for debt of testator or intestate.—No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

Source.—R. S., pt. 2, ch. 6, tit. 5, § 1.

Validity of original oral agreement.—Upon the death of decedent, the plaintiff, who was in possession of a farm and certain articles of personal property, claimed to be entitled thereto by virtue of an agreement made with the deceased. By an agreement by plaintiff with the executor and with the consent of the decedent's widow who was beneficially interested in the property, plaintiff released her interest in the property to defendant upon defendant personally agreeing to make certain payments to her. It was held that the agreement was founded upon a sufficient consideration, and that, being an original one, it was valid though not in writing. *Hall v. Richardson* (1880), 22 Hun 444, *affd.* 89 N. Y. 636.

§ 114. Liability of executors and administrators of executors and administrators.—The executors and administrators of every person, who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate, of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living.

Source.—R. S., pt. 2, ch. 6, tit. 5, § 6.

Application.—The section has no application to a case of assets of an estate remaining unadministered in the hands of an executor at his death, or money collected by an executor and retained in his hands at his death, unaccounted for, when there has been no breach of trust. *Walton v. Walton* (1863), 40 N. Y. (1 Keyes) 15, 2 Abb. Pr. N. S. 428.

Liability for negligence in failing to collect debts.—Having notice of the existence of a debt the executor is bound to act with diligence for its collection, and

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must proceed without waiting for a request from the distributees; the rule does not require the prosecution of doubtful claims merely because those interested think them well founded. If the case is one of such doubt, that an indemnity is proper, the executor must at least ask for it, and at any rate take the risk of showing that the debt is not lost by his negligence. If the debt be lost through his negligence the executor is personally liable therefor. *Harrington v. Keteltas* (1883), 92 N. Y. 40.

Uncollectible debt.—When an executor has reasonable grounds to believe that legal steps to collect assets will be ineffectual, and he is so advised by his counsel in the absence of any claim of bad faith his failure to take them will not render him liable as for a *devastavit*. The burden is upon the executor to show fair reason why he did not commence proceedings; when, however, he shows the absolute insolvency of the debtor or that he has no proof to establish that the property belongs to the estate, and is advised by his counsel in good faith and believes he cannot make such proof, he cannot be held liable. *O'Connor v. Gifford* (1889), 117 N. Y. 275, 22 N. E. 1036.

Section cited.—*Heinmuller v. Gray* (1872), 13 Abb. Pr. N. S. 299.

§ 115. **Rights of administrators de bonis non.**—When administration of the effects of a deceased person, which shall have been left unadministered by any previous executor or administrator of the same estate, shall be granted to any person, such person may appeal from any judgment obtained against such previous executor or administrator of the same estate, or against the original testator or intestate; and shall defend any appeal from any such judgment; and shall have the same remedies, in the prosecution or defense of any action, by or against such previous executors or administrators, and for the collection and enforcing of any judgment obtained by them, as they would have by law.

Source.—R. S., pt. 3, ch. 8, tit. 3, Article 1, § 18.

§ 116. **Actions upon contract by and against executors.**—Actions of account, and all other actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators.

Source.—R. S., pt. 2, ch. 6, tit. 5, § 2.

Actions maintainable.—An action for a breach of promise of marriage is not one upon a contract within the meaning of this section, and therefore does not survive and cannot be revived against the executor of the promisor. *Wade v. Kalbfleisch* (1874), 58 N. Y. 282, 17 Am. Rep. 250. An action to recover damages for alleged fraud on the part of defendant, in that he induced plaintiff to marry and to cohabit with him by means of false and fraudulent representations that his first wife was dead, and that he was in all respects competent to marry, does not survive; and upon the death of defendant, cannot be revived against his personal representatives. *Price v. Price* (1878), 75 N. Y. 244.

An executor cannot maintain an action to sell real estate to pay debts and legacies. *Dill v. Wisner* (1880), 23 Hun 123, *affd.* 88 N. Y. 153.

Parties.—Where the mortgagor or other party personally liable for the deficiency in a foreclosure case is dead, his personal representatives may be made parties to the suit to enable the complainant to obtain a decree that the deficiency be paid out of the estate in their hands in due course of administration. *Glacius v. Fogel* (1882), 88 N. Y. 434; *Leonard v. Morris* (1841), 9 Paige 89.

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Where there are several executors they must all join with the prosecution of a suit, even though some renounce. A suit in the name of A. B. as acting executor cannot be maintained. *Bodle v. Hulse* (1830), 5 Wend. 313.

On a note given to an executor, for a debt due his testator, he may sue either in his own name or as executor; merely describing him as executor in the commencement of the declaration will not prevent its being regarded as a personal action. *Merritt v. Seaman* (1852), 6 N. Y. 168.

§ 117. Administrators to have same rights and liabilities as executors.—Administrators shall have actions to demand and recover the debts due to their intestate, and the personal property and effects of their intestate; and shall answer and be accountable to others to whom the intestate was holden or bound, in the same manner as executors.

Source.—R. S., pt. 2, ch. 6, tit. 5, § 3.

Sale of lands by administrator with will annexed held to be void. *In re Place* 1 Redf. 276 (1849).

An administrator, so far as his initiative is concerned, is limited by this section to the collection of debts due the estate and marshalling the personal effects of his intestate. Thus, in the absence of proof that mortgaged premises of which an intestate died seized did not descend to an heir, the administrator cannot be allowed credit in his accounts for payments of interest upon the mortgage. *Matter of Roberfs* (1911), 72 Misc. 625, 132 N. Y. Supp. 396.

§ 118. Actions of trespass by executors and administrators.—Executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased, in his lifetime.

Source.—R. S., pt. 2, ch. 6, tit. 6, § 4.

By the common law causes of action classed as *ex delicto* did not survive the death of the person injured nor that of the wrongdoer. The injustice of the rule was manifest as to a class of actions founded in tort, and its rigidity was relaxed in a large number of cases by parliamentary enactments authorizing suits to be maintained by executors and administrators for causes of action existing in the lifetime of the deceased. Statutes in this state reviewed. *Moore v. McKinstry* (1885), 37 Hun 194.

Survivability.—A right of action for damages caused by a false and fraudulent representation of the solvency of the vendee of merchandise will not survive to the personal representatives of the party defrauded. An action, founded on an expressed or implied promise to a person, does not survive to his personal representatives, when the damages consist entirely in the mental or bodily sufferings of the deceased. *Zabriskie v. Smith* (1885), 13 N. Y. 322, 64 Am. Dec. 551. But an action against a common carrier for negligence in not transporting and delivering personal property survives. *Smith v. N. Y. & N. H. R. R. C.* (1858), 28 Barb. 605, 16 How. Pr. 277. So an action for waste in cutting growing trees. *Rutherford v. Aiken* (1874), 3 T. & C. 60.

An administrator may bring trespass for unlawfully taking goods of the intestate after his death and before administration granted. He may also maintain an action for a trespass committed on the real estate, or for taking and carrying away the goods, of the intestate in his lifetime. *Rockwell v. Saunders* (1854), 19 Barb. 473.

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several part-owners of vessels are tenants in common, and like tenants in common of the property they must join in an action at law to recover damages for conversion of it. In the case of the death of any part-owner, after action brought, the right of action survives to the others, and they may continue the suit by joining the executor of the deceased. *Bucknam v. Prett* (1861), 35 N. H. 96, 13 Abb. Pr. 119, 22 How. Pr. 233.

Action for a breach of promise of marriage is not one within the meaning of the statute; it does not relate to property interests or to personal injuries. There-fore it does not survive and cannot be revived against the executors or administrators of the promisor. *Wade v. Kalbfleisch* (1874), 58 N. Y. 282, 17 Am. Rep. 250.

9. Actions of trespass against executors and administrators.—Any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who in his lifetime shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person.

Revised Statutes.—R. S., pt. 2, ch. 6, tit. 5, § 5.

Action for unlawful entry upon certain land and for maliciously cutting down and appropriating trees growing thereon is properly continued against the personal representatives of the original defendant. *Gould v. Patterson* (1895), 87 N. Y. 3, 34 N. Y. Supp. 289.

Action for the recovery of possession of specific personal property against a defendant, wholly abates if the defendant dies before verdict or judgment; the court has no power in such a case to order the action to be continued against the personal representatives of defendant. *Hopkins v. Adams* (1857), 10 N. H. 68, 6 Duer 685, 5 Abb. Pr. 351.

Action brought against defendants as indemnitors of the sheriff, for damages in taking and carrying away plaintiff's goods under process of the court against a stranger, survives and continues after the death of one of the defendants, and may be revived against the administratrix of the deceased defendant. *Heinmuller v. Gray* (1872), 13 Abb. Pr. N. S. 299, 44 How. Pr. 260. See also *Heinmuller v. Gray* (1872), 13 Abb. Pr. N. S. 299, 44 How. Pr. 260.

See also *Mosely v. Mosely* (1860), 11 Abb. Pr. 105.

10. Actions for wrongs, by or against executors and administrators.—Wrong done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be maintained by the person injured, or after his death, by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators, in the same manner and with the like effect and respects, as actions founded upon contracts. This section shall not extend to an action for personal injuries, as such action is defined in section three hundred and forty-three of the code of civil procedure; except nothing herein contained shall affect the right of action now existing for damages for injuries resulting in death. (*Added by L. 1909, ch. 10, § 16.*)

Revised Statutes.—R. S., pt. 3, ch. 8, tit. 3, §§ 1, 2.

The purpose of the statute was to abolish, substantially, the rule *actio personalis moritur cum persona*, or at least to narrow its application to mere personal injuries. *Smith v. New York and New Haven R. R. Co.* (1858), 28 Barb. 605, 608.

Provisions of section are unrepealed by subsequent legislation.—*Kelsey v. Jewett* (1884), 34 Hun 11, 14.

Application.—The provisions of 2 Revised Statutes, 447, section 1, relating to suits brought by and against executors and administrators, apply only to the survival of a cause of action arising in favor of, or against, a deceased person during his lifetime. *Reilly v. Erie Railroad Co.* (1901), 63 App. Div. 415, 71 N. Y. Supp. 551.

Actions preserved from abatement by this section are for the benefit of estate. *Murphy v. N. Y. C. & H. R. R. Co.* (1884), 31 Hun 358; *Cregin v. Brooklyn Cross-Town R. R. Co.* (1878), 75 N. Y. 192, 31 Am. Rep. 459.

Revival of action for personal injuries after death of plaintiff. *Scott v. Brown* (1881), 24 Hun 620; *Potter v. Van Vranken* (1867), 36 N. Y. 619.

Deceased wrongdoer, action against representatives of. *Bond v. Smith* (1875), 4 Hun 48. And see *Haight v. Hayt* (1859), 19 N. Y. 464; *Byxble v. Wood* (1862), 24 N. Y. 607, 612; *Graves v. Spier* (1870), 58 Barb. 349, 385; *Heinmuller v. Gray* (1872), 13 Abb. Pr. N. S. 299, 44 How. Pr. 260.

The statute in force at the time when the question of survival or abatement of a cause of action arose is one that controls. The statute as it now stands (Decedent Estate Law, § 120) excepts from causes of action which survive those which are based on actionable injuries to the person, not only of the plaintiff but of another. (Code Civ. Pro. § 3343, subd. 9.) So held in an application to revive an action to recover for loss of services of plaintiff's wife, which resulted from her personal injuries, against the personal representative of the wrongdoer. *Gorlitzer v. Wolffberg* (1913), 208 N. Y. 475, 102 N. E. 528, Am. Cas. 1914, D 357, revg. 148 App. Div. 917, 133 N. Y. Supp. 1123.

It is not essential that the wrongdoer should, by the wrongful act, have derived an advantage to himself or acquired specific property by which, or by the proceeds of which, the assets in the hands of his personal representatives were increased. *Seventeenth Ward Bank v. Webster* (1901), 67 App. Div. 228, 73 N. Y. Supp. 648.

The test of survivorship is whether the injury is to pecuniary interests and that it is immaterial whether the wrongdoer profited by the wrong. *Mayer v. Ertheller* (1911), 144 App. Div. 158, 128 N. Y. Supp. 807.

Abatement upon death of wrongdoer.—*Hegerich v. Keddie* (1886), 103 N. Y. 258; *Matter of Meekin v. Brooklyn Heights R. R. Co.* (1900), 164 N. Y. 145, 58 N. E. 50, 79 Am. St. Rep. 635, 51 L. R. A. 235; *Hadcock v. Osmer* (1896), 4 App. Div. 435, 38 N. Y. Supp. 618, affd. 153 N. Y. 604, 47 N. E. 923; *Miller v. Young* (1895), 90 Hun 132, 35 N. Y. Supp. 643.

The cause of action given by section 1902 of the Code of Civil Procedure to the representatives of a decedent, whose death was caused by the negligence of another, abates upon the death of the wrongdoer, and an action cannot be maintained against his representatives. *Hegerich v. Keddie* (1885), 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, revg. 32 Hun 141.

The liability of the estate of a joint tortfeasor who dies pending the action is just the same as that of the executor of one who dies after having been sued with others upon contract, and the procedure to enforce that liability is the same in either case. *Lane v. Fenn* (1912), 76 Misc. 48, 51, 134 N. Y. Supp. 92.

The right of action to recover damages for a negligent injury to real estate of intestate, committed twelve years after his death, vests in his heirs and cannot be maintained by his administratrix. *Reilly v. Erie Railroad Co.* (1901), 63 App. Div. 415, 71 N. Y. Supp. 551.

An action brought by a bank against the president thereof for loaning money upon unmarketable and comparatively valueless securities, is an action for a wrong done to the property, rights and interests of the plaintiff, and in the event of the

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of the president of the bank, the cause of action will survive against his personal representatives. *Seventeenth Ward Bank v. Webster* (1901), 67 App. Div. 73 N. Y. Supp. 648.

Action against director of corporation for failure to file an annual report does not abate. *Stokes v. Stickney* (1884), 96 N. Y. 323; *Brackett v. Griswold* (1886), 103 N. Y. 425, 9 N. E. 438; *Blake v. Griswold* (1887), 104 N. Y. 613, 11 N. E. 137.

Action by a receiver of a corporation against its trustees to compel them to account for assets, alleged to have been misapplied, may be revived against the administratrix of one of the defendants who died pending the action. *Pierson v. Gan* (1889), 4 N. Y. Supp. 898.

Action against a non-resident for alleged illegal declaration of dividends survives death of the defendant. *German-American Coffee Co. v. Johnston* (1915), 168 App. Div. 31, 153 N. Y. Supp. 866.

Action for negligence of a common carrier, in not transporting and delivering personal property, is assignable, so as to authorize the assignee to sue in his own name. *Smith v. New York and New Haven R. R. Co.* (1858), 28 Barb. 605.

Action for false representations inducing marriage abates upon death of defendant. *Price v. Price* (1878), 75 N. Y. 244, 31 Am. Rep. 463.

Action for replevin does not abate by death of plaintiff. *Lahey v. Brady* (1865), 12 N. Y. 443; *Burkle v. Luce* (1848), 1 N. Y. 163, 4 How. Pr. 291.

Wrongs done extend to cases of nonfeasance.—*Elder v. Bogardus* (1836), *Lalor*

Action for waste against the assignee of a life tenant is maintainable, and survives to the personal representatives of the reversioner. *Rutherford v. Aiken* (1844), 3 T. & C. 60.

Taxpayer's action survives the death of the plaintiff, and may be continued in the names of his executors or administrators, on their motion or that of a defendant. *Gorden v. Strong* (1899), 158 N. Y. 407, 53 N. E. 33.

Cause of action for fraud and deceit against a tobacco broker, who induced the plaintiff to sell a quantity of tobacco by falsely representing that the vendee was financially responsible, survives the death of the defendant and may be continued against his executors. *Mayer v. Ertheiler* (1911), 144 App. Div. 158, 128 N. Y. Supp. 807.

Fraud and deceit, actions for, when will not abate. *Brackett v. Griswold* (1886), 103 N. Y. 425, 9 N. E. 438; *Moore v. McKinstry* (1885), 37 Hun 194; *Lyon v. Park* (1888), 111 N. Y. 350, 18 N. E. 863.

Action based on false representations in stating that bonds were the first lien on property is assignable, and although founded upon a wrong, belongs to the estate of the person who has suffered damages by reason thereof. *Wickham v. Werts* (1906), 112 App. Div. 742, 98 N. Y. Supp. 1092.

Action for the unauthorized use of a person's name and picture does not survive. *Wyatt v. Hall's Portrait Studio* (1911), 71 Misc. 199, 128 N. Y. Supp. 247.

Action cited.—*Keeler v. Dunham* (1906), 114 App. Div. 94, 98, 99 N. Y. Supp. 669.

§ 121. Action or proceeding by executor of executor.—An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof, as such executor. *Added by L. 1909, ch. 240, § 16.*

Source.—R. S., pt. 3, ch. 8, tit. 3, § 11.

Effect of section.—This section did not abate a suit properly commenced prior to its taking effect. *Campbell v. Bowne* (1835), 5 Paige 34.

Application.—Under this statute an executor or administrator of a deceased

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executor or administrator is merely the temporary custodian of such part of the unadministered estate of the first testator as may come into his hands. As he has no power to compel a delivery to himself, he is under no duty to assume possession, and unless he volunteers to do so he cannot be made liable for the default or misappropriation of others. *Matter of Hayden* (1912), 204 N. Y. 330, 338, 97 N. E. 718.

An executor of an executor has no interest in the estate of the testator of the first executor, nor any control over its administration. *Fosdick v. Delafield* (1876), 2 Redf. 392, 404.

§ 122. Appraisal of estate of deceased person.—Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the estate of any deceased person, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time. (*Renumbered by L. 1909, ch. 240, § 16.*)

Source.—L. 1891, ch. 34.

Consolidators' Note.—The words "or any insolvent * * * of a receiver or otherwise" of § 1, L. 1891, ch. 34, relating to the appraisal of insolvent estates and of property of corporations in the hands of receivers, has been incorporated in the Debtor and Creditor Law and the General Corporation Law.

Application.—The provisions of this section have no application to the auditing by the Superintendent of Insurance of the annual statements of insurance corporations. *Rept. of Atty. Genl.* (1907), p. 505.

Valuation of stock for purpose of taxation.—Within the meaning of the statute (L. 1891, ch. 34), three months is "a reasonable period of time" for a transfer tax appraiser to consider "the range of the market and the average of prices" in order to determine the value of stocks belonging to a decedent's estate. *Matter of Crary* (1900), 31 Misc. 72, 64 N. Y. Supp. 566.

A large but minority holding of unlisted stock in a private business corporation controlled by a family should not be valued at the record figures of isolated sales of small blocks thereof in assessing an inheritance tax thereon. The value of a large block of such unlisted stock not conveying a controlling interest may be less for the purposes of sale than the figures shown by records of sporadic sales of small parcels of such stock, and when there is uncontradicted evidence that the value of such stock is \$80 and \$90 a share the appraisal thereof at \$110 and \$107.50 solely on the record of isolated sales at such figures is too high. *It seems*, that when such stock is not the subject of free and customary market dealing, the manner of appraisal by record sales provided by Laws of 1891, chapter 34, does not apply. *Matter of Curtice* (1906), 111 App. Div. 230, 97 N. Y. Supp. 444, *affd.* 185 N. Y. 543, 77 N. E. 1184.

An appraiser may properly determine, for the purposes of taxation, the value of stocks from reports of public sales of such securities made at the New York Stock Exchange, in compliance with chapter 34 of the Laws of 1891, and where no sales are made, he must ascertain the value from the best information

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which he can obtain. The rule as to the adoption of Stock Exchange values is to be applied, although it appears that the decedent owned very large blocks of stock which, if thrown on the market at one time, might have a tendency to produce a break in it, and possibly result in the offer of a mere nominal price therefor. *Matter of Gould* (1897), 19 App. Div. 352, 46 N. Y. Supp. 506, modified, 156 N. Y. 423, 51 N. E. 287.

Stock not listed upon the New York Stock Exchange, but customarily bought and sold in the open market, comes within the classification of securities the manner of whose appraisal is prescribed by this section. In *re Chambers' Estate* (1912), 155 N. Y. Supp. 153.

In appraising active securities the average price for two months before and after decedent's death represents the fair market value at the date of death. In *re Kennedy's Estate* (1911), 155 N. Y. Supp. 192.

In appraising inactive securities calculations should be made upon the average prices at which they were sold within a reasonable time before and after decedent's death. In *re Kennedy's Estate* (1911), 155 N. Y. Supp. 192.

It seems that a range of three months before and three months after decedent's death would be a reasonable time in which to compute the value of inactive securities that are customarily bought and sold on the market. In *re Chambers' Estate* (1912), 155 N. Y. Supp. 153.

Evidence of fair market value.—The State may upon the appraisal properly introduce, as evidence of fair market value, the opinion of witnesses qualified to answer, price quotations of the stock, contained in market reports and authentic publications, and prices established by sales made in the regular course of business even though not made on the exchanges. *Matter of Proctor* (1903), 41 Misc. 79, 83 N. Y. Supp. 643.

ARTICLE V.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 130. Laws repealed.

131. When to take effect.

§ 130. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Source.—New.

§ 131. When to take effect.—This chapter shall take effect immediately.

Source.—New.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....Part 2, chapter 6, title 1, §§ 1-5, 21, 22, 40-53, 69-71
 Revised Statutes.....Part 2, chapter 6, title 4, §§ 55, 58
 Revised Statutes.....Part 2, chapter 6, title 5, §§ 1-6, 23
 Revised Statutes.....Part 3, chapter 7, title 3, §§ 67-70
 * Revised Statutes.....Part 3, chapter 8, title 3, §§ 1, 2, 11
 Revised Statutes.....Part 3, chapter 8, title 3, §§ 17, 18

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1787	47	All	1815	157	All
1799	75	All	1821	207	All
1801	9	All	1828	21	1,
R. L. 1813	23	All	§§ 83, 95, 196, 336, 544 (2d meet.)		
R. L. 1813	75	All	1828	313	All

* Inserted and expressly repealed by L. 1909, ch. 240, § 93, in effect April 22, 1909.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1829	148	All	1890	286	Proviso
1835	264	All	in § 6.		
1837	234	All	1891	34	1,
1840	348	1	pt. relating to estates of deceased persons.		
1848	319	Proviso	1893	100	All
in § 6.			1896	547	280-296
1860	360	All	1897	417	9,
1865	368	Proviso	pt. relating to executors, administrators and other trustees of estates of deceased persons.		
in § 6.			1902	295	1,
1867	782	3, 4	pt. amending L. 1897, ch. 417, § 9, as to executors, administrators and other trustees of estates of deceased persons.		
1869	22	All	1903	623	Pt.
1873	397	Proviso	amending the proviso in L. 1848, ch. 319, § 6.		
in § 5.			* 1904	106	All
1875	267	Proviso	1907	669	1,
in § 7.			pt. amending L. 1897, ch. 417, § 9, as to executors, administrators and other trustees of estates of deceased persons.		
1875	343	Proviso			
in § 5.					
1876	118	All			
1883	65	All			
1886	236	Proviso			
in § 7.					
1887	315	Proviso			
in § 5.					
1887	317	Proviso			
in § 7.					

Code Civil Procedure §§ 1843, 1859, 1868, 2611, 2628, 2633; § 2634, to and including words "in his office"; § 2660, words "If a surviving husband" to "creditors of the husband"; §§ 2694, 2703, 2704, 2732; § 2733, except last two sentences; § 2734.

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

Statutes repealed which are temporary or obsolete or have been consolidated in the "Consolidated Laws" are given with an explanatory note as follows:—

R. S., pt. 2, ch. 6, tit. 1, §§ 1-5, 21, 22, 40-53, 69-71.—Sections 1, 21 and 49 were amended "to read as follows" by later acts. Section 69 limits application of the provisions relating to revocation, to wills made by testators living one year after chapter takes effect. Obsolete. Section 70 provides that title 1 shall not be construed to affect the validity of execution of wills made before the chapter takes effect. Obsolete. The other sections have been consolidated in the Decedent Estate Law as follows: Sections 2-5 in §§ 11-14; section 22 in § 16; sections 40, 41 in §§ 21, 22; sections 42-48 in §§ 34-40; sections 50 and 51 in § 27; section 52 in § 29; section 53 in § 41, and section 71 in § 2.

R. S., pt. 2, ch. 6, tit. 4, §§ 55, 58.—Section 55 relates to failure of executor to qualify and is covered by Code Civ. Pro. § 2642; section 58 provides penalty for an executor making illegal sales, and is obsolete.

R. S., pt. 2, ch. 6, tit. 5, §§ 1-6.—Consolidated in Decedent Estate Law as follows: Section 1 in § 113; section 2 in § 116; section 3 in § 117; section 4 in § 118; section 5 in § 119; section 6 in § 114.

R. S., pt. 3, ch. 7, tit. 3, Article 7, §§ 67-70.—Consolidated in Decedent Estate Law, §§ 30-33.

R. S., pt. 3, ch. 8, tit. 3, Article 1, §§ 17, 18.—Consolidated in Decedent Estate Law, §§ 112, 115.

L. 1787, ch. 47.—To reduce the laws concerning wills into one statute. L. 1801, ch. 193, repeals all statutes which come within the purview of the Revised Acts. Statute cited comes within the purview of R. A., ch. 9.

L. 1799, ch. 75.—Relates to public administrator in city of New York. L. 1801, ch. 193, repeals all statutes coming within the purview of the Revised Acts. Statute cited comes within the purview of R. A., ch. 77.

L. 1801, ch. 9.—To reduce the laws concerning wills into one statute. L. 1813, ch. 202, repeals all statutes which come within the purview of the Revised Laws. Statute cited comes within the purview of R. L., ch. 23.

As the statutes covered by express repealing acts have been repealed by the Consolidated Laws the repealing statutes have been recommended for repeal.

L. 1835, ch. 364, § 1.—Is superseded by L. 1883, ch. 65, § 1.

* Inserted and expressly repealed by L. 1909, ch. 240, § 106, in effect April 22, 1909.

The following statutes have been amended so as to read as follows and are repealed and repealed by the amending statute: R. S., pt. 2, ch. 6, tit. 1, §§ 1, 19; L. 1847, ch. 80, § 1; 1848, ch. 319, § 6; 1897, ch. 417, § 9; where the foregoing statutes have been repealed by being amended "so as to read as follows," at the section "This act shall take effect immediately," this section is included the word "all" under the heading "Statutes hereby repealed."

1860, ch. 360.—Section 1 is consolidated as section 17 of Decedent Estate Law; on 2 is a repealing section.

1865, ch. 368, proviso in § 6.—Consolidated in Decedent Estate Law, § 18.

1867, ch. 782, §§ 3, 4.—Consolidated in Decedent Estate Law, §§ 10, 15.

1869, ch. 22, § 1.—Consolidated in Decedent Estate Law, § 26.

1873, ch. 397, proviso in § 5.—Consolidated in Decedent Estate Law, § 20.

1875, ch. 267, proviso in § 7.—Consolidated in Decedent Estate Law, § 18.

1875, ch. 343, proviso in § 5.—Consolidated in Decedent Estate Law, § 18.

1883, ch. 65.—Section 1 is consolidated in Decedent Estate Law, § 110; balance obsolete.

1886, ch. 236, proviso in § 7.—Consolidated in Decedent Estate Law, § 18.

1887, ch. 315, proviso in § 5.—Consolidated in Decedent Estate Law, § 20.

1887, ch. 317, proviso in § 7.—Consolidated in Decedent Estate Law, § 20.

1890, ch. 286, proviso in § 6.—Consolidated in Decedent Estate Law, § 20.

1891, ch. 34, § 1, so far as relates to estates of deceased persons. See note 9,

Consolidated in Decedent Estate Law, § 120.

1893, ch. 100.—Amends L. 1847, ch. 80, § 1, "so as to read as follows." L. 1847, 80, was repealed by L. 1893, ch. 686. The amendatory act was not expressly repealed but is superseded by Code of Civ. Pro. § 2719, as amended by L. 1893, 386.

1896, ch. 547, §§ 280-296.—See note 5, ante. Consolidated in Decedent Estate Law, §§ 80-97.

1902, ch. 295, § 1, so far as relates to executors, administrators and other trustees of estates of deceased persons. Consolidated in Decedent Estate Law, § 111.

1903, ch. 623, so far as amends the proviso in L. 1848, ch. 319, § 6. Consolidated in Decedent Estate Law, § 19.

Code of Civil Procedure, § 1843.—Consolidated in Decedent Estate Law, § 101.

Code of Civil Procedure, § 1859.—Consolidated in Decedent Estate Law, § 102.

Code of Civil Procedure, § 1868.—Consolidated in Decedent Estate Law, § 28.

Code of Civil Procedure, § 2611.—Consolidated in Decedent Estate Law, §§ 23-25.

Code of Civil Procedure, § 2628.—Consolidated in Decedent Estate Law, § 46.

Code of Civil Procedure, § 2633.—Consolidated in Decedent Estate Law, § 42.

Code of Civil Procedure, § 2634, to and including words "in his office." Consolidated in Decedent Estate Law, § 43.

Code of Civil Procedure, § 2660.—From "If a surviving husband" to "creditors of the husband." Consolidated in Decedent Estate Law, § 103.

Code of Civil Procedure, § 2694.—Consolidated in Decedent Estate Law, § 47.

Code of Civil Procedure, § 2703.—Consolidated in Decedent Estate Law, § 44.

Code of Civil Procedure, § 2704.—Consolidated in Decedent Estate Law, § 45.

Code of Civil Procedure, § 2732.—Consolidated in Decedent Estate Law, § 98.

Code of Civil Procedure, § 2733, except last two sentences. Consolidated in Decedent Estate Law, § 99.

Code of Civil Procedure, § 2734.—Consolidated in Decedent Estate Law, § 100.

DECORATION DAY.

Appropriations by town for observance; Town Law, § 136. Money for, in cities of first class, General City L. §§ 12, 13. Leave of absence to veterans; Public Officers Law, § 63. Legal holiday; General Construction Law, § 24.

DEEDS.

Short form; Real Property Law, § 258.

DELHI.

Agricultural School; Educational Law, §§ 1055-1060.

DENTAL SOCIETIES.

See Public Health Law, §§ 190-203.

§ 1. Dependent wives, children and relatives. L. 1911, ch. 814.

DENTISTRY.

Licensing and regulation of practice of, Public Health Law, §§ 190-203. Powers of Regents of University as to licensing and supervision of practice, Education Law, § 51.

DEPENDENTS.

Boards of child welfare; General Municipal Law, §§ 148-155. See also for dependents generally, Poor Law, State Charities Law, Insanity Law.

L. 1911, ch. 814. An act to better protect dependent wives, children and poor relatives and to declare them the primary beneficiaries of sums of money and any property awarded for their maintenance and support by any court, judge, magistrate, police justice, justice of the peace or judicial officer in this state. (*In effect July 28, 1911.*)

§ 1. From and after the passage of this act, any wife, child or children, parent, grand-parent or poor person for whom any sum of money or other valuable property or chattel is directed to be paid or applied for their respective support or maintenance by any court, judge, magistrate, police justice, justice of the peace, either of record or of an inferior court, or by any judicial officer in this state, is hereby declared to be the primary beneficiary, or beneficiaries thereof, and all laws in respect thereto shall be so construed, and said court, judge, magistrate, police justice or justice of the peace or judicial officer having jurisdiction, shall have power to determine what shall be a fair and reasonable amount for such support and maintenance to be paid by the party adjudged liable to be charged therewith commensurate with his financial ability, and according to his means.

DEPOSIT.

When court may order; Code Civ. Pro. §§ 717, 718.

DEPOSITIONS.

In civil actions; Code Civ. Pro. §§ 870-919. In criminal cases; Code Crim. Pro. §§ 620-657. Disclosure of; Penal Law, § 1780. False, Id., § 1620, when deemed complete, Id., § 1625.

DESCENT.

See Decedent Estate Law.

DETECTIVES.

Licenses of private; General Business Law, §§ 70-76. See County Detectives.

DISCOVERY.

Of books and papers; Code Civ. Pro. §§ 803-809. Action for, abolished; Code Civ. Pro. § 1914.

DISCRIMINATION.

In price of admission; Penal Law, § 515. See also Civil Rights Law.

DISEASES.

Of domestic animals; Agricultural Law, §§ 90-114. In bees; Agricultural Law 300. In fruit trees; Agricultural Law, § 304.

DISGUISES.

See Penal Law, §§ 710-713.

Cross references.

DISMISSAL.

Of criminal action; Code Crim. Pro. §§ 667-673.

DISORDERLY CONDUCT.

On public conveyances; Penal Law, § 720.

DISORDERLY HOUSES.

Definition, Penal Law, § 3. Keeping of; Penal Law, § 1146. Sending messenger boys to; Penal Law, § 488.

DISORDERLY PERSONS.

Defined; Code Crim. Pro. § 899. Proceedings for punishment; Code Crim. Pro. §§ 900-913. Summary punishment of professional criminals; Code Crim. Pro. 898-a. Exhibition of puppet shows, wire or rope dancing; Penal Law, § 833.

DISPENSARIES.

Defined; State Charities Law, § 350. Licensing; State Charities Law, §§ 290-293. Drug store or tenement houses not to be used for; State Charities Law, § 294. Penal regulations; State Charities Law, §§ 295, 296.

DISSECTION.

See Penal Law, §§ 2213-2215.

DISTRESS.

See Town Law, §§ 380-396.

DISTRICT ATTORNEY.

Election, appointment, terms, etc.; County Law, §§ 200-203. Employment of counsel by; County Law, § 204. Special; County Law, § 205.

DIVORCE.

Advertising to procure; Penal Law, § 120. Void and voidable marriages; Domestic Relations Law, §§ 5-7. Action to annul a void, or voidable marriage; Code Civ. Pro. §§ 1742-1755. Action for divorce for adultery; Code Civ. Pro. §§ 1756-1760. Marriage after divorce for adultery; Domestic Relations Law, § 8. Effect on dower rights, Real Property L., §§ 196, 206. Action for a limited divorce; Code Civ. Pro. §§ 1762-1767. General provisions as to matrimonial actions; Code Civ. Pro. §§ 1768-1774.

DOCUMENTS.

Injury to public record; Penal Law, § 2050. Offering false or forged, for filing or record; Penal Law, § 2051.

DOGS.

Licensing, killing of unlicensed, damages for injuries by; Agricultural L., §§ 131-1391, as added by L. 1917, ch. 800. Licensing in New York City; see Animals.

DOMESTIC COMMERCE LAW.

Formerly chapter 84 of the General Laws; Consolidation Board changed the name of the chapter to the General Business Law, which see.

DOMESTIC RELATIONS.

Husband and wife as witness in criminal action; Penal Law, § 2445.

DOMESTIC RELATIONS LAW.

L. 1909, ch. 19.—"An act relating to the domestic relations, constituting chapter fourteen of the consolidated laws."
[In effect February 17, 1909.]

CHAPTER XIV OF THE CONSOLIDATED LAWS.**DOMESTIC RELATIONS LAW.**

- Article 1.** Short title; definitions (§§ 1, 2).
 2. Marriages (§§ 5-8).
 3. Solemnization, proof and effect of marriage (§§ 10-25).
 4. Certain rights and liabilities of husband and wife (§§ 50-60).
 5. The custody and wages of children (§§ 70-72).
 6. Guardians (§§ 80-88).
 7. The adoption of children (§§ 110-118).
 8. Apprentices and servants (§§ 120-127).
 9. Laws repealed; when to take effect (§§ 140, 141).

ARTICLE I.**SHORT TITLE; DEFINITIONS.**

- Section 1.** Short title.
 2. Definitions.

§ 1. Short title.—This chapter shall be known as the "Domestic Relations Law."

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 1.

Scope of law.—Domestic Relations Law is the result of an examination of the various general statutes upon the subject of domestic relations from and including L. 1788, ch. 15, and ending with the session of 1908.

Domestic Relations Law embraces provisions relating to marriages; husband and wife; custody and wages of children; guardians; adoption and apprentices and servants.

All live provisions of general statutes which relate to the subjects above defined have been consolidated herein, and all dead, inactive and obsolete general statutes pertaining to the subject matter are recommended for repeal by a schedule of repeals. (Report of Board of Statutory Consolidation, p. 822.)

Historical note.—Legislation on subjects coming within the term "domestic relations," as used herein began at an early date.

The first general statute relating to apprentices was L. 1788, ch. 15, followed by L. 1801, ch. 11.

Provision was made for the custody of children whose parents had separated by L. 1815, ch. 221.

The next legislation on this subject was R. S., pt. 2, ch. 1, tit. 1, and ch. 8, tits. 1, 3, 4.

L. 1909, ch. 19.

Marriages.

§§ 2, 5.

By L. 1840, ch. 80, a married woman was permitted to insure, or cause to be insured, the life of her husband for her own benefit.

L. 1845, ch. 11, enabled a married woman to receive a patent for her own invention pursuant to the laws of the United States, and hold and enjoy the same.

A married woman, by L. 1848, ch. 200, was empowered to hold property for her sole and separate use as if she were a single female.

This was followed by legislation enlarging the rights of married women at each successive stage.

The first general statute authorizing the adoption of minor children was L. 1873, ch. 830. Prior to this all adoptions were made or had by contract.

By L. 1880, ch. 472, husband and wife holding any lands as tenants in common, joint tenants, or as tenants by entireties, were empowered to make partition or division of the same between themselves.

L. 1887, ch. 537, permitted a husband and wife each to make a transfer or conveyance of real estate direct to each other without the intervention of a third party.

All illegitimate children whose parents should intermarry were to be considered as legitimate for all purposes by L. 1895, ch. 531.

Most of the laws pertaining to this subject, then existing, were revised by L. 1896, ch. 272, being ch. 48 of the general laws, known as the Domestic Relations Law.

In the consolidation of this law an examination of upwards of one hundred general statutes, exclusive of the Revised Statutes, has been made.

In addition to the above, much time, care and attention was devoted to the examination of the Revised Statutes and the amendments thereto relating to the subjects contained in this law. (Report of Board of Statutory Consolidation, p. 322.)

§ 2. Definitions.—A minor is a person under the age of twenty-one years. A minor reaches majority at that age.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 1.

ARTICLE II.

MARRIAGES.

Section 5. Incestuous and void marriages.

6. Void marriages.
7. Voidable marriages.
8. Marriage after divorce for adultery.

§ 5. Incestuous and void marriages.—A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

1. An ancestor and a descendant;
2. A brother and sister of either the whole or the half blood;
3. An uncle and niece or an aunt and nephew.

If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be

deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 2, as amended by L. 1907, ch. 742; originally revised from R. S., pt. 2, ch. 8, tit. 1, § 3, as amended by L. 1893, ch. 601. The act of 1893 first made a marriage between uncles and nieces and aunts and nephews incestuous and void.

References.—Intermarriage between parties specified in this section is a crime punishable by imprisonment for not more than ten years, Penal Law, § 1110. Marriage secured by impersonating another, punishment, Id. §§ 928, 929. Solemnizing a marriage between parties who may not lawfully marry, a misdemeanor, Id. § 1450. Annulment of incestuous marriages, Code Civ. Pro. §§ 1742-1755.

Marriage of ancestor and descendant.—It is no defense that female was defendant's illegitimate daughter. *People v. Lake* (1888), 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344. For reason for provision as to persons in direct lineal line of consanguinity and collation of authorities treating thereof, see *Wightman v. Wightman* (1820), 4 Johns. Ch. 343.

The marriage of uncle and niece is not void at common law. Such a marriage before the amendment of 1893 is valid and will not be annulled. *Weisberg v. Weisberg* (1906), 112 App. Div. 231, 98 N. Y. Supp. 260.

A marriage between aunt and nephew is void as against decency and public policy; history of the introduction of the English canon law as to such marriages into this country considered. *Campbell v. Crampton* (1880), 8 Abb. N. C. 363.

Lex loci contractus governs.—A marriage valid under the laws of the state where it was contracted, is valid here, and every right and privilege growing out of the relation so established attaches to each party thereto. *Thorp v. Thorp* (1882), 90 N. Y. 602, 43 Am. Rep. 189. See *Matter of Hall* (1901), 61 App. Div. 266, 70 N. Y. Supp. 406. As a general rule, it may be stated that the validity of a marriage is to be determined by the *lex loci contractus*. *Smith v. Woodworth* (1865), 44 Barb. 198.

By the universal practice of civilized nations the permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated. *Cropsey v. Ogden* (1854), 11 N. Y. 228.

In the case of *Van Voorhis v. Brintnall* (1881), 86 N. Y. 13, 40 Am. Rep. 505, the rule is definitely stated that the validity of a marriage contract is to be determined by the law of the state where it was entered into. If valid there, it is to be recognized as such in the courts of this state, unless contrary to the prohibition of the natural law, or the express prohibitions of a statute. While every state can regulate the status of its own citizens, in the absence of express words, a legislative intent to contravene the *jus gentium*, under which the question of the validity of a marriage contract is referred to the *lex loci contractus*, cannot be inferred; the intent must find clear and unmistakable expression in the statute.

Where the laws of another state do not prohibit a re-marriage by a party divorced, its validity cannot be questioned in this state. *Moore v. Hegeman* (1883), 92 N. Y. 521, 44 Am. Rep. 408.

The doctrine that a marriage is to be held valid or otherwise, according to the laws of the place where it is contracted, although the parties went to the foreign country with an intention to evade the laws of their own, is an exception to the general principle of the law of contracts; the exception in favor of marriages so contracted is to prevent the inconvenience and cruelty of bastardizing the issue and to avoid the public mischief resulting from the loose state in which the parties would live; the exception, however, will not be extended to an unconsummated contract so to marry. *Haviland v. Halstead* (1866), 34 N. Y. 643.

§ 6. Void marriages.—A marriage is absolutely void if contracted by

a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; provided, that if such former marriage has been dissolved for the cause of the adultery of such person, he or she may marry again in the cases provided for in section eight of this chapter and such subsequent marriage shall be valid;

2. Such former husband or wife has been finally sentenced to imprisonment for life;

3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time. (Amended by L. 1915, ch. 266.)

Worce.—Former Domestic Relations L. (L. 1896, ch. 272) § 3; originally revised from R. S., pt. 2, ch. 8, tit. 1, §§ 5, 6.

References.—Code provisions relative to the annulment of marriages, Code Civ. Pro. §§ 1742–1755. Bigamy defined; punishment, Penal Law, §§ 340, 341; punishment of consort, Id. § 343. Pardon of prisoner sentenced for life does not restore marital rights, Domestic Relations Law, § 58.

Validity of subsequent marriage.—Where a former husband or wife of one of the parties is living, the subsequent marriage is absolutely void, and such marriage imposes no legal restraint upon the party imposed upon and no judicial sentence of nullity is necessary to free him. *Stein v. Dunne* (1907), 119 App. Div. 1, 103 N. Y. Supp. 894, *affd.* 190 N. Y. 524, 83 N. E. 1132.

A polygamous marriage is void without decree of court, but the courts will entertain an action to declare its invalidity. *Earle v. Earle* (1910), 141 App. Div. 611, 126 N. Y. Supp. 317.

At common law, the remarriage of one having a husband or wife actually living, though unheard of for years and believed to be dead, was void *ab initio*. Where a wife, not having heard from her husband for over seven years, was married to decedent in the state of New Jersey, letters of administration issued to her as his widow will be revoked on the presumption that in the absence of proof the common law prevails in the state of New Jersey. *Matter of Kutter* (1913), 79 Misc. 74, 139 N. Y. Supp. 693.

Distinction between void and voidable marriages.—"A very important distinction exists between a void and voidable marriage. In the former case the marriage is void *ab initio*. It never was a marriage. The legislative authority to procure a formal declaration of its nullity by the court is clearly in the interest of the public for the purpose of affording conclusive evidence by judicial decree of the fact that the marriage was void and never had any legal effect. *McCullen v. McCullen*, 162 App. Div. 599, 601, 147 N. Y. Supp. 1069. In the case of a voidable marriage, the marriage is legal until annulled by the court, and it only becomes void from the time its nullity is determined by the judgment of the court. In other words, the decree of nullity does not operate to make the marriage void *ab initio*. The legality of the marriage status and of all the consequences ordinarily flowing therefrom, from the time the voidable marriage relationship began until its annulment, is undisturbed. Such is the plain statutory declaration as interpreted by the courts." *Houle v. Houle* (1917), 100 Misc. 28.

Remarriage while first husband living void; effect of subsequent annulment of first marriage; ratification of second marriage.—Where a woman remarries while her first husband is still living, the second marriage is absolutely void, and will be declared to be so in a suit brought by the second husband, although after the second marriage the first marriage was annulled, on the ground that it was

induced by the false representations of the first husband. The second marriage is not validated by ratification after the annulment of the first marriage merely because the parties thereto continue to cohabit as man and wife, if there was no new solemnization of the second marriage in the manner required by the statute. *McCullen v. McCullen* (1914), 162 App. Div. 599, 147 N. Y. Supp. 1069.

Where a woman does not procure a divorce from her first husband until a month after she had married again, the second marriage is void and will be annulled where the second husband had no knowledge of the first marriage and there is no issue of the second marriage. *McCarron v. McCarron* (1899), 26 Misc. 158, 56 N. Y. Supp. 745.

Marriage void or voidable; inquiry as to death of party's husband or wife.—Any one of the three persons concerned may maintain the action, that is, either of the parties to the later marriage and the party to the former marriage who was not a party to the later one. If a woman marries when her husband by a former marriage is alive both marriages cannot be in full force at that time. Assuming that there was no divorce, either the subsequent marriage is void or the former marriage is suspended or in abeyance, and if this is so, it is not reinstated by the return of the absentee, but is voidable and not void until so adjudged. Otherwise both marriages would be in force at the same time and to this extent polygamy would be sanctioned by law. The marriage between the parties to the later marriage is thus either void or voidable. If the wife knew or should have known that fact at the time, it was absolutely void with no binding force upon either party and their relations were not sanctioned by law, whether they realized it or not. If she did not then know it within the true meaning of the statute and she married the second time in the full belief, after due observance of the five years' provision, that her first husband was dead, the marriage was not void but voidable, binding upon both parties thereto until action by the court, and their relation was that of honorable marriage. The inquiry to find out whether a husband or wife who has disappeared is yet alive must be made with an honest effort to find out the truth and the inquiry must be continued in good faith and with the diligence required by the importance of this subdivision. *Stokes v. Stokes* (1910), 198 N. Y. 301, 91 N. E. 793, revg. 128 App. Div. 838, 113 N. Y. Supp. 142.

Void and voidable marriages distinguished.—The statute distinguishes between marriages which are absolutely void and those which are merely voidable; the former are void from their inception, and the parties thereto may remarry, while the latter are void only from the time the invalidity is declared by a court of competent jurisdiction, and there is no right to remarry in the absence of such decree. *McCullen v. McCullen* (1914), 162 App. Div. 599, 147 N. Y. Supp. 1069.

An interlocutory judgment of divorce is ineffectual to dissolve the marriage relation between the parties, and a marriage contracted by the guilty husband with another woman in another state prior to the entry of the final judgment of divorce is absolutely void. The fact that the parties to the second marriage live together, after the entry of the final judgment, does not constitute a ratification of the void marriage, as such a marriage is not the subject of ratification, nor does it constitute the making of a new contract of marriage, it appearing that such cohabitation did not take place until after the statute abolishing the so-called parol common-law marriages had taken effect. *Pettit v. Pettit* (1905), 105 App. Div. 312, 93 N. Y. Supp. 1001.

Effect of divorce on ground of adultery.—A person divorced because of his or her adultery is regarded as having a husband or wife living, so long as the party obtaining the divorce lives; therefore a marriage with a person divorced because of his adultery is void, unless it be contracted in a state where such marriage is valid, in which case the *lex loci contractus* must prevail. *People v. Faber* (1883),

92 N. Y. 146, 44 Am. Rep. 357. See also *Thorp v. Thorp* (1882), 90 N. Y. 602, 43 Am. Rep. 189; *Van Voorhis v. Brintnall* (1881), 86 N. Y. 18, 40 Am. Rep. 505; *O'Dea v. O'Dea* (1885), 101 N. Y. 23, 40, 4 N. E. 110, 3 How. Pr. N. S. 271. A nonceremonial marriage contracted in this state by a man previously divorced because of his adultery is absolutely void, and the provisions declaring a marriage void only from the time when it has been pronounced a nullity, if a husband or wife marries when the other has been absent for five years, have no application. *Matter of Tabor* (1900), 31 Misc. 579, 65 N. Y. Supp. 571.

A marriage by a woman, prohibited from marrying by a decree of divorce, to a man, having to her knowledge a wife living, is void *ab initio*. *Dye v. Dye* (1910), 140 App. Div. 309, 125 N. Y. Supp. 242.

A subsequent marriage by a wife divorced for her adultery made while her first husband was living and contrary to the decree of divorce, is void. *Roth v. Roth* (1916), 97 Misc. 136, 161 N. Y. Supp. 99.

The statute is penal since it invalidates a marriage with any person who has been divorced because of his own adultery while the wife obtaining the divorce is living, and therefore places a restraint or punishment upon the person convicted of adultery. *Van Voorhis v. Brintnall* (1881), 86 N. Y. 18, 40 Am. Rep. 505.

After a divorce has been granted on the grounds, of the adultery of the husband he cannot, in this state, make a valid promise of marriage during the lifetime of his wife who obtained the divorce. *Haviland v. Halstead* (1866), 34 N. Y. 643.

Validity of marriage in foreign state in violation of decree of court.—The section covers the case of one married abroad, and divorced abroad for his own adultery. *Cropey v. Ogden* (1854), 11 N. Y. 228.

Where one of the parties is precluded from marrying again in this state by reason of a judgment granting a divorce to his former spouse because of his adultery, and both parties knowing this go to another state temporarily for the purpose of evading the prohibition, and are there married, such marriage cannot be annulled on that ground; and even if such marriage were void, the plaintiff is equally guilty with defendant and the court will not grant relief. *Kerrison v. Kerrison* (1880), 8 Abb. N. C. 444, 60 How. Pr. 51.

A second marriage is void if there was a prior marriage and a former wife is living at the time of the second marriage who was not divorced because of her adultery; it is not essential that the former marriage should have taken place, or have been dissolved, within this state. *Smith v. Woodworth* (1865), 44 Barb. 198.

Effect of imprisonment of husband for life upon marriage.—Where the maximum sentence imposed upon a husband convicted of murder in the second degree was for life, and the minimum twenty years, he is civilly dead, and that fact *ipso facto*, if his wife so elect, dissolves the marital relation, and her marriage to another during the life of the convict is neither void nor voidable and she will be granted a peremptory writ of mandamus to compel the issuance of a marriage license. *Matter of Gargan v. Sculley* (1913), 82 Misc. 667, 144 N. Y. Supp. 205.

Absence of husband or wife for five years.—The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith would have acted under the circumstances. *Gall v. Gall* (1889), 114 N. Y. 109, 21 N. E. 106. See also *Matter of Tyler* (1894), 80 Hun 406, 30 N. Y. Supp. 330; *Machini v. Zanoni* (1882), 5 Redf. 492.

Two leading facts must be found to bring a case within the terms of this statute: First, "That the husband or wife has absented himself or herself"; and, secondly, "That he or she has not been known to such person to be living during the space of five successive years." The words "absented himself" evidently refer to a withdrawal of his whereabouts from his wife, his relatives, and from the ordinary

and usual opportunities of identification; such a withdrawal from his wife and family as would, after the lapse of five successive years, lead naturally to the inference that death had ensued. *Jones v. Zoller* (1883), 29 Hun 551, 32 Hun 280 (1884).

Subdivision 3 is based upon the probability that in such case the absentee is dead, and is designed to protect the person who, in good faith, acts upon the statute. *Gall v. Gall* (1889), 114 N. Y. 109, 21 N. E. 106. Under this subdivision where a wife who knows that her husband has not been absent continuously for five years last past but has lived with her within that period, contracts, through fraud and deceit, a second marriage, such marriage is absolutely void. *Butler v. Butler* (1916), 93 Misc. 258, 157 N. Y. Supp. 188.

It is not essential to the validity of a second marriage that a first husband should have left the general locality where he formerly lived. *Jones v. Zoller* (1883), 29 Hun 551.

A second marriage of a husband is not voidable merely, because five years have not elapsed from the time of the separation from his first wife. Nor will there be any presumption that the first wife had been finally sentenced to imprisonment for life. In *re Stanton* (1910), 123 N. Y. Supp. 458.

The mere fact of absence, where it does not appear that it was created with a view of avoiding the statute, is sufficient, without reference to the manner, or the reason, or occasion of it. *White v. Lowe* (1862), 1 Redf. 376.

Where a husband remarried before the lapse of five years with no reason to believe that his former wife was dead, and after discovering that his first wife was living continued to cohabit with the second wife, the court acting upon general principles of equity, will not annul the second marriage at the husband's suit, but will leave him where he has placed himself. *Berry v. Berry* (1909), 130 App. Div. 53, 114 N. Y. Supp. 497.

See also cases cited under section 7, post.

Absence in good faith.—Where the wife, after her husband absents himself for five years, in good faith and supposing him to be dead, contracts a second marriage, the latter is only void after its nullity is pronounced by a court, and that only on application of one of the parties; it cannot be attacked collaterally. *Cropsey v. McKinney* (1859), 30 Barb. 47. See also *Taylor v. Taylor* (1898), 25 Misc. 566, 55 N. Y. Supp. 1052; *Brower v. Bowers* (1850), 1 Abb. App. Dec. 214, 222. There should be a *bona fide* absence of the absconding person from the state, and without being known to the other party to be living. *Wyles v. Gibbs* (1862), 1 Redf. 382.

The statute is not designed to allow a couple by mutual understanding to separate, take no steps to hear from the other, or inquire from friends or relatives where the other is, and after five years contract new marriage relations on the theory that a five years' statute of limitations runs against a marriage. *Alixanian v. Alixanian* (1899), 28 Misc. 638, 59 N. Y. Supp. 1068.

As to presumption of death after absence for the statutory time, and the necessity for inquiry as to absentee's whereabouts, see *McCartee v. Camel* (1846), 1 Barb. Ch. 455.

Annulment of second marriage; discretion of court; proof.—This section is not mandatory and the court may refuse to annul a second marriage, although the former husband or wife is living, if such decree would be highly inequitable and the plaintiff does not come into court with clean hands. *Stokes v. Stokes* (1908), 128 App. Div. 338, 113 N. Y. Supp. 142, revd. on the grounds 198 N. Y. 301, 91 N. E. 793. An action to set aside a void marriage will not lie after the decease of one of the parties. *Combs v. Combs* (1885), 17 Abb. N. C. 265.

Where the defendant does not appear in an action to annul a second marriage on the ground that the husband by the former marriage is still living, the plaintiff

need merely allege and prove the former marriage, that the former husband was living at the time of the marriage with the plaintiff, and that the former marriage has not been annulled or dissolved. It is not necessary for the plaintiff to negative by allegation, or proof, the exceptions or provisos contained in this section. *McCullen v. McCullen* (1914), 162 App. Div. 599, 147 N. Y. Supp. 1069.

Proof required.—Where the fact of a ceremonial marriage, followed by the long cohabitation of the parties and the birth of children is established, it is incumbent upon whoever assails the validity of the marriage and the legitimacy of the children to prove his case by evidence instead of presumptions, even if that involves proof of a negative, especially where the attempt is made after the lapse of thirty years and the death of the parties, not by any one claiming rights under an alleged prior marriage, but by relatives who would deprive children of their inheritance by branding them as illegitimate. *Matter of Meehan*, 150 App. Div. 681, 135 N. Y. Supp. 723.

Where in an action to annul a marriage it appears that the parties acted in good faith and in the belief, after full and careful inquiry, that defendant's first husband, from whom she had not heard for over seven years and did not know him to be alive, was dead, plaintiff is entitled to judgment though he knew all the defendant knew about the facts before he married. *Tiedemann v. Tiedemann* (1916), 94 Misc. 449, 157 N. Y. Supp. 1101.

Where a marriage took place at 11 o'clock in the morning and a decree of divorce freeing the wife from a former husband was granted, entered and perfected at or about 2 o'clock in the afternoon of the same day, the marriage, having been made in good faith and under the belief that the divorce had been granted, is valid. *Merriam v. Wolcott* (1881), 61 How. Pr. 377.

Proof of prior marriage is not alone sufficient for annulment; there is a presumption in favor of innocence of defendant, to be overcome by evidence showing that former spouse had not absented himself for a period sufficient to raise presumption of death. *Fagin v. Fagin* (1915), 88 Misc. 304, 151 N. Y. Supp. 809; *Lazarowicz v. Lazarowicz* (1915), 91 Misc. 116, 154 N. Y. Supp. 107.

Divorce void for insufficient service.—In an action to annul a marriage on the ground that a divorce procured by the defendant from a former wife was void, it appeared that the decree of divorce was granted in Massachusetts where the former marriage was not contracted, that the defendant did not reside in that state, nor was he served with process there, nor did he appear. It was held that the decree based upon constructive service by publication, was void in New York, and that the second marriage should be annulled. *Davis v. Davis* (1893), 2 Misc. 549, 22 N. Y. Supp. 191.

Validity of second marriage presumed under the circumstances, although the husband had another wife living. *In re Stanton* (1910), 123 N. Y. Supp. 458.

The presumption of the continuance of a first marriage, assuming it to have been valid, is not as strong as the presumption of the validity of a second marriage, where the latter presumption is strengthened by the uninterrupted cohabitation of the parties to it for more than twenty years and until the death of one of them, the attitude of their friends, relatives and acquaintances, the birth of children and the conduct of the alleged former wife. *Matter of Meehan* (1912), 150 App. Div. 681, 135 N. Y. Supp. 723.

Statute of limitations.—The statute makes a marriage under such circumstances void *ab initio* and not voidable merely, and no lapse of time will make it valid. So the statute of limitations may not be invoked in the absence of allegations tending to show that the subsequent marriage is voidable. *Chittenden v. Chittenden* (1909), 64 Misc. 649, 118 N. Y. Supp. 1005, *affd.* 137 App. Div. 932, 123 N. Y. Supp. 1110.

Necessity for judgment of annulment.—The first marriage is only placed by the

law in abeyance; it only temporarily suspends the right of the first husband; but as the second marriage is only void after it is so pronounced by a court of competent jurisdiction, if the first husband omits or neglects to resort to the proper remedy to annul the second marriage, the latter marriage continues in force after the death of the first husband, and has the same force and effect as if, when it was solemnized, the first husband was not alive. *Griffin v. Banks* (1862), 24 How. Pr. 213, *revd.* on other grounds 37 N. Y. 621. See also *Valleau v. Valleau* (1836), 6 Paige 207. Where a party enters into a second marriage, knowing his first wife to be living, he cannot relieve himself from his civil liabilities thereunder until relieved legally by a decree of the court. *Anonymous* (1873), 15 Abb. Pr. N. S. 311.

A judgment declaring void the marriage relation entered *ex parte* on referee's report, without application to the court, is irregular; reasons for the necessity of the submission of the evidence to the court set forth. *Blott v. Rider* (1873), 47 How. Pr. 90.

Rights of wife in second husband's estate upon return of former husband.—Where a woman, whose husband had absented himself for more than five successive years without being known to her to be alive during that time, again married in good faith and with the honest belief that he was dead and lived with her second husband more than eleven years and until his death without any decree annulling the second marriage, she is entitled to the statutory exemption and to her dower in the real estate of her second husband, notwithstanding the subsequent re-appearance of her former husband. *Matter of McKinley* (1910), 66 Misc. 126, 122 N. Y. Supp. 807.

Annulment of a prior marriage will not validate a second marriage void under this section.—*Barker v. Barker* (1916), 172 App. Div. 244, 158 N. Y. Supp. 413.

Effect of annulment on dower.—Where a marriage has been annulled on the ground that the husband had a former wife living, although it was voidable until declared void by judicial decree, and the cohabitation of the parties was not adulterous and it was entered into in good faith, yet the wife is not entitled to dower in the real estate of the husband at the date of the decree. *Price v. Price* (1891), 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359.

A marriage contracted while the former husband or wife is living, though after an absence of five years, is not to be regarded as valid for any other purpose concerning property than that of preserving the inheritance of the offspring thereof, from the competent parent; the second marriage being in effect illegal, notwithstanding the statute a woman can have no dower in the property of her second husband. *Spicer v. Spicer* (1873), 16 Abb. Pr. N. S. 112; In *Matter of Del Genovese* (1907), 56 Misc. 418, 107 N. Y. Supp. 1033, *affd.* 136 App. Div. 894, 120 N. Y. Supp. 1121, the Surrogate in referring to the above case said: "The reasoning of that case is clearly in defiance of the statute and it seems to have been very generally ignored by the higher courts in this state. It cannot therefore, be regarded as a precedent which the courts should be obliged to follow."

Insurance.—A second wife, though the first be living, who believes herself to be lawfully married and is held out by the insured and accepted by the association as such, may be made the beneficiary of a policy payable to the widow of the insured. *Story v. Williamsburgh M. M. B. Ass'n* 95 N. Y. 474.

As to former equity rule, see *Williamson v. Williamson* (1815), 1 Johns. Ch. 483; *Williamson v. Parisien* (1815), 1 Johns. Ch. 389.

§ 7. **Voidable marriages.**—A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years;

2. Is incapable of consenting to a marriage for want of understanding;
3. Is incapable of entering into the married state from physical cause;
4. Consents to such marriage by reason of force, duress or fraud;
5. Has a husband or a wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time.

Actions to annul a void or voidable marriage may be brought only as provided in the code of civil procedure.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 4; originally revised from R. S., pt. 2, ch. 8, tit. 1, §§ 4, 6, 2, as amended by L. 1887, ch. 24. The statutory Revision Commission, in its report of 1896, said: "The word 'duress' was inserted in the fourth subdivision of this section in accordance with § 1743 of the Code of Civil Procedure. The age of legal consent was raised to eighteen years in the case of females, to conform to § 282 of the Penal Code, as amended by L. 1895, ch. 460 (Penal Law, § 70, subd. 4), which makes it abduction to marry a woman under eighteen years of age without the consent of her parents."

References.—Procedure for annulment of marriages, Code Civ. Pro. §§ 1742-1755. False personation at marriage, Penal Law, §§ 928, 929. Compelling marriage by force, fraud or duress, Id. § 532.

Annulment of marriage because of parties not being of the age of legal consent.—History of legislation on subject considered. See *Conte v. Conte* (1903), 82 App. Div. 335, 81 N. Y. Supp. 923.

An action by a woman to annul a marriage lies under section 1743 of the Code of Civil Procedure when the plaintiff had not at the time of marriage attained the age of legal consent set at eighteen years by the Domestic Relations Law, article 1, section 4. This is so although the parties have cohabited and the parents of the plaintiff consented to the marriage. *Wander v. Wander* (1906), 111 App. Div. 189, 97 N. Y. Supp. 586.

A wife having an absolute right to an annulment of her marriage because contracted under the age of eighteen years, did not lose said right merely because after her complaint was prepared, but before the action was commenced, she returned for a period to live with her husband, such transactions occurring before she had arrived at the age of eighteen. *Earl v. Earl* (1904), 96 App. Div. 639, 89 N. Y. Supp. 1103.

It is not a defense to an action to annul a marriage, brought by the plaintiff on the ground that he had not attained the necessary legal age when the marriage was consummated, for the defendant to plead that he then fraudulently represented to her that he was of legal age, that she believed him and was thereby deceived into marrying him. *Quigg v. Quigg* (1903), 42 Misc. 48, 85 N. Y. Supp. 550.

A girl married under the age of fifteen years, whose cohabitation with her husband ended before reaching the age of eighteen years, is entitled to an annulment of the marriage, and this right is not barred by her laches of over five years, where it appears that she was an ignorant girl and had been told that after five years she would have a right to a divorce without any court proceedings. *Macri* (1917), 177 App. Div. 292.

Annulment of marriage performed in foreign state because parties under age.—Where two persons, resident of this state, the woman being under the age of legal consent as fixed by statute in both states, went to New Jersey and were married, and the marriage was not followed by cohabitation, *held*, that the marriage of the woman without the knowledge or consent of her parents was repugnant to our public policy and legislation, and our courts have the power to re-

Heve plaintiff by its annulment. *Cunningham v. Cunningham* (1912), 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355.

Where residents of this state under eighteen years of age, while sojourning in Canada, where marriage by them was permitted without restriction or condition of any character, intermarry and forthwith return to this state, an action to annul the marriage upon the ground that plaintiff, the husband, was under age when the marriage was consummated cannot be maintained. *Donohue v. Donohue* (1909), 63 Misc. 111, 116 N. Y. Supp. 241.

But where a woman under the age of eighteen years, a resident of the city of Buffalo, goes to Canada and is there married to another citizen of the same city without the knowledge or consent of the woman's sole surviving parent or guardian, and the parties at once return to this state and after living together two months separate, it will be inferred that the relation established by the marriage was intended by the parties to be sustained in the state of New York, and such relation is therefore subject to the laws of this state, so far as they authorize a dissolution thereof by judicial proceedings for any cause. *Mitchell v. Mitchell* (1909), 63 Misc. 580, 117 N. Y. Supp. 671.

Where a marriage is entered into in a foreign state by a woman who under the laws where it was contracted had arrived at the age of consent, it will not be annulled at her suit because, under the laws of this state where she lived, she had not reached that age and the parties went into the foreign state to avoid the effect of the laws of New York. *Reid v. Reid* (1911), 72 Misc. 214, 129 N. Y. Supp. 529.

Validity of marriage between residents of this state performed in Canada and followed by cohabitation in this state. *Wilcox v. Wilcox* (1887), 46 Hun 32.

The Supreme Court of the state of New York has jurisdiction of an action to annul a marriage contracted within the state of New York, irrespective of the residence of the parties. *Becker v. Becker*, 58 App. Div. 374, 69 N. Y. Supp. 75.

Right to annulment where parents' consent has been given.—An annulment of marriage contracted by a girl under sixteen years of age may be decreed where the marriage took place with the consent of the parents or guardian. An action for an annulment may be maintained by an infant above sixteen years of age and under eighteen years of age, under section 1743 of the Code of Civil Procedure, although the parents or guardian of the infant consented to the marriage. The provisions of the Domestic Relations Law relative to marriage licenses, expressly permitting the issuance of a license to a woman under eighteen years of age where the consent of the parents or guardian is obtained, do not modify §§ 1742 and 1743 of the code. *Kruger v. Kruger* (1910), 137 App. Div. 289, 122 N. Y. Supp. 23 revg. 64 Misc. 382, 119 N. Y. Supp. 189.

Lunacy or want of understanding.—Marriage is a civil contract, and before it can be canceled on the ground of lunacy or for want of understanding on the part of one of the parties, it must be satisfactorily shown that the party in whose interest or right the action is brought was mentally incapable of understanding the nature, effect and consequences of the marriage. *Meekins v. Kinsella* (1912), 152 App. Div. 32, 136 N. Y. Supp. 806.

A marriage with a lunatic, duly solemnized, and followed by cohabitation, is voidable, and its invalidity may not be asserted in a collateral way. *Stuckey v. Mathes* (1881), 24 Hun 461.

An inquisition is only presumptive evidence of incapacity because of lunacy at any time prior to the finding, although retrospectively included in it; as to subsequent acts, however, the inquisition is conclusive. *Banker v. Banker* (1875), 63 N. Y. 409. See also *Jacques v. Public Administrator* (1851), 1 Bradf. 499.

Insanity subsequent to marriage is not a ground for annulment. *Forman v. Forman* (1893), 53 N. Y. St. Rep. 639, 24 N. Y. Supp. 917.

A wife, in an action to annul a marriage because her husband was a lunatic, is not entitled to counsel fee and alimony. *Jones v. Brinsmade* (1905), 133 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192.

Mental incapacity, what constitutes. *Doe v. Roe* (1846), 1 Edm. Tel. Cas. 344.

The Committee of the person and property of an incompetent cannot as such, under section 2340 of the Code of Civil Procedure, maintain an action to annul the marriage of the incompetent on the ground that he is a lunatic and was such at the time of his marriage. Since the action to annul a marriage is purely statutory, such an action can be maintained only by a relative, or next friend, of the incompetent, or the incompetent himself, after his restoration to sanity. *Walter v. Walter* (1916), 217 N. Y. 439, 111 N. E. 1081, *affd.* 170 App. Div. 870, 156 N. Y. Supp. 713.

Physical incapacity.—The alleged incapacity must have existed at the time of the marriage and must still continue and must be incurable; mere sterility can in no case form a sufficient ground for a decree of nullity. *Devanbagh v. Devanbagh* (1836), 5 Paige 554, 28 Am. Dec. 443. The physical cause referred to by statute for annulling a marriage is want of *potentia copulandi* and not mere incapacity for procreation. *Schroter v. Schroter* (1907), 56 Misc. 69, 106 N. Y. Supp. 22. A woman who has had her ovaries removed by surgical operation is not incapable of entering into the marriage state; possession of the organs necessary to conception is not essential so long as there is no impediment to the indulgence of the passions. *Wendel v. Wendel* (1898), 30 App. Div. 447, 52 N. Y. Supp. 72, *revg.* 22 Misc. 152, 49 N. Y. Supp. 375.

"The courts decline to grant annulment for physical incapacity where, by reason of the advanced years of the parties at the time of the marriage, the desire for support and companionship, rather than the usual motives of marriage, must have actuated them." The marriage of a soldier's widow fifty-six years old and drawing a pension with one sixty-nine years of age will not be annulled for his physical incapacity. *Hatch v. Hatch* (1908), 58 Misc. 54, 110 N. Y. Supp. 18.

The court has no power to annul a marriage contract, on the ground of physical incapacity, except in a case of incurable impotence. The fact that the defendant is unwilling to cohabit with the complainant, and therefore refuses to submit to a slight surgical operation for the purpose of removing a temporary disability, is not a ground for a decree of nullity. *Devanbagh v. Devanbagh* (1836), 6 Paige 175.

The court will not annul a marriage on the ground of impotence where there is a probability of capacity, and where from the testimony in the case there is good reason to believe that the disability of the defendant may be removed by a slight surgical operation, without any danger whatever to the subject of such operation. *Devanbagh v. Devanbagh* (1836), 6 Paige 175.

A mere doubt as to what would be the result of a surgical operation upon an uncommonly dense and tenacious hymenial membrane, where there does not appear to be any other incapacity or malformation, is not sufficient to justify a decree of nullity; as cases of that kind belong to the class of temporary and curable incapacities. *Devanbagh v. Devanbagh* (1836), 6 Paige 175.

There is no rule of law that will enable a husband to annul the marriage contract on the ground that his wife has a swollen tongue or inflammation of the bladder. *Riley v. Riley* (1893), 73 Hun 575, 26 N. Y. Supp. 164.

Physical examination.—Where a wife seeks to annul the marriage on the ground of physical incapacity of the husband, the court has power to compel a surgical examination of the defendant. *Cahn v. Cahn* (1897), 21 Misc. 506, 48 N. Y. Supp. 173.

A suit to annul a marriage on the ground of the physical incapacity of the defendant, if the answer admits the present incapacity, but denies that it existed at the time of the marriage, and the nature of the incapacity is such as to render

a surgical examination of the defendant necessary, in connection with a personal examination on oath as to the commencement and progress of the disease which has created the incapacity, the court will direct the defendant to submit to such examination, although she has been previously examined ex parte and without oath by her own medical attendants. *Newell v. Newell* (1841), 9 Paige 25.

Where a husband sues to annul his marriage on the ground of the physical incapacity of his wife and moves for a physical examination before trial and the defendant replies that she has been examined by three physicians whose privilege she will waive, the court in denying the motion should require a stipulation waiving the privilege to be signed by the attorneys of the parties. *Geis v. Geis* (1906), 116 App. Div. 362, 101 N. Y. Supp. 845.

Where the plaintiff sues to annul her marriage for fraud, consisting in the defendant having represented himself to her as in good health at the time of marriage when in fact he was afflicted with a contagious venereal disease, the court may, solely by virtue of its inherent powers, compel him to submit to a physical examination where this is necessary to establish the plaintiff's case, but a remedy so extreme will not be granted before trial, nor upon it, unless necessary to prevent a denial of justice. *Anonymous* (1901), 34 Misc. 109, 69 N. Y. Supp. 547.

In an action brought by a wife to annul her marriage, on the ground of her husband's physical incapacity, the court has power to grant an order requiring the husband to submit to a surgical examination as to the matters alleged in the complaint. There being no fixed and definite procedure laid down by the court or by any statute to control the examination, the method to be adopted must rest largely in the judicial discretion of the Special Term. In the absence of peculiar and unusual features, the examination and the evidence of the examining surgeons should not be taken before a referee prior to the trial, but should be taken before the court during the progress of the trial. *Gore v. Gore* (1905), 103 App. Div. 168, 93 N. Y. Supp. 396.

An action was brought by a husband to dissolve a marriage, on the ground that he was induced to enter into it by the fraudulent concealment of a disease with which his wife was afflicted, and also on the ground that by reason of such disease she was physically incapable of entering into the marriage state, and that there was no reason to suppose that her physical incapacity would be removed. It was held that a compulsory reference could not be ordered on the application of the defendant unless plaintiff waived his right to a trial by jury in the manner provided in section 1009 of the Code of Civil Procedure. *Morrell v. Morrell* (1879), 17 Hun 324.

The provision of the statute, authorizing a reference in an action to annul a marriage for physical incapacity of one of the parties, embraces only cases in which from a physical incapacity, other than that which results from sickness, the marriage cannot be consummated. *Morrell v. Morrell* (1879), 17 Hun 324.

Duress may be practiced by defendant's relatives and friends. *Anderson v. Anderson* (1895), 74 Hun 56, 26 N. Y. Supp. 492, *affd.* 147 N. Y. 719, 42 N. E. 721. The circumstance of a party being under arrest as the putative father of a bastard child as to his giving assent at the ceremony ought to be taken into consideration almost exclusively. *Jackson v. Winne* (1831), 7 Wend. 47, 22 Am. Dec. 563.

The legal principles governing the authority of the court to annul a marriage on the ground of duress of one of the parties thereto are essentially the same as those applied when the annulment of any other contract is requested upon the like ground, and to be available as a ground for relief it must appear that the duress of the party asking to be relieved was occasioned by the other contracting party, or that he knowingly used or availed himself of such duress as a means of procuring the contract sought to be annulled. *Sherman v. Sherman* (1892), 20 N. Y. Supp. 414, 47 N. Y. St. Rep. 404.

To justify the annulment of a marriage it should appear that plaintiff's duress was occasioned by the defendant, and that she uttered or instigated the threats of imprisonment, etc., or, at least, that at the time of the marriage she knew or had reason to believe that plaintiff was impelled to marry her by fear that the threats of imprisonment and bodily harm would be carried into execution if he did not marry her. *Sherman v. Sherman* (1892), 20 N. Y. Supp. 414, 47 N. Y. St. Rep. 404.

Where, after the birth of a child of which plaintiff was the father, the mother coerced him by threats of bodily violence, to be inflicted by her brother, to go through the form of a marriage ceremony and he complied upon the express understanding, embodied in a writing, that they should never live together as husband and wife nor have any claim upon each other because of, or arising from, the marriage ceremony, and it is established that they had not cohabited or lived together as husband and wife, plaintiff is entitled to a decree of annulment on the ground that his consent to the marriage was procured under duress. *Houle v. Houle* (1917), 100 Misc. 28.

Fraud, what constitutes.—*Ferlat v. Gojon* (1825), 1 Hopk. 478, 14 Am. Dec. 554; *Sloan v. Kane* (1854), 10 How. Pr. 66; *Moot v. Moot* (1885), 37 Hun 288. Annulment allowed where defendant kept a pool room for some time prior to his marriage unknown to the plaintiff. *King v. Brewer* (1894), 8 Misc. 587, 29 N. Y. Supp. 14. See also *Keyes v. Keyes* (1893), 6 Misc. 355, 26 N. Y. Supp. 910.

A court of equity may annul a childless marriage for fraud on proof that the defendant, who long prior to and at the time of the marriage was an insurable epileptic, not only concealed the fact from plaintiff but led him to believe that she was in good health, and that but for such concealment and misrepresentation plaintiff would not have married her. *McGill v. McGill* (1917), 99 Misc. 86, 163 N. Y. Supp. 462.

Defendant, a woman designing, shrewd and unchaste, by representing herself as spiritualistic medium, obtained from plaintiff, an old man, infirm and a firm believer in spiritualism, the deed to property worth \$25,000 and on the same day married him; held, such fraud as to justify annulling the marriage. *Hides v. Hides* (1883), 65 How. Pr. 17. If a woman induce a man, whom she charges as the putative father of her child, to marry her under the supposition that the child might be his, though she knew it was not his child, she is guilty of such fraud as to authorize the court to annul the marriage. *Scott v. Schufeldt* (1835), 10 How. Pr. 43.

Ill health of one of the parties, constituting fraud, as ground of annulment of marriage, see *Gumbiner v. Gumbiner* (1911), 72 Misc. 211, 131 N. Y. Supp. 85.

Where a woman, having a diseased condition of the womb, uterus and vagina, is by her folks that marriage will cure her, and conceals this condition from her husband, he is entitled to the annulment of the marriage for fraud. *Meyer v. Meyer* (1875), 49 How. Pr. 311.

Defendant, plaintiff, a school girl fifteen years old, while absent from home on a visit to her relatives, was induced by the defendant, who was twenty-four years old, and had been employed for about four months upon the farm of the plaintiff's father, to marry at the house of a clergyman and have a marriage ceremony performed. The plaintiff having at first refused to be married without the consent of her parents, because of her youth, the defendant falsely stated to her that her parents were of the object of his visit and that they would not care or object, and assured that she need not live with him for a good while, for three or four years, and that the ceremony should be kept secret and that she could continue to reside with her parents and attend school. The marriage was never consummated. It was held that as these representations related to the very essence of the contract, and were false and made with intent to induce the plaintiff to consent, they furnished

sufficient grounds to uphold a judgment declaring the marriage contract void, under subdivision 4 of section 1743 of the Code of Civil Procedure, as having been obtained by fraud. *Moot v. Moot* (1885), 37 Hun 288.

Existence of venereal disease.—A marriage is void on the ground of fraud, where one of the parties at the time of its celebration is afflicted with a chronic, contagious and hereditary venereal disease, known to and concealed by him, especially where the marriage had not been consummated, and the marriage relation had not yet ripened into the complications of a public status, involving the consideration of questions of public policy. *Svenson v. Svenson* (1903), 178 N. Y. 54, 70 N. E. 120, revg. 78 App. Div. 536, 79 N. Y. Supp. 657. As to fraudulent marriages, see also *Di Lorenzo v. Di Lorenzo* (1902), 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609, revg. 71 App. Div. 509, 75 N. Y. Supp. 878.

Misrepresentation as to physical capacity to discharge the marital duties, such as the affliction of one of the parties with a venereal disease, is fraud sufficient to vitiate the marriage. *Anonymous* (1897), 21 Misc. 765, 49 N. Y. Supp. 331.

Misrepresentations as to chastity may be grounds for an annulment of a marriage for fraud because, as a matter of law, it may be material upon the question of consent, which is essential to the contract of marriage. *Domschke v. Domschke* (1910), 138 App. Div. 454, 122 N. Y. Supp. 892.

Where defendant before her marriage was pregnant by another than her husband, the plaintiff, who neither before nor after the marriage had sexual intercourse with her and did not know of such pregnancy at the time of the marriage, is entitled to have it annulled for fraud. *Fontana v. Fontana* (1912), 77 Misc. 28, 135 N. Y. Supp. 220.

A marriage although consummated will be annulled for fraud where the woman on inquiry of her intended husband stated that she had been the wife of a man then deceased, and that he was the father of her child, when in truth she had been his mistress and the child was a bastard, if the plaintiff did not cohabit with her after the discovery of the fraud. It is true that such misrepresentation does not go to the *essentials* of the marriage contract, as prior chastity is not a necessary qualification for marriage, but chastity, if insisted upon, may be made an essential qualification. *Domschke v. Domschke* (1910), 138 App. Div. 454, 122 N. Y. Supp. 892.

In an action to annul a marriage on the ground that defendant falsely represented to plaintiff that her illegitimate child had been born in lawful wedlock to her and F., it appears that at the time of the marriage plaintiff knew that defendant had been unchaste with at least another beside himself, and he made no effort to verify defendant's statement as to the place where and the year in which she claimed that her ceremonial marriage to F. had taken place, and it further appears that defendant, who denied having made the misrepresentation alleged, in answer to a printed question in the marriage license described herself as never having been married, plaintiff fails to establish his case by that fair preponderance of evidence required by law, and judgment will be granted in favor of defendant. *Bahrenburg v. Bahrenburg* (1914), 88 Misc. 272, 150 N. Y. Supp. 589.

Tuberculosis.—Where, in an action to annul a marriage on the ground that defendant, knowing himself to be afflicted with tuberculosis, was guilty of fraud in concealing from and misrepresenting to plaintiff the actual facts, knowledge of which plaintiff alleges would have precluded her from entering into the marriage, and it appears that within a few days subsequent to the marriage a physician diagnosed defendant's case as tuberculosis and incurable, and that thereafter plaintiff no longer continued to cohabit with him, and there are no children of the marriage, plaintiff will be granted a judgment. *Sobol v. Sobol* (1914), 88 Misc. 277, 150 N. Y. Supp. 248.

Fraud; what does not constitute.—The fact that defendant married plaintiff with-

disclosing to him her previous marriage and divorce was not such a fraud as to warrant an annulment of the marriage. *Fisk v. Fisk* (1896), 6 App. Div. 39 N. Y. Supp. 537, affg. 12 Misc. 466, 34 N. Y. Supp. 33. See also *Clarke v. Clarke* (1860), 11 Abb. Pr. 228; *Blossom v. Barrett* (1868), 37 N. Y. 434, 97 Am. 747. Fact concealed from husband that wife, before marriage, had given birth to an illegitimate child, does not constitute fraud. *Shrady v. Logan* (1896), 10 App. Div. 329, 40 N. Y. Supp. 1010. So also as to concealment by husband of fact of cohabitation with another woman prior to the marriage. *Glean v. Glean* (1902), 10 App. Div. 576, 75 N. Y. Supp. 622.

Where defendant pretended to plaintiff that she was pregnant by him, and was so pregnant at all, and he married her believing her statement, the marriage cannot be set aside, even though never consummated by cohabitation; the plaintiff by his own immoral acts had put himself into her power. *Tait v. Tait* (1893), 3 Misc. 218, 23 N. Y. Supp. 597.

Representations that defendant represented to plaintiff his age as twenty-one when in fact he was but twenty years and some months, and that just prior to their marriage he told her she need not leave her home and could always continue to reside there, are insufficient to justify a decree annulling the marriage on the ground of fraud, though it has not been consummated by cohabitation, where each of the parties was over the age of legal consent. *Williams v. Williams* (1911), 71 Misc. 130 N. Y. Supp. 875.

Where it appears that the plaintiff in an undefended action to annul a marriage was induced by fraud, by reason of defendant's giving birth to a child one month after marriage, married defendant with full knowledge of her advanced state of pregnancy, and there is no proof of any deception on the part of defendant, inducing plaintiff to marry her, and the only testimony as to the birth of any child at all is that of plaintiff himself, the testimony does not warrant a judgment in his favor. *Bange v. Bange* (1905), 46 Misc. 196, 194 N. Y. Supp. 8.

An annulment of a marriage on the ground of fraud should not be granted solely on the testimony of the plaintiff that the defendant, who before the marriage professed his undying love, shortly after the marriage told her that he did not love her and never intended to, and insisted that she get a divorce from him. *Schaeffer v. Schaeffer* (1913), 160 App. Div. 48, 144 N. Y. Supp. 774.

Where a woman pretends to a man that she is pregnant by him, and she is not so pregnant at all, but he marries her, believing her representation to be true, he cannot have the marriage set aside for this fraud, even though the marriage was never consummated by cohabitation. *Tait v. Tait* (1893), 3 Misc. 218, 23 N. Y. Supp. 597.

Where the complaint in an action for the annulment of a marriage alleges that the plaintiff was induced to marry defendant on his representations that he was an honest and law abiding citizen and a duly licensed attorney at law, that after the marriage plaintiff learned that defendant had done time as a convict, and that he was not a member of the bar, but the testimony of defendant as to improper intimacy with plaintiff prior to their marriage is corroborated by two reputable physicians, both of whom testified that with plaintiff's consent they made a physical examination of her, the complaint must be dismissed. *Berus v. Berus* (1914), 83 App. Div. 624, 146 N. Y. Supp. 554.

Where, in an undefended action to annul a marriage, plaintiff testifies that she was induced to marry defendant in reliance upon his representations that he would support her and that with her money, and money of his own, defendant would buy a house and go into business, and she further testifies that two days after the marriage she drew her money from the savings bank and gave it to defendant upon his representation that it was to be paid on account of the purchase price of the hotel, that up to the date of the trial of the action she had not seen defendant nor

learned of his whereabouts, judgment will be awarded in her favor. *Robert v. Robert* (1914), 87 Misc. 629, 150 N. Y. Supp. 366.

Representations as to property.—An annulment cannot be granted for the husband's fraud in inducing the marriage by false representations as to his character and property; plaintiff should inform herself as to these matters and not blindly rely on defendant's representations. *Klein v. Wolfsohn* (1876), 1 Abb. N. C. 134.

Cohabitation subsequent to plaintiff's discovery of fraud deprives him of right to ask for annulment on that ground. *Muller v. Muller* (1885), 21 Wk. Dig. 287.

To establish "matrimonial cohabitation" no announcement of the purpose of the parties, further than that which is given by the appearances, is necessary. The purpose of parties so living is an important element, and that the purpose is lawful and in performance of a matrimonial engagement may be inferred from adequate circumstances. *Wilcox v. Wilcox* (1887), 46 Hun 32.

The burden of proof in an action for the annulment of a marriage on the ground of fraud is on plaintiff to show not only that the misrepresentation complained of was as to a fact which was an essential element of plaintiff's assent to the marriage, but also that such misrepresentation was of such a nature as to deceive a person of ordinary prudence. *Bahrenburg v. Bahrenburg* (1914), 88 Misc. 272, 150 N. Y. Supp. 589.

Husband or wife by former marriage living.—"If a woman marries when her husband by a former marriage is alive, both marriages cannot be in full force at that time. Assuming that there was no divorce, either the subsequent marriage is void or the former marriage is suspended or in abeyance, and, if so, it is 'not reinstated by the return of the absentee,' but is voidable and not void until so adjudged. 'Otherwise both marriages would be in force at the same time and, to this extent, polygamy would be sanctioned by law.' (*Gall v. Gall*, 114 N. Y. 109, 120, 21 N. E. 106)"; *Stokes v. Stokes* (1910), 198 N. Y. 301, 305, 91 N. E. 793.

Although a woman married a man with the knowledge that he was already bound by a valid and subsisting marriage she is entitled nevertheless to a decree annulling the marriage, for it is absolutely void. The court of its own motion cannot deny such relief upon equitable principles. *Brown v. Brown* (1912), 153 App. Div. 645, 138 N. Y. Supp. 602.

In an action brought by the woman for a separation from her second husband the latter will not be entitled to a decree dissolving the second marriage, on the ground that the plaintiff's first husband was living at the time of such marriage, where it appears that he lived with the plaintiff for more than ten years after obtaining knowledge that her former husband was not dead at the time of her second marriage. *Quære*, whether such a counterclaim is proper in an action for a separation. *Taylor v. Taylor* (1901), 63 App. Div. 231, 71 N. Y. Supp. 411, *affd.* 173 N. Y. 266, 65 N. E. 1098.

Absence of husband or wife.—A marriage annulled upon the ground that the husband had a wife living who had absented herself five years prior to the marriage and not known to him to be living, until it was annulled, was voidable only and not void, and the cohabitation of the parties was not adulterous; and although both parties entered into the marriage in good faith, yet the wife is not entitled to dower in real estate owned by the husband at the date of the decree. *Price v. Price* (1891), 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359.

The phrase "being known," as used in subdivision 5 of this section, implies and includes not only the thing known but also that which *may be known*. *Kinzey v. Kinzey* (1878), 7 Daly 460.

Where a wife, after her husband's absence for five successive years, and without knowing that he is living during that time, marries a second husband, the first marriage is only placed in abeyance. *Griffin v. Banks* (1862), 24 How. Pr. 213.

If the wife, after the husband has abandoned her and been absent more than

five years, marries a second husband, the first husband cannot obtain a divorce, on the ground of her adultery with the second husband subsequent to such marriage, unless he can establish the fact that at the time of the second marriage the wife knew that her first husband was living within five years then next preceding. Where the husband has been absent more than five years, and his wife has contracted a second marriage in good faith, her husband not being known to her to be living within the five years, a cohabitation with the second husband after the mistake is discovered will not entitle the first husband to a divorce on the ground of adultery. The last marriage being voidable merely, but not void, the remedy of the first husband is by a bill to annul the voidable marriage; and then, if his wife continues to cohabit with the second husband after such marriage has been judicially annulled, the first husband may file a bill for a divorce on the ground of such adulterous intercourse. *Valleau v. Valleau* (1836), 6 Paige 207.

Evidence that the husband of an ignorant Roumanian woman deserted her; that he had been gone nine years, during which period she had never seen or heard from him, although she had made some inquiries for him, is sufficient to warrant a finding that a marriage contracted by her six years after the desertion was valid. *Circus v. Independent Order Ahawas Israel* (1900), 55 App. Div. 534, 67 N. Y. Supp. 342.

Where a husband, divorced and forbidden to marry again in the lifetime of his wife, subsequently contracts a nonceremonial marriage in the State of New York while she is living, the latter marriage is absolutely void, and the provisions of 2 R. S. m. p. 139, 140, declaring a marriage void only from the time when it has been pronounced a nullity, in case a husband or wife marries while the other has been absent for five successive years without being known to be living, have no application. *Matter of Tabor* (1900), 31 Misc. 579, 65 N. Y. Supp. 571.

The marriage in good faith of a woman, whose husband disappeared five years before and who she had reason to believe was dead, is valid as to all the world, unless the first husband reappears and institutes an action to annul the same; and such marriage renders legitimate her child by the second husband, born before her second marriage. *Matter of Del Genovese* (1907), 56 Misc. 418, 107 N. Y. Supp. 1033, *affd.* 136 App. Div. 894, 120 N. Y. Supp. 1121.

A second marriage, when entered into in good faith and in ignorance that the first husband was alive, is not void, but simply voidable. *Chittenden v. Chittenden* (1910), 68 Misc. 172, 123 N. Y. Supp. 629.

A person desiring to take advantage of subdivision 5 of this section must act in good faith and use all such means to obtain information with respect to the absent spouse as reasonable persons would make use of under the circumstances; she cannot shut her eyes and ears and make no effort to secure information and then marry at the end of the five years relying merely on the absence of her husband. *Circus v. Independent Order of Ahawas* (1900), 55 App. Div. 534, 67 N. Y. Supp. 342.

Assuming that a wife whose adultery causes her husband to leave her, can, after the expiration of five years, bring herself within the provisions of the statute protecting subsequent marriages, where the wife has been deserted by her husband, something more than the mere act of desertion by the husband must be shown; it must be shown where the husband went to reside, or that diligent inquiry in that respect had proved unavailing, that he had abandoned his former resorts or occupations, and, if his residence was discovered, that he had afterwards abandoned such residence without leaving any trace of where he had gone. *Matter of Tyler* (1894), 80 Hun 406, 30 N. Y. Supp. 330.

See also cases cited under section 6, ante.

§ 8. Marriage after divorce for adultery.—Whenever a marriage has been or shall be dissolved, the complainant may marry again during the

lifetime of the defendant. But a defendant for whose adultery the judgment of divorce has been granted in this state may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall be made only upon satisfactory proof that five years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good; and a defendant for whose adultery the judgment of divorce has been rendered in another state or country may not marry again in this state during the lifetime of the complainant unless five years have elapsed since the rendition of such judgment and there is no legal impediment by reason of such judgment, to such marriage in the state or country where the judgment was rendered. But this section shall not prevent the remarriage of the parties to an action for divorce. (*Amended by L. 1915, ch. 266.*)

Source.—R. S., pt. 2, ch. 8, tit. 1, § 49, as amended by L. 1897, ch. 452; Code Civil Proc. § 1761.

References.—Divorce on ground of adultery, Code Civil Procedure, § 1756. Where divorce denied although adultery is proved, *Id.* § 1758.

Application.—The provisions of this section have no effect outside of the state in the absence of the express terms of the statute showing legislative intent to give them effect. *Van Voorhis v. Brintnall* (1881), 86 N. Y. 18.

Prohibition in a judgment for divorce against a second marriage has no extra-territorial effect. *People v. Chase* (1882), 28 Hun 310.

To bring a person within this prohibition it is not requisite that the former marriage should have been contracted after the revised statutes took effect. Nor that the relation of husband and wife should have existed by virtue of the former marriage since that time. *Cropsey v. Ogden* (1854), 11 N. Y. 228.

Parties to an action for divorce are not prevented from remarrying by this section as amended. But prior to the adoption of section 1761 of the Code of Civil Procedure in 1880 from which this section was derived, the parties could not marry without first procuring the *vacatur* of the decree of divorce and the prohibition contained therein against remarriage. *Matter of Eichler* (1914), 84 Misc. 667, 671, 146 N. Y. Supp. 846.

An interlocutory judgment of divorce is ineffectual to dissolve the marriage relation between the parties, and a marriage contracted by the guilty husband with another woman in another state prior to the entry of the final judgment of divorce is absolutely void. *Pettit v. Pettit* (1905), 105 App. Div. 312, 93 N. Y. Supp. 1001.

Remarriage of defendant.—The effect of the omission of R. S., pt. 2, ch. 8, tit. 1, § 49, from the Repealing Act of 1880 (ch. 245), was to modify § 1761 of the Code of Civil Procedure as to provide for the remarriage of a defendant convicted of adultery under the conditions prescribed by said § 49. *Peck v. Peck* (1881), 8 Abb. N. C. 400, 60 How. Pr. 206; *Bracher v. Bracher* (1881), 3 Law Bull. 52. Under former Revised Statutes parties could not remarry where one was guilty of adultery. *Moore v. Moore* (1877), 8 Abb. N. C. 171. Remarriage by a defendant in the plaintiff's lifetime is prohibited notwithstanding plaintiff's absence for seven years, without being heard from. *Matter of Borrowdale* (1882), 28 Hun 336; *Matter of Taber* (1900), 31 Misc. 579, 65 N. Y. Supp. 571.

After divorce for his adultery, a man cannot make a valid promise to marry during his wife's lifetime. *Haviland v. Halstead* (1866), 34 N. Y. 643.

Application to remarry.—The right to make application for leave to remarry

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onymous with the absolute right to have the application granted; the
ation should only be made where conditions required are satisfactorily
so court may order reference to take proofs. *Bracher v. Bracher* (1881),
Bull. 52.

to defendant convicted of adultery to marry again is not to be refused
because petitioner continued to cohabit with a woman, by reason of cohabi-
with whom he had been divorced and by whom he had had a child, when it
that the cohabitation was continued with apparent decency and in part for
e of the child. *Greene's Case* (1880), 8 Abb. N. C. 450.

e of motion to modify a judgment of divorce forbidding the defendant to
again need not be given to the plaintiff wife as she has no interest in the
for her husband's adultery. *Matter of Salmon* (1901), 34 Misc. 251, 69 N.
215.

ity of marriage in another state.—Parties forbidden to marry here may
t a valid marriage in another state to which they have gone solely for the
of such marriage, returning here immediately thereafter. *Van Voorhis*
Small (1881), 86 N. Y. 18, 40 Am. Rep. 505, overruling *Marshall v. Marshall*
2 Hun 238, 48 How. Pr. 57; *Thorp v. Thorp* (1881), 47 Super. (15 J. & S.)
How. Pr. 295, revd. on other grounds, 90 N. Y. 602, 43 Am. Rep. 189. The
age by a defendant in New Jersey is not void in an action by heirs of the
marriage. *Moore v. Hegeman* (1883), 92 N. Y. 521, 44 Am. Rep. 408; *Kerri-*
Kerrison (1880), 8 Abb. N. C. 444; *In re Stack* (1887), 15 State Rep. 416.

to recognize the remarriage of a former husband or wife who has been di-
and has been forbidden to again marry, where such remarriage took place
ite in which it was authorized. But this is upon the ground that the for-
to remarry was in the nature of a penalty which had no effect outside
state." *Cunningham v. Cunningham* (1912), 206 N. Y. 341, 99 N. E. 845,
A. (N. S.) 355.

ARTICLE III.

SOLEMNIZATION, PROOF AND EFFECT OF MARRIAGES.

10. Marriage a civil contract.
11. By whom a marriage must be solemnized.
- 11a. Duty of city clerk in certain cities of first class.
12. Marriage, how solemnized.
13. *Marriages licenses.
14. Town and city clerks to issue marriage licenses; form.
15. Duty of town and city clerks.
16. False statements and affidavits.
17. Clergyman or officer violating article; penalty.
18. Clergyman or officer, when protected.
19. Records to be kept by town and city clerks.
20. Records to be kept by the county clerk.
21. Forms and books to be furnished.
22. Penalty for violation.
23. Presumptive evidence.
24. Effect of marriage of parents of illegitimates.
25. License, when to be obtained.

. Marriage a civil contract.—Marriage, so far as its validity in law
n original.

is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 5, as amended by L. 1901, ch. 339, renum. and amended by L. 1907, ch. 742, § 3; originally revised from R. S., pt. 2, ch. 8, tit. 1, §§ 1, 19, as amended by L. 1887, ch. 77.

Reference.—Subdivision 4 of § 11, requiring a written contract of marriage in the absence of a ceremony either before a minister or magistrate, in effect abolishes common-law marriages. This change was brought about by L. 1901, ch. 339, taking effect January 1, 1902. Common-law marriages contracted prior to that date are valid.

Constitutionality.—State legislation affecting the institution of marriage and annulling the relation between the parties, is not within the prohibition of the U. S. Constitution against the impairment of contracts by state legislation. *Maynard v. Hill* (1888), 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723.

The right of a government, as well as that of the several states of the Union, to determine the marital status of its own citizens, and prescribe the terms and conditions upon which their relations may be changed is elementary and beyond question. *Cunningham v. Cunningham* (1912), 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355.

Marriage partakes more of the nature of a relation than of a contract, although the relation may be established and induced by the contract to enter into it. The relation, however, is always subject to the control of the sovereignty under which the parties to the marriage live. *Mitchell v. Mitchell* (1909), 63 Misc. 580, 117 N. Y. Supp. 671.

Marriage contracts have always been considered as involving questions of public policy, and the interest of others than those of the contracting parties, and should, therefore, be construed in accordance with such policy. *Cunningham v. Cunningham* (1912), 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355.

Consent.—"The free and full consent, which is the essence of all ordinary contracts, is expressly made by the statute necessary to the validity of the marriage contract. The minds of the parties must meet in one intention." *Domschke v. Domschke* (1910), 138 App. Div. 454, 122 N. Y. Supp. 892.

While marriage contracts are based upon considerations peculiar to themselves and public policy is concerned with the regulation of the family relation, nevertheless the law of this state considers marriage in no other light than that of a civil contract, requiring for its validity that full and free consent which is the essence of all ordinary contracts; every misrepresentation of a material fact made with the intention to induce another to enter into an agreement and without which he would not have done so, justifies the court in vacating the agreement, and there is no valid reason for excepting the marriage contract from the general rule. *di Lorenzo v. di Lorenzo* (1903), 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92.

Common-law marriages, valid prior to the enactment of L. 1901, ch. 339, were again made valid by repeal of section 6 of said statute by L. 1907, ch. 742, and are now valid. *Ziegler v. Cassidy's Sons* (1917), 220 N. Y. 98, 115 N. E. 471, affg. 171 App. Div. 959, 155 N. Y. Supp. 1151.

Common-law marriages were legal prior to the enactment of L. 1901, ch. 339, when such marriages were expressly prohibited. *Spencer v. Spencer* (1914), 84 Misc. 264, 267, 147 N. Y. Supp. 111.

During the operation of section 19 of the Domestic Relations Law, as the same was added to that law by chapter 339 of the Laws of 1901, a marriage claimed to have been solemnized in the State of New York in a mode other than the statutory mode, and not pursuant to the regulations of a religious sect to which the parties belonged, is invalid. *It seems*, however, that the effect of the amendment

made to the Domestic Relations Law by chapter 742 of the Laws of 1907 was to recognize the validity of marriages contracted otherwise than in the form prescribed by the statute. *Matter of Hinman* (1911), 147 App. Div. 452, 131 N. Y. Supp. 861 *affd.* 206 N. Y. 653, 99 N. E. 1108.

Upon the repeal of L. 1901, ch. 339 by L. 1907, ch. 742, there was no statutory declaration of the invalidity of a marriage contracted otherwise than as prescribed, the legislative intent being to remove the absolute inhibition of common law marriages. *Matter of Smith* (1911), 74 Misc. 11, 133 N. Y. Supp. 730.

At common law no formal ceremony is requisite to give validity to a marriage; but a contract between the parties *per verba de presenti* or *futuro* is sufficient. *Starr v. Peck* (1841), 1 Hill 270. All that is necessary at common law for the validity of a contract of marriage is the deliberate consent of competent parties entering into a present agreement. *Clayton v. Wardell* (1850), 4 N. Y. 230. Such a marriage need not be followed by cohabitation. *Jackson v. Winne* (1831), 7 Wend. 47, 22 Am. Dec. 563, cited with approval, *Caujollo v. Ferrié* (1861), 23 N. Y. 90, 106. See also *Davis v. Davis* (1877), 7 Daly 308.

It is well settled at common law that a man and woman, without the presence of witnesses, without the intervention of minister or magistrate, by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves and to society as such. And if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was, in the beginning, an actual, *bona fide* and valid marriage. *Brinkley v. Brinkley* (1872), 50 N. Y. 184, 198, 10 Am. Rep. 460. See also *Gall v. Gall* (1889), 114 N. Y. 109, 21 N. E. 106; *Betsinger v. Chapman* (1882), 88 N. Y. 487; *O'Gara v. Eisenlohr* (1868), 38 N. Y. 296; *Fenton v. Reed* (1809), 4 Johns. 52, 4 Am. Dec. 244; *Rose v. Clark* (1841), 8 Paige 574.

Marriage is a civil contract, and may exist without any formal solemnization by minister or magistrate; and to support an indictment for bigamy it is a sufficient marriage that the parties agree to be husband and wife, and cohabit and recognize each other as such. And it is no defense that the accused did not intend or consent to a marriage in fact, but obtained the consent of the woman by fraudulently imposing upon her the form of marriage by a pretended clergyman. *Hayes v. People* (1862), 25 N. Y. 390, 82 Am. Dec. 364, 24 How. Pr. 452. See also *People ex rel. Public Charities & C. Comrs. v. Barthol* (1881), 24 Hun 272.

"Our law considers marriage in no other light than as a civil contract." *Di Lorenzo v. Di Lorenzo* (1903), 174 N. Y. 472, 67 N. E. 63, 63 L. R. A. 92; *Kujek v. Goldman* (1896), 150 N. Y. 176, 182, 44 N. E. 773, 34 L. R. A. 156.

It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the common-law or statute contract; it cannot be dissolved by the parties when consummated, nor released with or without consideration, neither the rights, duties or obligations can be transferred and the action scarcely resembles an action upon contract; an action founded on breach thereof is personal and will not survive as against the executor of the defendant. *Wade v. Kalbfleisch* (1874), 58 N. Y. 282, 17 Am. Rep. 250, 16 Abb. Pr. N. S. 104.

Proof of marriage.—See note, 11 N. Y. Supp. 752 (1890), as to evidence necessary to prove existence of a marriage. See note on mode of proving marriage, 17 Abb. N. C. 494.

Proof of common-law marriage.—*Matter of Garner* (1908), 59 Misc. 116, 112 N. Y. Supp. 212; *Moller v. Sommer* (1914), 86 Misc. 110, 149 N. Y. Supp. 103, *affd.* 165 App. Div. 990, 150 N. Y. Supp. 1097; *Matter of Terwilliger* (1909), 63 Misc. 479, 118 N. Y. Supp. 424; *Matter of Spink* (1909), 62 Misc. 158, 116 N. Y. Supp. 267; *Spencer v. Spencer* (1914), 84 Misc. 264, 147 N. Y. Supp. 111.

Common-law marriage held valid so as to entitle wife to bring action for death of husband. *Summo v. Snare & Triest Co.* (1915), 166 App. Div. 425, 152 N. Y. Supp. 29.

Cohabitation, repute and declarations.—Cohabitation, family life, declaration of the parties, repute of marriage, while not constituting marriage, evidence it, because they are circumstances which usually characterize it; the presumption arising therefrom is one of the strongest known to law. *Hynes v. McDermott* (1883), 91 N. Y. 451, 43 Am. Rep. 677, affg. 9 Daly 4, 7 Abb. N. C. 98. See also *Betsinger v. Chapman* (1882), 88 N. Y. 487. Mere reputation, when admissible at all, is always to be regarded as the weakest kind of evidence; it is never conclusive, except when it is general and supported by other evidence. *Clayton v. Wardell* (1850), 4 N. Y. 230, 236.

Cohabitation and repute merely do not constitute a marriage; there must be an agreement to be husband and wife,—mere living together as such is not sufficient. The agreement is an absolute and vital prerequisite; but a valid marriage may be established by circumstantial evidence, and a preponderance of evidence only is required. *Matter of Hamilton* (1894), 76 Hun 200, 27 N. Y. Supp. 813. See also *Badger v. Badger* (1882), 88 N. Y. 546, 42 Am. Rep. 263; *Hill v. Burger* (1856), 3 Bradf. 432.

Though a common-law marriage may be proved by cohabitation, reputation among friends and neighbors, and mutual recognition by the parties of that relation, yet such facts do not, of themselves, constitute marriage, but are simply evidence of it. *Matter of Brush* (1898), 25 App. Div. 610, 49 N. Y. Supp. 803.

Cohabitation alone, insufficient.—The fact that a man and woman matrimonially cohabited for a number of years does not conclusively establish a marriage between them. It is but *prima facie* evidence and may be overcome by attendant circumstances which tend to show a purely meretricious relationship. *Chamberlain v. Chamberlain* (1877), 71 N. Y. 423. See also *Turpin v. Public Administrator* (1853), 2 Bradf. 424; *Hayes v. People* (1862), 25 N. Y. 390, 397, 82 Am. Dec. 364, 24 How. Pr. 452.

A mere agreement to marry at some future time, followed by cohabitation, will not constitute a marriage. *Bissell v. Bissell* (1869), 55 Barb. 325, 7 Abb. Pr. N. S. 16. See also *Cheney v. Arnold* (1857), 15 N. Y. 345, 69 Am. Dec. 609.

Agreement to live together.—Where there was neither a marriage ceremony, nor any contract of marriage between a man and woman, and no agreement to live together as husband and wife, but only an agreement to live together, the man never having held the woman out to the world as his wife, the general repute being to the contrary, the facts do not create a presumption, as a matter of law, that the marriage relation exists between the parties. *Soper v. Halsey* (1895), 85 Hun 464, 33 N. Y. Supp. 105.

Meretricious cohabitation.—The presumption that an intercourse, illicit in its origin, continued to be of that character, may be repelled by a contrary presumption in favor of marriage, and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place. *Caujolle v. Ferrié* (1861), 23 N. Y. 90. The presumption of marriage arising from cohabitation is repelled by proof that the connection of the parties was illicit in its origin; the presumption then is that it is likely to continue so. *Clayton v. Wardell* (1850), 4 N. Y. 230. Where the prior relation between the parties was a meretricious one, a marriage will not be presumed from cohabitation and reputation. *Bates v. Bates* (1894), 7 Misc. 547, 27 N. Y. Supp. 872.

The presumption of marriage arising from a cohabitation apparently matrimonial does not assume that the marriage took place at any particular place, manner or time; it means that a legal marriage existed. *Matter of Hinman* (1911), 147 App. Div. 452, 131 N. Y. Supp. 861, affd. 206 N. Y. 653, 99 N. E. 1108.

L. 1909, ch. 19. Solemnization, proof and effect of marriages. § 11.

"The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence." *Hynes v. McDermott* (1883), 91 N. Y. 451, 459.

"The presumption of law is that a relationship illicit in its inception continues as such." *Spencer v. Spencer* (1914), 84 Misc. 264, 269, 147 N. Y. Supp. 111.

To presume that there has been an actual marriage from the fact of cohabitation, it must be matrimonial and be so begun, and not illicit. *Rose v. Clark* (1841), 8 Paige, 574. As to continuance of illicit or meretricious cohabitation, see *Wilcox v. Wilcox* (1887), 46 Hun 32, 10 N. Y. St. Rep. 746; *Fagan v. Fagan* (1890), 32 N. Y. St. Rep. 994, 11 N. Y. Supp. 748; *Turpin v. Public Administrator* (1853), 2 Bradf. 424; *Hyde v. Hyde* (1856), 3 Bradf. 509.

§ 11. By whom a marriage must be solemnized.—The marriage must be solemnized by either:

1. A clergyman or minister of any religion, or by the leader, or any of the three assistant leaders, of the Society for Ethical Culture in the city of New York, having its principal office in the borough of Manhattan, or by the leader of the Society for Ethical Culture in the borough of Brooklyn of the city of New York;

2. A mayor, recorder, city magistrate, police justice or police magistrate of a city, or the city clerk of a city of the first class or any of his deputies designated by him for such purpose, as provided in section eleven-a of this chapter, except that in cities which contain more than one hundred thousand and less than one million inhabitants, a marriage shall be solemnized by the mayor, or police justice, and by no other officer of such city, except as provided in subdivisions one and three of this section. (*Subd. 2 amended by L. 1916, ch. 524.*)

3. A justice or judge of a court of record, or of a municipal court, a police justice of a village, or a justice of the peace; except that justices of the peace in cities which contain more than one hundred thousand and less than one million inhabitants, shall have no power to solemnize marriages; or,

4. A written contract of marriage signed by both parties and at least two witnesses who shall subscribe the same, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded, provided, however, that all of such contracts of marriage must in order to be valid be acknowledged before a judge of a court of record. Such contract shall be recorded within six months, after its execution in the office of the clerk of the county in which the marriage was solemnized.

The word "clergyman," when used in the following sections of this article, includes each person referred to in the first subdivision of this section. The word "magistrate," when so used, includes any person referred

to in the second or third subdivision. (*Section amended by L. 1911, ch. 610, L. 1912, ch. 166, and L. 1913, ch. 490.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 6, as amended by L. 1901, ch. 339; L. 1902, ch. 522; L. 1905, ch. 499; L. 1907, ch. 480, and renum. and amended by L. 1907, ch. 742, and amended by L. 1908, ch. 73; originally revised from R. S., pt. 2, ch. 8, tit. 1, § 8, as amended by L. 1888, ch. 78; L. 1889, ch. 415; L. 1893, ch. 242. By the Revision of 1896, police justices and judges of municipal courts were authorized to solemnize marriages. The last sentence, defining "clergyman" and "magistrate," was new in the Revision of 1896.

References.—Solemnizing unlawful marriage a misdemeanor, Penal Law, § 1450. False personation at marriage, *Id.* §§ 928, 929.

Who may perform marriage ceremony.—Rept. of Atty. Genl. (1904) 218. Marriages solemnized by non-resident clergymen are legal. Rept. of Atty. Genl. (1893) 316; Rept. of Atty. Genl. (1899) 252.

A police justice in a village has no authority to solemnize a marriage. Rept. of Atty. Genl. (1912), p. 29.

A minister residing in another state may solemnize a marriage in this state. Rept. of Atty. Genl. (1911), p. 138.

A British Consular officer has no authority to perform a marriage here, even though the parties are British subjects. Rept. of Atty. Genl., Aug. 18, 1910.

Marriage of parties under 18 years of age.—A clergyman or magistrate may not solemnize a marriage where either of the contracting parties are under 18 years of age, even with the consent of the parents. Rept. of Atty. Genl. (1905), pp. 514, 524.

Proof of ceremonial marriage.—*Fisk v. Holding* (1914), 163 App. Div. 85, 148 N. Y. Supp. 501.

A marriage ceremony legally solemnized by a minister of the gospel, without further relation on the part of the parties, becomes a legal marriage and the relation of husband and wife is created. *Williams v. Williams* (1911), 71 Misc. 590, 130 N. Y. Supp. 875.

Marriage by contract.—Parties under 18 years of age with the requisite consents may marry in accordance with subdivision 4 of this section. Rept. of Atty. Genl. (1905), p. 514, 524.

A second marriage, while wife has husband living, is not validated by ratification after the annulment of the first marriage for misrepresentation, merely because the parties thereto continue to cohabit as man and wife, if there was no new solemnization of the second marriage in the manner required by the statute. *McCullen v. McCullen* (1914), 162 App. Div. 599, 147 N. Y. Supp. 1069.

The fact that the parties to the second marriage live together, after the entry of the final judgment, does not constitute a ratification of the void marriage, as such a marriage is not the subject of ratification, nor does it constitute the making of a new contract of marriage, it appearing that such cohabitation did not take place until after the statute abolishing the so-called parol common-law marriages had taken effect. *Pettit v. Pettit* (1905), 105 App. Div. 312, 93 N. Y. Supp. 1001.

Common-law marriage.—See cases cited under section 10, ante.

§ 11-a. **Duty of city clerk in certain cities of the first class.**—Whenever persons to whom the city clerk of a city of the first class having more than one million inhabitants has issued a marriage license shall request him to solemnize the rites of matrimony between them and present to him such license it shall be the duty of such clerk, either in person or by one of his deputies designated by him as provided in subdivision two of section eleven of this chapter, to solemnize such marriage; provided, however, that noth-

ing contained either in this section or in subdivision two of section eleven of this chapter shall be construed as empowering or requiring either the said city clerk or any of his deputies designated by him to perform marriage ceremonies, to solemnize marriages at any place other than at the office of such city clerk. In all cases in which the city clerk of such city of the first class or one of his deputies shall perform a marriage ceremony such official shall demand and be entitled to collect therefor a fee of two dollars, which sum shall be paid by the contracting parties before or immediately upon the solemnization of the marriage; and all such fees so received shall be paid over monthly to the treasurer of the city. (*Added by L. 1916, ch. 524.*)

§ 12. Marriage, how solemnized.—No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.

The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practiced in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 7; as renum. and amended by L. 1907, ch. 472, § 5; originally revised from R. S., pt. 2, ch. 8, tit. 1, § 9. The words "when solemnized by a minister or priest, the ceremony of marriage shall be according to forms and customs of the church or society to which he belongs," formerly included in the section of the Revised Statutes, were omitted in the Revision of 1896, as being a subject for ecclesiastical control.

Reference.—Solemnizing unlawful marriage is a misdemeanor, Penal Law, § 1450.

Assumption as to manner of marriage.—The court cannot assume that a marriage which took place in the State of New York after January 1, 1902, did not take place in the manner provided for by section 7 (now § 12) of the Domestic Relations Law as amended by chapter 742 of the Laws of 1907, which provides that that chapter shall not affect marriages among "Friends" or "Quakers," or marriages among people of any other denomination having as such any particular way of solemnizing marriages. *Matter of Hinman* (1911), 147 App. Div. 452, 131 N. Y. Supp. 861, *affd.* 206 N. Y. 653, 99 N. E. 1108.

§ 13. Marriage licenses.—It shall be necessary for all persons intending to be married to obtain a marriage license from the town or city clerk of the town or city in which the woman to be married resides and to deliver said license to the clergyman or magistrate who is to officiate before the marriage can be performed. If the woman or both parties to be married are nonresidents of the state such license shall be obtained from the clerk

of the town or city in which the marriage is to be performed; or, if the woman to be married resides upon an island located not less than fifty miles from the office or residence of the town clerk of the town of which such island is a part, and such office or residence is not on such island such license may be obtained from any justice of the peace residing on such island, and such justice, in respect to powers and duties relating to marriage licenses, shall be subject to the provisions of this article governing town clerks and shall file all statements or affidavits received by him while acting under the provisions of this section with the town clerk of such town. (*Amended by L. 1914, ch. 230.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 8, as added by L. 1907, ch. 742, § 6.

Marriage of nonresidents.—Where a marriage license is issued to nonresidents of the state the marriage must be performed in the town or city where the license is issued. Rept. of Atty. Genl. (1908), p. 356; Rept. of Atty. Genl. (1909), p. 907.

Indians must procure license.—Clergymen and ministers performing marriages between Indians are governed by the provisions of the Domestic Relations Law, requiring the production of a license by the persons intending to be married. Rept. of Atty. Genl. (1912), p. 73.

§ 14. **Town and city clerks to issue marriage licenses; form.**—The town or city clerk of each and every town or city in this state is hereby empowered to issue marriage licenses to any parties applying for the same who may be entitled under the laws of this state to contract matrimony, authorizing the marriage of such parties, which license shall be substantially in the following form:

STATE OF NEW YORK,
County of }
City or town of..... }

Know all men by this certificate that any person authorized by law to perform marriage ceremonies within the state of New York to whom this may come, he, not knowing any lawful impediment thereto, is hereby authorized and empowered to solemnize the rites of matrimony between of in the county of and state of New York and in the county of and state of New York and to certify the same to be said parties or either of them under his hand and seal in his ministerial or official capacity and thereupon he is required to return his certificate in the form hereto annexed. The statements endorsed hereon or annexed hereto, by me subscribed, contain a full and true abstract of all the facts concerning such parties disclosed by their affidavits or verified statements presented to me upon the application for this license.

In testimony whereof, I have hereunto set my hand and affixed the seal of said town or city at this day of , nineteen Seal.

1909, ch. 19. Solemnization, proof and effect of marriages. § 14.

The form of the certificate annexed to said license and therein referred shall be as follows:

I,, a, residing at
 the county of and state of New York do hereby
 certify that I did on this day of in the
 year A. D., 19...., solemnize the rites of matrimony between.....
 of in the county of
 and state of New York, and of
 the county of and state of New York in the
 presence of and
 as witness, and the license therefor is hereto annexed.
 Witness my hand at in the county of.....
 this day of A. D., 19....
 In the presence of

.....

.....

There shall be endorsed upon the license or annexed thereto at the end hereof, subscribed by the clerk, an abstract of the facts concerning the parties as disclosed in their affidavits or verified statements at the time of the application for the license made in conformity to the provisions of section fifteen of this chapter.

The license issued, including the abstract of facts, and the certificate duly signed by the person who shall have solemnized the marriage therein authorized shall be returned by him to the office of the town or city clerk who issued the same on or before the tenth day of the month next succeeding the date of the solemnizing of the marriage therein authorized and any person or persons who shall willfully neglect to make such return within the time above required shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars or more than fifty dollars for each and every offense. (*Amended by L. 1912, ch. 216.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 9, as added by L. 1907, ch. 742, § 6.

Filing certificate.—Where a marriage is performed in a village the certificate should be filed by the officiating person with the town clerk. Rept. of Atty. Genl. (1908), p. 347.

Where parties to a marriage contract procure a license in a town of this state and are married in Pennsylvania, the town clerk should not file the license and the certificate showing the performance of the marriage returned by the person performing the ceremony. Rept. of Atty. Genl. (1912), Vol. 2, p. 542.

Return of certificate of marriage to town or city clerk.—A minister or other person performing a marriage ceremony is required to return the certificate of the marriage to the town or city clerk who issued the marriage license, and in addition in the city of New York he is required to make a report of such marriage to the Department of Health. Rept. of Atty. Genl. (1912), p. 94.

§ 15. **Duty of town and city clerks.**—It shall be the duty of the town or city clerk when an application for a marriage license is made to him to require each of the contracting parties to sign and verify a statement or affidavit before such clerk or one of his deputies, containing the following information. From the groom: Full name of husband, color, place of residence, age, occupation, place of birth, name of father, country of birth, maiden name of mother, country of birth, number of marriage. From the bride: Full name of bride, place of residence, color, age, occupation, place of birth, name of father, country of birth, maiden name of mother, country of birth, number of marriage. From each: A statement in the following words: "I have not to my knowledge been infected with any venereal disease, or if I have been so infected within five years I have had a laboratory test within that period which shows that I am now free from infection from any such disease." The said clerk shall also embody in the statement if either or both of the applicants have been previously married, a statement as to whether the former husband or husbands or the former wife or wives of the respective applicants are living or dead and as to whether either or both of said applicants are divorced persons, if so, when and where the divorce or divorces were granted and shall also embody therein a statement that no legal impediment exists as to the right of each of the applicants to enter into the marriage state, the town or city clerk is hereby given full power and authority to administer oaths and may require the applicants to produce witnesses to identify them or either of them and may also examine under oath or otherwise other witnesses as to any material inquiry pertaining to the issuing of the license; provided, however, that in cities of the first class the verified statements and affidavits may be made before any regular clerk of the city clerk's office designated for that purpose by the city clerk. If it appears from the affidavits and statements so taken, that the persons for whose marriage the license in question is demanded are legally competent to marry, the said clerk shall issue such license, except in the following cases. If it shall appear upon an application of the applicants as provided in this section that the man is under twenty-one years of age, or that the woman is under the age of eighteen years, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardian or guardians of such minor or minors. If one of the parents has been missing and has not been seen or heard from for a period of one year preceding the time of the application for the license, although diligent inquiry has been made to learn the whereabouts of such parent, the town or city clerk may issue a license to such minor upon the sworn statement and consent of the other parent. If the marriage of the parents of such minor has been dissolved by decree of divorce or annulment, the consent of the parent to whom the court which granted the decree has awarded the custody of such minor

shall be sufficient. If there is no parent or guardian of the minor or minors living to their knowledge then the town or city clerk shall require the written consent to the marriage of the person under whose care or government the minor or minors may be before a license shall be issued. The parents, guardians or other persons whose consents it shall be necessary to obtain before the license shall issue, shall personally appear before the town or city clerk and execute the same if they are residents of the state of New York and physically able so to do. If they are nonresidents of the state the required consents may be executed and duly acknowledged without the state, but the consent with a certificate attached showing the authority of the officer to take acknowledgments must be duly filed with the town or city clerk before a license shall issue. Before issuing any license herein provided for, the town or city clerk shall be entitled to a fee of one dollar, which sum shall be paid by the applicants before or at the time the license is issued; and all such fees so received by the clerks of cities shall be paid monthly to the treasurer of the city wherein such license is issued. Any town or city clerk who shall issue a license to marry any persons one or both of whom shall not be at the time of the marriage under such license legally competent to marry without first requiring the parties to such marriage to make such affidavits and statements or who shall not require the procuring of the consents provided for by this article, which shall show that the parties authorized by said license to be married are legally competent to marry shall be guilty of a misdemeanor and on conviction thereof shall be fined in the sum of one hundred dollars for each and every offense. In any city the fees collected for the issuing of a marriage license, or for solemnizing a marriage, so far as collected for services rendered by any officer or employee of such city, shall be paid into the city treasury and may by ordinance be credited to any fund therein designated, and said ordinance, when duly enacted, shall have the force of law in such city. (*Amended by L. 1912, ch. 241, and L. 1917, ch. 503, in effect May 16, 1917.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 10, as added by L. 1907, ch. 742, § 6, and amended by L. 1908, ch. 73.

False statement as to age not a ground for refusal to issue licenses.—This section pertains solely to the administration of the office where the license to marry is issued. The law specifically states that if it shall appear upon the application of the applicants that they are under the specified age the parents' consent is necessary, and consequently if the infant attests falsely that he is over the age of twenty-one years, the clerk has no right to refuse to issue the license as prescribed. *Greenberg v. Greenberg* (1916), 97 Misc. 153, 160 N. Y. Supp. 1026.

Sections 1742 and 1743 of the Code of Civil Procedure, providing for the annulment of marriages, are in no way modified by this section of the Domestic Relations Law, which provides that a marriage license cannot be issued where the man is under twenty-one years of age or the woman under eighteen years unless the written consent of the parents or guardian of such minor be obtained. *Kruger v. Kruger* (1910), 137 App. Div. 239, 122 N. Y. Supp. 23.

Issuance of license by city clerk.—A city clerk (1) cannot demand upon an application for a marriage license the production of a certified copy of a decree of divorce; (2) he may issue a duplicate marriage license and must record every

copy from which a marriage certificate is returned; (3) he should call the attention of the district attorney to failures of persons solemnizing marriages to return marriage licenses and certificates; (4) he may rely upon verified proof as to the residence of the parties. Rept. of Atty. Genl. (1913), Vol. 2, p. 480.

No compensation is prescribed for any of the services required of town clerks under this statute, except the fee payable at the time of the issuance of the license, and a clerk may not charge for filing such licenses in the marriage record book. (Opinion of State Comptroller, 1916), 10 State Dept. Rep. 543.

Age of female to whom license may be issued.—This section does not place any limitation upon the age of a female to whom a license may be issued. If the applicant is a woman under eighteen years of age, the town clerk must procure the consents specified in the statute. Rept. of Atty. Genl. (1911), Vol. 2, p. 632.

Consent of parent to marriage; residence outside county.—Where one of the parents of a minor applicant for a marriage license resides within the State, but is unable because of physical disability to come personally to the office of the clerk to give consent to the marriage, the clerk may accept a written consent duly executed and acknowledged at the parent's home. Rept. of Atty. Genl. (1914), p. 81.

Publication of affidavits.—Applicants for licenses to marry need not be made public until after the ceremony has been performed and a certificate filed showing that fact. Rept. of Atty. Genl. (1911), p. 237.

§ 16. False statements and affidavits.—Any person who shall in any affidavit or statement required or provided for in this article wilfully and falsely swear in regard to any material fact as to the competency of any person for whose marriage the license in question or concerning the procuring or issuing of which such affidavit or statement may be made shall be deemed guilty of perjury and on conviction thereof shall be punished as provided by the statutes of this state.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 11, as added by L. 1907, ch. 742, § 6.

References.—Swearing falsely in any form, perjury, Penal Law, § 1622. Punishment of perjury, Id. § 1633.

False statement by applicant for marriage license that he had not been married before, evidence as to prior marriage. *People v. Leceusse* (1914), 182 N. Y. St. Rep. 929, 148 N. Y. Supp. 929.

§ 17. Clergyman or officer violating article; penalty.—If any clergyman or other person authorized by the laws of this state to perform marriage ceremonies shall solemnize or presume to solemnize any marriage between any parties without a license being presented to him or them as herein provided or with knowledge that either party is legally incompetent to contract matrimony as is provided for in this article he shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for a term not exceeding one year.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 12, as added by L. 1907, ch. 742, § 6.

Reference.—Solemnizing unlawful marriage is a misdemeanor, Penal Law, § 1450.

Place of marriage.—A marriage may be solemnized in any place in the state where the parties are both residents and no legal disqualification exists and they

L. 1909, ch. 19. Solemnization, proof and effect of marriages. §§ 18, 19.

have a marriage license issued as prescribed by statute; but nonresidents must be married in the town or city in which the license is obtained. Rept. of Atty. Genl. (1909), p. 907.

Marriage of non-residents in a town or city other than that in which the marriage license was issued renders the person solemnizing the marriage guilty of a misdemeanor. Rept. of Atty. Genl. (1908), p. 356.

§ 18. Clergymen or officer, when protected.—Any such clergymen or officer as aforesaid to whom any such license duly issued may come and not having personal knowledge of the incompetency of either party therein named to contract matrimony, may lawfully solemnize matrimony between them.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 13, as added by L. 1907, ch. 742, § 6.

§ 19. Records to be kept by town and city clerks.—Each town and city clerk hereby empowered to issue marriage licenses shall keep a book in which he shall record and index all affidavits, statements, consents and licenses, together with the certificate attached showing the performance of the marriage ceremony, which book shall be kept and preserved as a part of the public records of his office. Whenever an application is made for a search of such records the city or town clerk may make such search and furnish a certificate of the result to the applicant upon the payment of a fee of fifty cents for a search of one year and a further fee of ten cents for each additional year, which fees shall be paid in advance of such search. All such affidavits, statements and consents, immediately upon the taking or receiving of the same by the town or city clerk, shall be recorded and indexed and shall be public records and open to public inspection. On or before the fifteenth day of each month the said town and city clerk shall file in the office of the county clerk of the county in which said town or city is situated the original of each affidavit, statement, consent, license and certificate, which have been filed or made before him during the preceding month. He shall not be required to file any of said documents with the county clerk until the license is returned with the certificate showing that the marriage to which they refer has been actually performed. (*Amended by L. 1912, ch. 241 and L. 1916, ch. 381.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 14, as added by L. 1907, ch. 742, § 6.

Failure to file contract of marriage; effect of.—Where a contract of marriage was not filed within six months as required by § 19 (repealed by L. 1907, ch. 742) said marriage though possibly voidable because of failure to file the contract was not void. *Kahn v. Kahn* (1908), 60 Misc. 334, 113 N. Y. Supp. 256; *Kahn v. Kahn* (1909), 62 Misc. 550, 115 N. Y. Supp. 1028, *affd.* 133 App. Div. 889, 118 N. Y. Supp. 1116.

Inspection of records of marriages.—A city clerk has no power to withhold the inspection of records of marriages, after the ceremony is performed and the certificate returned from any taxpayer, and in the case of the city of Watertown from any citizen or taxpayer therein, even on the ground that such examination

§§ 20, 21. Solemnization, proof and effect of marriages. L. 1909, ch. 19.

might result in embarrassment or humiliation to the parties to the marriage. Rept. of Atty. Genl. (1914), p. 21.

Publication of affidavits for licenses.—Affidavits for licenses to marry need not be made public by the city or town clerk until after the ceremony has been performed and the certificate filed. Rept. of Atty. Genl. (1911), p. 237.

Evidence; record of marriage.—A marriage record not in substance or in form in compliance with the statute is inadmissible as evidence. In re Estate of Molter (1885), 22 Wk. Dig. 507.

§ 20. **Records to be kept by the county clerk.**—The county clerk of each county except the counties included within the city of New York shall keep a copy and index in a book kept in his office for that purpose of each statement, affidavit, consent and license, together with a copy of the certificate thereto attached showing the performance of the marriage ceremony, filed in his office. During the first twenty days of the months of January, April, July and October of each year the county clerk shall transmit to the state department of health at Albany, New York, all original affidavits, statements, consents and licenses with certificates attached filed in his office during the three months preceding the date of such report, also all original contracts of marriage made and recorded in his office during such period entered into in accordance with subdivision four of section eleven of this chapter, which record and certificate shall be kept on file and properly indexed by the state department of health. Whenever it is claimed that a mistake has been made through inadvertence in any of the statements, affidavits or other papers required by this section to be filed with the state department of health, the state commissioner of health may file with the same, affidavits upon the part of the person claiming to be aggrieved by such mistake, showing the true facts and the reason for the mistake and may make a note upon such original paper, statement or affidavit showing that a mistake is claimed to have been made and the nature thereof. The services rendered by the county clerk in carrying out the provisions of this article shall be a county charge except in counties where the county clerk is a salaried officer in which case they shall be a part of the duties of his office. (*Amended by L. 1915, ch. 422, and L. 1917, ch. 245, in effect Apr. 23, 1917.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 15, as added by L. 1907, ch. 742, § 6.

§ 21. **Forms and books to be furnished.**—Blank forms for marriage licenses and certificates and also the proper books for registration ruled for the items contained in said forms and also blank statements and affidavits and such other blanks as shall be necessary to comply with the provisions of this article shall be prepared by the state board of health and shall be furnished by said department at the expense of the state to the county clerks of the various counties of the state in the quantities needed from time to time, and the county clerk of each county shall distribute them to town and city clerks in his county in such quantities as their neces-

1909, ch. 19. Solemnization, proof and effect of marriages. §§ 22-24.

es shall require. The expense of distributing the same to said town and city clerks is hereby made a county charge.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 16, as added by L. 1907, ch. 742, § 6.

Reference.—As to duties of boards of health and health officers relative to registration of marriages, see Public Health Law, § 22.

§ 22. **Penalty for violation.**—Any town, city or county clerk who shall violate any of the provisions of this article or shall fail to comply there-
with shall be deemed guilty of a misdemeanor and shall pay a fine not exceeding the sum of one hundred dollars on conviction thereof.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 17, as added by L. 1907, ch. 742, § 6.

§ 23. **Presumptive evidence.**—Copies of the records of marriages including the license and certificate of marriage and all other records pertaining thereto duly certified by the clerk of the county where the same are recorded under his official seal shall be evidence in all courts.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 18, as added by L. 1907, ch. 742, § 6.

Registers as evidence.—A register of marriage is *prima facie* evidence of the fact of the marriage and the time when it occurred; an entry therein, in the handwriting of the rector whose duty it was to keep the same, is admissible notwithstanding that for a time the register was in the hands of the clerk of the church and entries were made therein by him. *Maxwell v. Chapman* (1850), 8 Barb. 579. See *Wignan v. Degnan* (1892), 43 N. Y. St. Rep. 646, 17 N. Y. Supp. 883. The register of births, marriages and deaths is competent evidence; and wherever an original of a public nature, and admissible in evidence, an exemplified copy will equally be admitted. *Jackson v. King* (1825), 5 Cow. 237, 15 Am. Dec. 468.

Direct proof of a ceremonial marriage is only necessary in prosecutions for bigamy and actions for criminal conversation; in other cases it may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family and other circumstances. *Rockwell v. Tunncliffe* (1862), 62 Barb. 408. See also *Gara v. Eisenlohr* (1868), 38 N. Y. 296; *Jackson v. Claw* (1820), 18 Johns. 346; *Anton v. Reed* (1809), 4 Johns. 52, 4 Am. Dec. 244; *Tummalty v. Tummalty* (1855), 13 Bradf. 369; *Van Gelder v. Post* (1836), 2 Edw. 577; *Rose v. Clark* (1841), 8 Paige, 48. An actual marriage must be proved in these cases. *Dann v. Kingdom* (1873), 1 T. & C. 492.

§ 24. **Effect of marriage of parents of illegitimates.**—All illegitimate children whose parents have heretofore intermarried or who shall hereafter intermarry shall thereby become legitimatized and shall become legitimate for all purposes and entitled to all the rights and privileges of legitimate children; but an estate or interest vested or trust created before the marriage of the parents of such child shall not be divested or affected by reason of such child being legitimatized. Nothing in this article shall be deemed or construed to in any manner impair or affect the validity of any lawful marriage contract made before the passage of this article.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 19, as amended by L. 1909, ch. 725, and renumbered by L. 1907, ch. 749; originally revised from L. 1895, § 531.

References.—Inheritance of illegitimate child, Decedent Estates Law, § 89. As legitimacy of child where marriage is annulled, Code Civil Procedure, § 174. Legitimacy not affected by divorce obtained by husband, *Id.* § 1760.

Term illegitimate has by common law and the law of this state a well-defined meaning, which is, begotten and born out of wedlock. *Miller v. Miller* (1879), Hun 507, *revd.* on other grounds, 91 N. Y. 315.

Effect of statute on vested interests.—As the statute cannot divest any title acquired prior to its enactment, where the record is silent as to whether the child's father died before or after its enactment, the court will assume that the death occurred subsequent to it and sustain such child's right as heir. *Wissel v. C.* (1898), 34 App. Div. 159, 54 N. Y. Supp. 605. See *Smith v. Lansing* (1898), Misc. 566, 53 N. Y. Supp. 633.

The acts of 1895 and 1896 are retroactive, so far as they change the status of illegitimates born before they went into effect; but the legislature did not intend to divest interests vested before 1895 or during the illegitimacy of any child who was restored to legitimacy. *Matter of Barringer* (1899), 29 Misc. 457, 61 N. Y. Supp. 1090.

Presumption of legitimacy is favored, and where the evidence indicates that a man had reason to believe and did believe himself to be the father of a child, his subsequent marriage to its mother legitimizes the child under ch. 531 of the Laws of 1895. *Davis v. Davis* (1899), 27 Misc. 455, 59 N. Y. Supp. 223.

A second marriage, executed in good faith after the absence of the husband for five years, renders legitimate a child by the second husband, born before the first marriage. *Matter of Del Genovese* (1907), 56 Misc. 418, 107 N. Y. Supp. 103, *affd.* 136 App. Div. 894, 120 N. Y. Supp. 1121.

Marriage procured by duress.—A child becomes legitimized by the marriage of its parents, although the marriage was procured by duress, and the status of the child is not disturbed by the subsequent annulment of the marriage. *Houle v. Houle* (1917), 100 Misc. 28, N. Y. Supp.

A child of a common-law marriage, illegitimate because at the time of its birth his father's legal wife was living, is legitimized by such common-law marriage contracted after the death of such legal wife, and is entitled to a distributive share in his mother's estate. *Matter of Schmidt* (1904), 42 Misc. 463, 87 N. Y. Supp. 42.

The decedent, when living in Italy, had entered into meretricious relations with the plaintiff at a time when she had a husband and he had a wife living. They met after they came to this country and cohabited together in all respects as husband and wife, and children were born to them and baptized with the father's name. During this intercourse, but before the year 1911, the decedent's lawful wife died, and at about the same time the plaintiff received a letter from a relative in Italy informing her that her lawful husband had committed suicide, he having left her for places unknown many years before. After this information the parties again agreed together to be lawful husband and wife. On all the evidence it was held that a finding by the jury that the plaintiff was the lawful wife of the decedent was to be entitled to maintain an action to recover damages for his death, and that the children of said marriage had become legitimate, was justified. *Summons v. Snare & Triest Co.* (1915), 166 App. Div. 425, 152 N. Y. Supp. 29.

Children legitimized by the laws of another state do not become vested there with the title to real property in this state, where they are still illegitimates under the laws of the latter state. There is nothing in the "due faith and credit" clause of the Federal Constitution which requires the courts of one state to give effect to the statutes of another state where the title to real property with the former state is affected thereby. *Olmsted v. Olmsted* (1909), 216 U. S. 386, 10 L. ed. 530, 30 Sup. Ct. 292, *affd.* 190 N. Y. 458, 83 N. E. 569, 123 Am. St. Rep. 585.

An illegitimate child, legitimized by the subsequent marriage of its parents

§ 19. Solemnization, proof and effect of marriages. § 25.

ing to the laws of the state or country where the marriage takes place, is mate everywhere, and enjoys the rights derived from legitimacy, including the of inheritance. *Miller v. Miller* (1882), 91 N. Y. 315, 43 Am. Rep. 669. t such marriage must be lawfully made, and may not be polygamous, incestu- r prohibited by law. *Olmsted v. Olmsted* (1908), 190 N. Y. 458, 83 N. E. 569, Am. St. Rep. 585, affd. 216, U. S. 386, 54 L. ed. 530, 30 Sup. Ct. 292, revg. 118 Div. 69, 102 N. Y. Supp. 1019. The legitimatization of an infant under the laws foreign country where the marriage took place, and which was the domicile e parents, is effective in determining the rights of such infant to inherit rty in this state as heir of its father. *Bates v. Virolet* (1898), 33 App. Div. 53 N. Y. Supp. 893.

eriting by illegitimate.—Testator had married twice, without being divorced, both wives and children by them survived him; the woman he married the d time was the only one mentioned in his will and she was appointed therein ardiard of his children; held sufficient to indicate that it was her children, gh illegitimate, that he intended to designate when he directed in the will his estate be held for the benefit of his "children." *Gelston v. Shields* (1879), Y. 275, affg. 16 Hun 143.

ere a testator, knowing that his son had an illegitimate child, made a will ing a trust for his son during life, and at his death the capital to be paid to e lawful issue, then living," the illegitimate child does not take, although the married the mother of the child to his father's knowledge prior to the will. d States Trust Co. v. Maxwell (1899), 26 Misc. 276, 57 N. Y. Supp. 53.

ere there are legitimate children in existence at the time of making the will, to satisfy the words of the bequest in their primary sense, an illegitimate cannot take under a general bequest to children, unless there is something aring upon the face of the will to show that the testator intended to include beside legitimate children. *Collins v. Hoxie* (1841), 9 Paige 81. See also h v. Lansing (1898), 24 Misc. 566, 53 N. Y. Supp. 633.

ght of children born out of wedlock but made legitimate by subsequent marriage ke remainder of trust estate for benefit of fathr; "lawful issue."—A testator ed a part of his estate in trust for the benefit of his son during his life with nder to the son's "lawful issue," and at the time of the making of the will of the death of the testator the son was married and had two children living, ssue of said marriage, and one was subsequently born. The eldest of these e children died without leaving issue. After the death of the testator the had six children born to him out of wedlock by a woman whom he subse- tly married shortly after the death of his first wife. Prior to the second iage, but after the birth of the children out of wedlock, the statute (Laws of chap. 531; Dom. Rel. Law, § 24) was passed making children born out of lock legitimate by the subsequent marriage of their parents, but providing that ed interests or estates shall not be divested or affected by reason of such ren being legitimatized. It was held, that upon the death of the son, the two iving children of the first wife are entitled to the whole of the remainder of the t estate, and that his remaining children are not "lawful issue" within the ning of the will and have no interest in the remainder. *Central Trust Co. v. m* (1912), 154 App. Div. 227, 138 N. Y. Supp. 884.
ction cited.—*People v. Connell* (1912), 151 App. Div. 943, 136 N. Y. Supp. 912.

25. License, when to be obtained.—The provisions of this article per- ing to the granting of the licenses before a marriage can be lawfully brated apply to all persons who assume the marriage relation in ac- dalance with subdivision four of section eleven of this chapter. Noth-

ing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age nor to render void any marriage between minors or with a minor under the legal age of consent where the consent of parent or guardian has been given and such marriage shall be for such cause voidable only as to minors or a minor upon complaint of such minors or minor or of the parent or guardian thereof.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 20, as added by L. 1907, ch. 742, § 6.

Issuance of marriage license on Sunday does not invalidate a marriage. Rept. of Atty. Genl. (1913), p. 180.

ARTICLE IV.

CERTAIN RIGHTS AND LIABILITIES OF HUSBAND AND WIFE.

Section 50. Property of married woman.

51. Powers of married woman.
52. Insurance of husband's life.
53. Contracts in contemplation of marriage.
54. Liability of husband for ante-nuptial debts.
55. Contract of married woman not to bind husband.
56. Husband and wife may convey to each other or make partition.
57. Right of action by or against married woman for torts.
58. Pardon not to restore marital rights.
59. Compelling transfer of trust property.
60. Married woman's right of action for wages.

§ 50. **Property of married woman.**—Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control or disposal nor liable for his debts.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 20; originally revised from L. 1848, ch. 200, §§ 1, 2; L. 1849, ch. 375, § 1; L. 1860, ch. 90, § 1.

Section 1 of the act of 1860 provided that the property of a married woman should not be liable for the debts of her husband "except such debts as may have been contracted for the support of herself or her children by her as his agent." These words were omitted from the Revision of 1896. See Report of Statutory Revision Commission, 1896, pp. 636-638.

For history of separate property acts and decisions in this and other states, see *Bertles v. Nunan* (1883), 92 N. Y. 152, 44 Am. Rep. 361.

Object and effect of enabling acts.—The act for the protection of the property of a married woman has worked a complete radical change in the marital rights of the husband. His old common-law right to the personal estate of the wife, and the use of her real estate, has gone. He has no estate, or interest or right whatever, absolute or contingent, except that, upon the death of the wife, after issue born, without exercising the *ius disponendi*, a husband has the estate for his life as tenant by the curtesy. A married woman may hold her estate during life discharged of all control over or power of disposal by her husband, and may convey

it in his lifetime or devise it by will to take effect on her death to whomsoever she pleases. *McIlvaine v. Kadel* (1865), 26 Super. Ct. (3 Robt.) 429, 30 How. Pr. 193.

"These acts demand a liberal construction to carry into effect the beneficent intent of the legislature. The design was not to render the property inalienable during coverture, but to secure to the wife the beneficial use of it. In respect to property owned by her at the time of the marriage, it relieved her from the common-law disabilities incident to coverture, and continued to her her rights as if she had remained sole." *Sherman v. Elder* (1862), 24 N. Y. 381, 384.

"The principal object of these statutes was, doubtless, to obliterate all those common law doctrines by which the husband was enabled to acquire any of his wife's estate through his marital relations." *Gage v. Dauchy* (1866), 34 N. Y. 293, 296.

At common law the husband, where no trust was created, had an estate in his wife's real property during coverture, and during his life, if there was issue of the marriage; and the wife's personal estate, in the absence of a trust, vested in him absolutely. The object of the statutes of 1848 and 1849 was to divest the title of the husband *jure mariti* during coverture, and to enable the wife to take absolute title, as though she were unmarried. *Knapp v. Smith* (1863), 27 N. Y. 277. See also *Babcock v. Eckler* (1862), 24 N. Y. 623; *Buckley v. Wells* (1865), 33 N. Y. 518.

The object of the act was to give married women the use, control and right to dispose of all property, of every description, held by them, without regard to the manner in which or the form of the instrument by which it was conveyed, provided it was not from the husband; hence she is entitled in her own right to the possession of premises demised to her. *Darby v. Callaghan* (1857), 16 N. Y. 71.

While the common-law rule that husband and wife are one has been to some extent abrogated by special legislation, yet there are situations where that unity still exists; for instance where that unity survives for the purpose of aiding the wife to enforce a covenant for her benefit made by her husband. *Buchanan v. Tilden* (1899), 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454.

The rule of the common law, recognized by the Revised Statutes (2 R. S. 75, §§ 29, 30; *id.* 98, § 79), which authorizes a husband to hold the property of his deceased wife, not only by virtue of administration, but also by virtue of his marital rights—so far as it applies to the case of a wife dying intestate, without leaving descendants, has not been changed by the various acts in relation to married women. *Robin v. McClure* (1885), 100 N. Y. 328, 3 N. E. 663; *Barnes v. Underwood* (1872), 47 N. Y. 351; *Ransom v. Nichols* (1860), 22 N. Y. 110.

The acts of 1848 and 1849 made no alteration in the statute of distributions. *McCook v. Golden* (1849), 1 Bradf. 64.

A husband absolutely entitled to reduce to possession money bequeathed to his wife, before the passage of the Married Women's Act in 1848, might waive such right and permit his wife to hold the money as part of her separate estate and properly receive it from the wife upon trust to hold it for the benefit of their children. *Dorland v. Dorland* (1901), 59 App. Div. 37, 69 N. Y. Supp. 179.

The separate property acts do not affect property acquired before their passage, or interest accrued upon securities composing such property. *Ryder v. Hulae* (1862), 24 N. Y. 372. See also *Savage v. O'Neill* (1871), 42 Barb. 374, revd. 44 N. Y. 83; *Westervelt v. Gregg* (1854), 12 N. Y. 202, 62 Am. Dec. 160; *Wood v. Wood* (1861), 33 N. Y. 575; *Torrey v. Torrey* (1856), 14 N. Y. 430; *Matter of Mitchell* (1901), 61 Hun 372, 16 N. Y. Supp. 180.

When a married woman loans directly to her husband money which has been advanced to her, whether given before or since the act of 1848, and which he has always treated as her separate property, he becomes in equity her debtor.

Being equitably bound to pay, he may do so voluntarily, and either in money or other property. If he repays, although voluntarily, since the acts of 1848 and 1849, she holds the money or property thus received by a strictly legal title good against her husband and his creditors. *Savage v. O'Neil* (1871), 44 N. Y. 298.

As to property in the wife's possession, although no date of acquisition is shown there is no legal presumption that she obtained it prior to the act of 1848, although she was married before that time; on the contrary the presumption is she acquired it at a time when absolute ownership was possible. Even if the former presumption exists, the wife had an equitable title which under said acts ripened at once into a legal right and vested the property in her. *Whiton v. Snyder* (1882), 88 N. Y. 299.

The object of the statutes of 1848 and 1849 was to divest the title of the husband, *jure mariti*, during coverture, and to enable the wife to take the absolute title to property as though she were unmarried. *Draper v. Stouvenel* (1886), 38 N. Y. 507.

Prior to the statute of 1860 (ch. 90, § 7, p. 158), a married woman could not render herself personally liable for rent; but if the lessor was willing to assume the risk, the lease taken by the wife would be valid, and no estate would pass to her husband. *Draper v. Stouvenel* (1866), 35 N. Y. 507.

The right of survivorship arising by a deposit by a husband in a savings bank in the name of his wife "and" himself, was not changed by the statute removing the disabilities of married women. *West v. McCullough* (1908), 123 App. Div. 846, 108 N. Y. Supp. 493, *affd.* 194 N. Y. 518, 87 N. E. 1130.

Separate estate of wife.—Under the present policy in respect to the relation of husband and wife, a married woman may sue her husband to enforce any right affecting her separate property, in the same manner that she might sue any stranger. *Wright v. Wright* (1873), 54 N. Y. 437; *Rowe v. Smith* (1871), 45 N. Y. 230. Where household furniture belonging to a married woman is, with her consent, taken to the house of her husband and mingled with his furniture, it does not thereby become the property of the husband, but the title remains in her. *Fitch v. Rathbun* (1875), 61 N. Y. 579, *dist.* 9 Paige 365.

Services rendered for the benefit of the separate estate of a married woman with her knowledge, are presumed to have been rendered at her request. *Boynton v. Squires* (1895), 85 Hun 128, 32 N. Y. Supp. 467.

A married woman, as a necessary incident to her right to acquire property and possess it, independent of the control or interference of her husband, is competent although living with her husband, to secure and maintain legal possession of property acquired by her, free and independent of the rights of persons claiming an interest therein through or under her husband. *Stanley v. National Union Bank* (1889), 115 N. Y. 122, 22 N. E. 29.

Husband and wife being for most purposes distinct persons at law, an adjudication in an action to which the wife is a party alone, does not bind him in a subsequent action, to which he is a party, nor can he claim benefit of the adjudication on the ground of being husband. *Stamp v. Franklin* (1895), 144 N. Y. 607, 39 N. E. 634.

Business conducted by wife in her own name.—The wife's liability is only affected in matters relating to her separate estate and to any business she may, under the statutes, carry on for her own benefit; in other respects the common-law rule of liability still prevails. *Vanneman v. Powers* (1874), 56 N. Y. 39. See also *Porter v. Dunn* (1892), 131 N. Y. 314, 30 N. E. 122.

Where the husband permits, without objection, his wife to hold herself out before the world as transacting business on her sole and separate account, although he may advance money to her in her business, the title to property purchased there-

as against the husband, vests in the wife. *Sammis v. McLaughlin* (1866), 1 N. Y. 647.

Where the husband permits, without objection, his wife to hold herself out to the world as transacting business on her sole and separate account, although he may advance money to her in her business, the title to property purchased therewith, as against the husband, vests in the wife. *Sammis v. McLaughlin* (1866), 35 N. Y. 647.

Property of wife used by husband.—A wife, by allowing chattels belonging to her and which remain *in specie*, to be employed by her husband in the carrying on of a business for their common benefit, does not devote them to her husband so as to render them liable for his debts. Otherwise, it seems, as to articles of furniture by the husband as merchandise, whether a part of the goods belonging to her before marriage, or purchased out of the earnings and accumulations of the husband. *Sherman v. Elder* (1862), 24 N. Y. 381.

Paraphernalia of a wife, given her by her husband, which prior to the marriage statutes was her separate estate in equity, became clothed with all the incidents of a legal estate; and, for an injury to or conversion thereof, she is the proper person to bring suit. *Rawson v. Pennsylvania Railroad Co.* (1872), 48 N. Y. 2.

Where the wife was the owner of a farm upon which she resided with her husband, and which he carried on in her name, without any agreement as to compensation; it was held that neither the products of the farm, nor property purchased in exchange therefor, could be attached by creditors, as the property of her husband. Where the legal title to property is in the wife, as against her husband, it cannot be seized to satisfy his debts without proof that, in the given case, her husband is merely colorable and fraudulent as against the creditors of the husband. *Dauchy v. Dauchy* (1866), 34 N. Y. 293.

Where a married woman leases lands, whether for money paid from her separate estate or upon credit, to the extent of her interest therein, the lands become her separate estate, and she can let them or enter into any contract in reference to them the same as if she were a *feme sole*. *Prevot v. Lawrence* (1872), 51 N. Y. 2.

Session and conveyance of real property.—The legislature intended to remove the entire disability which the common law and the statute had thrown around a married woman, not only as regards their right to take and hold free and independent of their husbands, but also to remove the obstacles which the law had interposed against their conveying both by grant and devise, and to place them, so far as the lands which they held in their own right was concerned, on the same footing, precisely, as unmarried females. *Blood v. Humphrey* (1854), 17 Barb. 660. Assimilating the case of a wife to that of an unmarried woman, the legislature clearly meant to say that she should have the same power as though she was not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provisions of law. *White v. Wager* (1862), 25 N. Y. 328. As to effect of enabling acts on right of conveyance, see *Martin v. Rector* (1886), 101 N. Y. 77, 4 N. E. 183, 3 How. Pr. N. S. 1; *Berkowitz v. Brown* (1893), 3 Misc. 1, 23 N. Y. Supp. 792; *Wood v. Wood* (1891), 83 N. Y. 575.

A woman is placed under no disability by reason of coverture. She is now the sole mistress of her own property. She may invest it as she pleases; she may do what she pleases, and, unless it is shown that some wrong has been done by her in living with her husband, which has come or ought to have come to the knowledge of the purchaser, it seems to us that he gets a perfect title." *Potter v. Sachs* (1899), 45 App. Div. 454, 457, 61 N. Y. Supp. 426.

Contract for a valuable consideration for the conveyance of real property from

a man to a woman is not suspended or rendered void by their subsequent intermarriage. *Dygert v. Remerschnider* (1865), 32 N. Y. 629.

A wife, whose husband holds, as trustee, a second mortgage on premises sold under the foreclosure of a first mortgage thereon, may purchase them at such sale and acquire a good title thereto. *Potter v. Sachs* (1899), 45 App. Div. 454, 61 N. Y. Supp. 426.

The wife of one of the executors named in a will, who, after the passage of the Married Woman's Act, purchases real estate of which the testator died seized, at an executor's auction sale thereof, and pays her bid out of her separate estate, acquires a marketable title to the property purchased, where the *bona fides* of the auction sale, and the fact that she was the highest bidder, are not impeached. *Miller v. Weinstein* (1900), 52 App. Div. 533, 65 N. Y. Supp. 387, *affd.* 166 N. Y. 608, 59 N. E. 1126. A purchase under such circumstances at a private sale is valid. *Wyeth v. Sorchan* (1902), 38 Misc. 173, 77 N. Y. Supp. 263.

Effect on right to devise.—The act of 1849 enabling a married woman to devise property as if she were unmarried, does not extend the rule that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage" to a will executed by a married woman, who subsequently became a widow and remarried. *Matter of McLarney* (1897), 153 N. Y. 416, 47 N. E. 817, 60 Am. St. Rep. 664.

Estate by the entirety.—Since the enactment of the Married Woman's Acts, a husband and wife owning land as tenants by the entirety have equal rights; each is a tenant in common with the right of survivorship, and when land so owned by a husband and wife has been damaged by a change of grade in a village street, an award to the husband does not bind the wife nor include her interest, and she may make her claim for damages independent of her husband. *Goodrich v. Village of Otego* (1915), 216 N. Y. 112, 110 N. E. 162.

"A tenancy by the entirety is a peculiar estate in which each tenant is seized in the eye of the law, not of a moiety but of an entirety. There has been much discussion as to the respective rights of each tenant to the usufruct of the estate, but it has been settled in this State that, under the so-called Married Woman's Acts, each tenant becomes a tenant in common, or joint tenant 'of the use, each being entitled to one-half of the rents and profits during the joint lives.'" *Niehaus v. Niehaus* (1910), 141 App. Div. 251, 253, 125 N. Y. Supp. 1071; *Steenberg v. Low* (1905), 46 Misc. 285, 92 N. Y. Supp. 518.

While the husband, by virtue of his marital rights, has the power to receive and dispense the avails of land so conveyed to himself and wife, for the common support of themselves and their children, he is not at liberty when he absents himself from the possession and control of the property, leaving his wife in the possession and control thereof, to dispose of the rents, issues and proceeds thereof to a third party. *O'Connor v. McMahon* (1889), 54 Hun 66, 67, 7 N. Y. Supp. 225.

The separate property acts have not abrogated the common-law doctrine that on a conveyance to husband and wife they take by the entirety, and upon the death of either the survivor takes the whole estate; however, the common-law right of the husband to enjoy the usufruct during the lives of both, not being an essential characteristic of this species of tenancy, was intended to be taken away by these acts. *Hiles v. Fischer* (1895), 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762. See also, *Bertles v. Nunan* (1883), 92 N. Y. 152; *Zorntlein v. Bram* (1885), 100 N. Y. 12; *Grosser v. City of Rochester* (1896), 148 N. Y. 235; *Price v. Pestka* (1900), 54 App. Div. 59, 66 N. Y. Supp. 297; *Steiz v. Shreck* (1891), 128 N. Y. 263, 268, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475; *Coleman v. Bresnahan* (1889), 54 Hun 619, 8 N. Y. Supp. 158; *Demby v. City of Kingston* (1891), 60 Hun 294, 14 N. Y. Supp. 601, *affd.* 133 N. Y. 538, 30 N. E. 1148; *Reynolds*

v. Strong (1894), 82 Hun 202, 31 N. Y. Supp. 329; Ward v. Krumm (1876), 54 How. Pr. 95.

The statutes relating to the property of married women, do not destroy the legal unity of husband and wife, or change the rule of the common law governing the effect of conveyances to them jointly. Under such a conveyance the husband has a right of possession of the property during the joint lives of himself and wife. Beach v. Hollister (1875), 3 Hun 519, 5 T. & C. 568.

Our recent statutes for the better protection of the separate property of married women have no relation to, or effect upon, real estate conveyed to husband and wife jointly. In such a case the wife has no separate estate, but is seized, with her husband, of the entirety; neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate. Farmers and Mechanics' National Bank of Rochester v. Gregory (1867), 49 Barb. 155; Golet v. Gori (1860), 31 Barb. 314; Freeman v. Barber (1874), 3 T. & C. 574.

It seems that where a grant or devise is made to a husband and wife, without any words specially prescribing, qualifying or characterizing the kind of quality of the estate which each shall take, the grantees hold as tenants of the entirety. Where, however, it appears from the words of the grant or devise that the intent was to create a tenancy in common in the grantees or devisees, they take and hold as tenants in common. Miner v. Brown (1892), 133 N. Y. 308, 31 N. E. 24.

Joint tenants.—Where, by the terms of the instrument of conveyance, property is conveyed to a husband and wife "as joint-tenants," to be held by them, "their heirs and assigns, forever as joint-tenants, and not as tenants in common," a joint-tenancy, and not a tenancy by the entirety, is created between the husband and wife. Cloos v. Cloos (1890), 55 Hun 450, 8 N. Y. Supp. 660.

Curtesy.—Husband's common-law right as tenant by curtesy is not affected by these acts. Hatfield v. Sneden (1873), 54 N. Y. 280; Matter of Starbuck (1910), 137 App. Div. 866, 122 N. Y. Supp. 584, *affd.* 201 N. Y. 531, 94 N. E. 1098; Matter of Winne (1870), 2 Laus 21; Leach v. Leach (1880), 21 Hun 381; Clark v. Clark (1857), 24 Barb. 581; Burke v. Valentine (1868), 5 Abb. Pr. U. S. 164; Jaycox v. Collins (1863), 26 How. Pr. 496.

"Tenancy by the curtesy initiate ceased to be a certain interest in lands thereafter acquired when the statutes permitted the wife to dispose of her estate in them." Matter of Clark (1886), 40 Hun 233, 237.

"If the wife does not avail herself of the right given by statute (1848) to convey or devise her real property the husband will, upon her decease, become tenant by curtesy, whenever he would have been such tenant prior to the statute." Valentine v. Hutchinson (1904), 43 Misc. 314, 316, 88 N. Y. Supp. 862.

Right of husband to wife's services.—A contract made between a man and a woman before they were married, which related solely to personal services to be rendered by the woman for the man for a consideration named, is merged in the marriage contract which implied that her services should belong to him without other compensation than support and the discharge of the marital obligations, and she can recover only for services performed to the date of the marriage. Matter of Callister (1897), 153 N. Y. 294, 47 N. E. 298, 60 Am. St. Rep. 620. The legislation upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes; they have not by express provision, nor by implication, deprived the husband of his common-law right to avail himself of a profit or benefit from her services. Peter v. Dunn (1892), 181 N. Y. 314, 30 N. E. 122. See also Blaechinska v. Howard Mission and Home (1892), 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215; Reynolds v. Robinson (1876), 64 N. Y. 589; Coleman v. Burr (1883), 93 N. Y. 17, 45 Am. Rep. 160; Whitaker v. Whitaker (1873), 53 N. Y. 368, 11 Am. Rep. 711.

Responsibility of married women for acts of agents.—Married women owe the same duty to those with whom they deal and may be bound in the same manner as if unmarried; where they clothe others with apparent authority to act for them, they are estopped from denying it where others have been induced to act on the faith of it. *Bodine v. Killeen* (1873), 53 N. Y. 93. See also *Dorsey v. Pike* (1890), 32 N. Y. St. Rep. 258, 10 N. Y. Supp. 268; *Travis v. Scriba* (1877), 12 Hun 391. Possession of realty by a married woman is not lost or impaired by permitting her husband to exercise acts of care or agency with respect to it, or by his occupancy of it, as head of the family, for the family residence. *Mygatt v. Coe* (1897), 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521.

There is nothing in the marriage relation which forbids the wife to employ her husband as her agent in the management of her property, nor does such employment subject her property or its profits to the claims of her husband's creditors. *Merchant v. Bunnell* (1867), * 42 N. Y. (3 Keyes) 539, 3 Abb. App. Div. 280. See also *Woodworth v. Sweet* (1872), 51 N. Y. 8, affg. 44 Barb. 268; *Knapp v. Smith* (1863), 27 N. Y. 277. Wife held for labor performed on and materials furnished for her separate property at the request of her husband where she was present and made no objection. *Mackey v. Webb* (1889), 25 N. Y. St. Rep. 308, 6 N. Y. Supp. 795.

Bonds and mortgages, the property of a *feme sole*, are not extinguished by the intermarriage of the mortgagor and mortgagee, but the wife may, notwithstanding, maintain an action in her own name for their foreclosure. *Power v. Lester* (1861), 23 N. Y. 527.

A gift by a husband to a wife will be upheld, when the rights of creditors are not in question, without the aid of the statutes of 1848 or 1849, 1860 or 1862. *Kelly v. Campbell* (1863), * 40 N. Y. (1 Keyes) 29, 2 Abb. App. Div. 492. See also *Borat v. Spelman* (1850), 4 N. Y. 284.

Where a husband takes a note to himself and wife, he furnishing the whole consideration, it is a gift to the wife if she survives him; but the wife has no legal interest in it until his death. The rule has been many times reasserted as still existing, although it had its origin in the rules of the common law. *Wegmann v. Kress* (1912), 141 N. Y. Supp. 525.

"If the husband and wife each contribute to a joint investment or to the purchase of a security and the title is taken in their joint names to be held by them, no presumption can properly arise from the nature of the act that either intended to make a gift of his or her share to the survivor. The just inference is that each regarded it as a loan of individual property upon the strength of the security taken, and they become tenants in common of the bond and mortgage with all the rights and incidents of such a relationship." *Matter of Albrecht* (1892), 136 N. Y. 91, 95, 96, 32 N. E. 632, 18 L. R. A. 329.

The character and use of articles forming part of the paraphernalia of a wife and actually used by her, although purchased by the husband, imply a personal gift and a separate possession, and in the absence of other facts contradicting the inference, establish her title. As to other articles, such as household furniture and goods adapted to the use and used by the family generally and in their common possession, there is no presumption of ownership by the wife. Her title to such articles, therefore, must be established by showing an executed gift to or purchase by her or a separate and personal possession. *Whiton v. Snyder* (1882), 88 N. Y. 299.

Liability for physician's services in attending husband.—A married woman is under no legal or equitable obligation to pay physician for services in attending her husband. *Callahan v. O'Rourke* (1897), 17 App. Div. 277, 45 N. Y. Supp. 764.

§ 51. **Powers of married woman.**—A married woman has all the rights

in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife can not contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may confess a judgment specified in section one thousand two hundred and seventy-three of the code of civil procedure.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 21; Code Civ. Pro. § 450, as amended by L. 1877, ch. 416; L. 1879, ch. 542; L. 1890, ch. 248, §§ 1206, 1273, as amended by L. 1877, ch. 416; L. 1897, ch. 38; originally revised from L. 1835, ch. 275; L. 1848, ch. 200, § 3, as amended by L. 1849, ch. 375; L. 1851, ch. 321; L. 1860, ch. 90, §§ 1, 2, 3, as amended by L. 1862, ch. 172; L. 1878, ch. 300; L. 1884, ch. 381; L. 1892, ch. 594.

References.—Capacity of married woman to take and hold real property. Real Property Law, §§ 10, 11. Acknowledgment of deed by married woman, Id. § 302. Power to make will, Decedent's Estates Law, §§ 10, 11; effect of marriage on will, Id. § 36. Liability of husband for debts of deceased wife, Id. § 103.

Carrying on separate business.—A married woman is subject to the same liability for articles for her separate business as though a *feme sole*. Purdy v. Bean (1883), 17 Wk. Dig. 143.

In the management of her separate property or business a *feme covert* is answerable for the frauds of her agent. Bodine v. Killeen (1873), 53 N. Y. 93. See also Lewis v. Woods (1872), 4 Daly, 241. To charge the separate estate or business of a married woman for services not rendered for the benefit thereof, an agreement so to charge must be included in the original contract; an agreement by her to charge value of past services upon her estate is insufficient. Eisenlord v. Snyder (1877), 71 N. Y. 45.

A debt created by a married woman in the course of her separate business or for the immediate benefit of her separate property becomes a charge thereon without any written instrument creating it. Cohen v. O'Connor (1873), 5 Daly 28, *affd.* 56 N. Y. 613.

The charge of a debt contracted by a married woman upon her separate estate is not a specific lien, but is enforceable against all such property as she may have at the time satisfaction is demanded. Maxon v. Scott (1873), 55 N. Y. 247.

A wife owning a farm, purchased with her own money, can employ her insolvent husband to work the same without impeaching her title to the issues and profits of the same. Vrooman v. Griffiths (1863), 40 N. Y. 53.

When a husband and wife live and work together the presumption is that the services of the wife are performed in her relation of wife, and that the business is that of the husband. The wife may, however, engage in a business separate from that of her husband, and conduct such business on her own account and have the benefit of it. Schlitz Brewing Co. v. Ester (1895), 93 N. Y. 22.

"Since the passage of the 'act concerning the rights and liabilities of husband and wife' (chap. 90, Laws of 1860), there can be no longer a question that a

married woman can carry on business on her sole and separate account, and that in such business she can purchase property for cash or upon credit, and that she can manage her business and property through her husband as her agent." *Abbey v. Deyo* (1871), 44 N. Y. 343, 348.

Enforcement of contracts of married women.—It is no longer necessary, in order to hold a married woman to her contracts, to prove that the obligation was created by her for the benefit of her separate business or estate, or that the intention to charge her separate estate is expressed in the instrument. *Bowery Nat. Bank v. Sniffen* (1889), 54 Hun 394; 7 N. Y. Supp. 520. See also *Paul v. Van Da Linda* (1890), 35 N. Y. St. Rep. 810, 12 N. Y. Supp. 638.

A married woman who embarks in business with a member of a firm is liable upon the firm notes given for money to use in the firm's business. *Williams v. Burton* (1884), 19 Wk. Dig. 399.

A married woman who assumes and agrees to pay a mortgage upon premises conveyed to her is personally liable to pay the mortgage debt. *Cashman v. Henry* (1878), 75 N. Y. 103.

In order to charge the separate estate of a married woman with a debt it is not necessary that there be a specific agreement to that effect. The intent may be inferred from the surrounding circumstances. *Conlin v. Cantrell* (1876), 64 N. Y. 217.

A married woman, although she carries on no business, and has no separate estate, is liable for a debt contracted in the leasing of real estate. *Ackley v. Westervelt* (1881), 86 N. Y. 448.

"A husband has now no title to or interest in the property of his wife, and no authority merely because of the marital relation to dispose of or bind such property in any way." *Kurtz v. Potter* (1899), 44 App. Div. 262, 264, 60 N. Y. Supp. 764.

Prior to the enabling act of 1884 contracts of married women were only enforceable; 1st, when created in or about carrying on a trade or business of the wife; 2d, when relating to or made for the benefit of her separate estate; 3d, when the intention to charge her separate estate is expressed in the instrument or contract by which the liability is created. *Manhattan B. & M. Co. v. Thompson* (1874), 58 N. Y. 80. See also *Frecking v. Rolland* (1873), 53 N. Y. 422; *Saratogo Co. Bank v. Pruyn* (1882), 90 N. Y. 250; *Bogert v. Gulick* (1873), 65 Barb. 322, 45 How. Pr. 385; *Linderman v. Farquharson* (1886), 101 N. Y. 434, 5 N. E. 67; *Nash v. Mitchell* (1877), 71 N. Y. 199, 27 Am. Rep. 38; *Yale v. Dederer* (1858), 18 N. Y. 265, 72 Am. Dec. 503, 17 How. Pr. 165, 22 N. Y. 450, 78 Am. Dec. 216, 20 How. Pr. 242 (1860), 68 N. Y. 329; *Gosman v. Cruger* (1877), 69 N. Y. 87, 25 Am. Rept. 141; *Dickerson v. Rogers* (1889), 114 N. Y. 405, 21 N. E. 992; *Broome v. Taylor* (1879), 76 N. Y. 564; *Second Nat. Bk. v. Miller* (1875), 63 N. Y. 639; *Quassic National Bank v. Waddell* (1874), 1 Hun 125, 3 T. & C. 680; *Phillips v. Wicks* (1873), 36 Super. (4 J. & S.) 254, 14 Abb. Pr. (N. S.) 380; *White v. McNett* (1865), 33 N. Y. 371.

It was only in the cases specified in the statutes of 1848, 1849, 1860, 1862 that married women were, prior to the enabling act of 1884, capable of making contracts or of being sued thereon. *Linderman v. Farquharson* (1886), 101 N. Y. 434, 5 N. E. 67. See also *Van Order v. Van Order* (1876), 8 Hun 315.

Husband as agent of wife.—A married woman, who is possessed of a separate estate, and engaged in a separate business, may employ her husband as agent to carry on the same, and may agree with him to compensate him for his services. *Third Nat. Bank v. Guenther* (1890), 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780. See also *Nostrand v. Dittmis* (1891), 127 N. Y. 355, 28 N. E. 27; *Perkins v. Perkins* (1872), 62 Barb. 531, 7 Lans. 19. A married woman is responsible for the acts of her husband done as her agent in the management of her estate. *Owen v. Cawley* (1867), 36 N. Y. 600; *Graves v. Spier* (1870), 58 Barb. 349; *Armstrong v.*

L. 1909, ch. 19. Rights and liabilities of husband and wife. § 51.

Jones (1880), 10 Wk. Dig. 144; Miller v. Hunt (1874), 1 Hun 491, 3 T. & C. 762; Knapp v. Smith (1863), 27 N. Y. 277.

Authority of husband to make a contract, as agent for his wife, is not sufficient to authorize him to cancel it. Stilwell v. Mutual Life Ins. Co. (1878), 72 N. Y. 385.

The possession by a husband of authority to buy land in his wife's name, and with her money, does not include power to bind her personally to assume payment of the mortgage debt. Blass v. Terry (1898), 156 N. Y. 122, 50 N. E. 953.

It is not within the scope of the husband's authority, when acting as his wife's agent, to adjust the amount due under a contract. Parker v. Collins (1891), 127 N. Y. 185, 27 N. E. 825. See also Bickford v. Menier (1887), 107 N. Y. 490, 14 N. E. 438.

Where services are rendered for the benefit of the separate estate of a married woman, with her knowledge, the presumption is that they were rendered at her request; so held, where she and her husband occupied a house owned by her, and plaintiff, an architect, called at house at the request of the husband, but the wife assisted in drawing up the plans, which were finally approved by her. Cutter v. Morris (1889), 116 N. Y. 310, 22 N. E. 451. See also Fairbanks v. Mothersell (1871), 60 Barb. 406, 41 How. Pr. 274; Mackey v. Webb (1889), 2 Silv. Sup. Ct. 421, 6 N. Y. Supp. 795.

Where wife holds herself out as principal in the ownership of the business and her husband as agent in the conduct of it, she warrants the presumption that these relations continue until notice of a change, and she is responsible for debts contracted by him after a nominal transfer of the business to him but where to external appearances no change had been made. Jones v. Bruens (1899), 26 Misc. 741, 57 N. Y. Supp. 77.

The notice to and knowledge of the husband, acting as the wife's agent, must be regarded as that of the wife; and she cannot relieve herself from her husband's and agent's act upon the hypothesis that she did not know. Adams v. Mills (1875), 60 N. Y. 533, 539. See also Brumfield v. Boutall (1881), 24 Hun 451; Hensler v. Seffrin (1880), 19 Hun 564.

Evidence of agency of husband cannot be made out by his statement that he had such authority. Wolfe v. Benedict (1892), 48 N. Y. St. Rep. 195, 20 N. Y. Supp. 585. See also O'Callaghan v. Barrett (1892), 50 N. Y. St. Rep. 166, 21 N. Y. Supp. 368. Question of agency of the husband is a question of fact for the jury. Cutter v. Morris (1889), 116 N. Y. 310, 22 N. E. 451; Farmilo v. Stiles (1889), 52 Hun 450, 5 N. Y. Supp. 579. The question of agency may be established by acts, declarations and conduct of the principal and agent, and it may also be inferred from circumstances. Matter of Zinke (1895), 90 Hun 127, 35 N. Y. Supp. 645; Bank of Albion v. Burns (1871), 46 N. Y. 170.

To charge the wife for the acts of her husband as her agent there must be proof of the agency; the relation of husband and wife, and the knowledge of the wife that the work was in progress, and that she did not object are insufficient to charge the wife or establish the agency. Jones v. Walker (1875), 63 N. Y. 612; Helmer v. Brockert (1897), 21 Misc. 431, 48 N. Y. Supp. 255; Snyder v. Sloane (1901), 65 App. Div. 543, 72 N. Y. Supp. 981.

No authority in the husband as agent can be inferred or presumed from the relationship; it must be alleged and proved. Valentine v. Applebee (1895), 87 Hun 1, 33 N. Y. Supp. 762; Smith v. Fellows (1876), 41 Super. Ct. (J. & S.) 36; Fowler v. Seaman (1869), 40 N. Y. 592; Dickerson v. Rogers (1889), 114 N. Y. 405, 21 N. E. 992; Allen v. Williamsburgh Sav. Bank (1876), 2 Abb. N. C. 342, affd. 69 N. Y. 314; Hoffman v. Treadwell (1857), 2 T. & C. 57.

The fact that a wife resides with her husband upon premises leased by him in her name, is no evidence that she authorized the leasing. Sanford v. Pollock (1887), 105 N. Y. 450, 11 N. E. 836.

Evidence establishing agency of husband to authorize a railroad company to take gravel from his wife's land. *Douglas v. New York Central and Hudson River R. R. Co.* (1905), 105 App. Div. 65, 93 N. Y. Supp. 723.

Power of attorney to husband.—The wife may appoint her husband her agent or attorney in fact; and a conveyance of her property by him under a power of attorney given him by her, is good even to carrying her dower right with it. *Wronkow v. Oakley* (1892), 133 N. Y. 505, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661. A husband, who has a written power of attorney to make notes for his wife in her business as a coffee merchant, has no authority to make a note for her to pay his own debt to a third person. *Moquin v. Bennett* (1898), 24 Misc. 157, 51 N. Y. Supp. 18.

Where a husband fraudulently secures a power of attorney from his wife to act as her agent, she is nevertheless chargeable with his acts thereunder; a married woman is liable for the acts of her husband, as her agent, as though the marital relation did not exist. *Warner v. Warren* (1871), 46 N. Y. 228.

Liability of wife for debts of husband.—Where land belonging to wife is cultivated by husband, proceeds are not liable to husband's creditors. *Gage v. Dauchy* (1886), 34 N. Y. 293. But where agency exists, wife may be bound by debts contracted by her husband in conducting business of farm. *Smith v. Kennedy* (1878), 13 Hun 9. Though the husband acts as his wife's agent, she does not thereby become responsible for his debts. *Vrooman v. Griffiths* (1863), 4 Abb. Ct. App. Dec. 505, *40 N. Y. (1 Keyes) 53.

In the management of his wife's separate business a husband may work for her, as any other person might, without any compensation, and his creditors would not thereby gain any rights against the wife. *Abbey v. Deyo* (1871), 44 N. Y. 343. See also *Buckley v. Wells* (1865), 33 N. Y. 518.

Although a wife's express agreement to pay her husband wages in aid of her separate business may be enforced, she cannot be required to pay his creditors for services voluntarily rendered by him. *Maxwell v. Lowther* (1891), 35 N. Y. St. Rep. 767, 13 N. Y. Supp. 169.

A married woman is liable for the board of herself and her husband when she contracts to pay for the same out of her separate estate. *Maxon v. Scott* (1873), 55 N. Y. 247. See also *Corn Exchange Ins. Co. v. Babcock* (1870), 42 N. Y. 613, 1 Am. Rep. 601, 9 Abb. Pr. N. S. 246.

A married woman is not liable for medical services rendered to her husband and his family unless in the first instance she pledged her personal credit to pay for the services. *Hazard v. Potts* (1903), 40 Misc. 365, 82 N. Y. Supp. 246.

The fact that a wife assists her husband in his business and speaks of the business as their business, etc., does not make her liable for goods sold for use in the business. *Blaut v. Fletcher* (1898), 34 App. Div. 383, 54 N. Y. Supp. 232.

A receiver, appointed in proceedings supplementary to execution, cannot maintain an action against the debtor's wife to recover the value of services rendered by the husband in carrying on the separate business of the wife, where such services were rendered without any express agreement on the part of the wife to pay him therefor. *Lynn v. Smith* (1885), 35 Hun 275.

Liability for torts.—A *feme covert* is liable for fraud committed by her in dealing with her separate property, or by her husband as her agent, as an individual in all respects capable of acting *sui juris*; but prior assent or authorization by her, or passive acquiescence at the time, does not make her liable for a tort of her husband in which she takes no active part or by which neither she nor her separate property is benefited. *Vanneman v. Powers* (1874), 56 N. Y. 39.

The circumstance that the fraud was committed by the husband, acting as the wife's agent, does not impair her liability; she is liable in the same manner for frauds or torts committed in the management of her property, as she is upon con-

tracts relating to it, and just as liable for fraudulent representations upon the sale of it as upon a covenant for quiet enjoyment; she may be sued therefor as if a *feme sole*, nor need the husband be joined. *Baum v. Mullen* (1872), 47 N. Y. 577. See also *Du Flon v. Powers* (1873), 14 Abb. Pr. (N. S.) 391.

Under the statutes of this state a married woman has such freedom and control over her own real property that her husband cannot, without her consent, and against her will, maintain a vicious domestic animal thereon, and she is liable for injuries committed by such animal, although it is owned by the husband. *Quilty v. Battie* (1892), 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521.

Liability of married woman on promissory notes.—A married woman is liable upon a several promissory note given by herself and husband, regardless of the purposes for which the money was expended. *Martin v. Roberts* (1893), 30 Hun 255. Where a married woman procures an indorsement of a note made by her for the use of her separate estate, she is liable to such indorser for the amount paid by him on her failure to pay at maturity, even if the proceeds of the note were not used for the purposes intended. *Scott v. Otis* (1881), 25 Hun 33.

A married woman may authorize her husband, as agent for her to make negotiable paper, and may be sued upon it in the ordinary way by general complaint without special averments; and she may be estopped by her acts and declarations as to matters in which she is capable of acting *sui juris*. *Noel v. Kinney* (1887), 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423.

Possession of wife's lands.—Since the acts relating to the property of married women, there is no presumption that the husband is in possession of lands belonging to the wife, and upon which they both live, and on an ejectment against the husband to recover possession of such lands it is a question of fact whether the wife is occupying the lands, or has given possession thereof to her husband. *Martin v. Rector* (1886), 101 N. Y. 77, 4 N. E. 183, 3 How. Pr. (N. S.) 361.

The wife's omission to disclose her ownership of the property does not of itself render her liable on a contract made by her husband for improvements to the property. *Ainsley v. Mead* (1870), 3 Lans. 116. See also *Newell v. Roberts* (1873), 54 N. Y. 677; but see *Colvin v. Currier* (1856), 22 Barb. 371.

The wife by allowing her husband, where he lives with her on premises belonging to her, to pay the taxes, make repairs and perform such duties of care and management as are incidental to the occupation of the property and usually grow out of the marital relations, does not surrender her possession or in any way impair her title; such acts no more affect her title than if done by a stranger. *Mygatt v. Coe* (1897), 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521. See also *S. C. 147 N. Y. 456*, 42 N. E. 17.

A married woman, as a necessary incident to her right to acquire and possess property independent of the control of her husband, is competent, although living with him, to secure legal possession of property acquired by her, free of the rights of persons claiming through her husband. *Stanley v. Nat. Bank* (1889), 115 N. Y. 122, 22 N. E. 29.

The fact that the goods were charged to the husband does not relieve the wife from liability, when the vendor does not know of the ownership by her of the property to be benefited. *Boynton v. Squires* (1895), 85 Hun 128, 32 N. Y. Supp. 467.

Proof of the fact of the use of fertilizer bought by husband to be used on the wife's farm is not sufficient to charge the separate estate of the wife. *Helmer v. Brockert* (1897), 21 Misc. 431, 48 N. Y. Supp. 255. See also *Jones v. Walker* (1875), 63 N. Y. 612.

Where a woman who owned a farm was lame, and was assisted by her husband in its management, and in negotiating for the purchase of the farm stock referred the seller to her husband, who afterwards closed the bargain, it was held that the jury

was warranted in finding that the husband acted under her authority. *McLouth v. Myers* (1891), 40 N. Y. St. Rep. 853, 16 N. Y. Supp. 779.

Wife's right to sue and be sued.—A married woman impliedly has power in course of a business carried on by her to enter into contracts binding on her; she is to be regarded in the same light as a man, so far as that business and every thing connected with or appertaining to it is concerned, and may sue and be sued as such. *Young v. Gori* (1861), 13 Abb. Pr. 13. See also *Barton v. Beer* (1861), 35 Barb. 78, 21 How. Pr. 309; *Klen v. Gibney* (1862), 24 How. Pr. 31.

The common-law disability of the wife to sue the husband having been removed, a wife who has applied her separate estate to the purpose of an obligation resting primarily upon her husband may now recover from him the reasonable amounts which she has thus expended out of her separate estate in discharge of his obligation. *De Brauwere v. De Brauwere* (1911), 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508, affg. 144 App. Div. 521, 129 N. Y. Supp. 587.

In an action by a married woman to recover damages for the conversion of a United States bond delivered by her to the defendant as her agent, it is not necessary that she should prove that she had a separate estate, nor the source of her title to the property in question. *Lumley v. Torsiello* (1902), 69 App. Div. 76, 74 N. Y. Supp. 567.

Actions for personal injuries.—Prior to L. 1890, ch. 51, a married woman could not recover damages for personal injuries, unless she was carrying on a separate business. *Filer v. N. Y. C. R. R. Co.* (1872), 49 N. Y. 47, 10 Am. Rep. 327; *Sloan v. N. Y. C. R. R. Co.* (1874), 1 Hun 540, 4 T. & C. 135; *Cregin v. Brooklyn Crosstown R. R. Co.* (1879), 18 Hun 368; *Brooks v. Schwerin* (1873), 54 N. Y. 343; *Hartel v. Holland* (1884), 19 Wk. Dig. 312; *Dawson v. City of Troy* (1888), 49 Hun 322, 2 N. Y. Supp. 137; *Mellwitz v. Manhattan Ry. Co.* (1891), 43 N. Y. St. Rep. 354, 17 N. Y. Supp. 112; *Griffith v. Utica & Mohawk R. R. Co.* (1892), 43 N. Y. St. Rep. 835, 17 N. Y. Supp. 692, affd. 137 N. Y. 566, 33 N. E. 339; *Roblee v. Gallentine* (1884), 19 Wk. Dig. 153. See post, § 27.

Separate property in certain actions.—The right of action by a wife for injury to her person, *Bennett v. Bennett* (1889), 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, or for wrongfully and maliciously enticing her husband away from her is her separate property. *Jaynes v. Jaynes* (1886), 39 Hun 40.

Confession of judgment by a married woman.—A married woman may only confess judgment for a debt contracted for the benefit of her separate estate, or in the course of her separate trade or business. *White v. Wood* (1888), 49 Hun 381, 2 N. Y. Supp. 673.

A confession of judgment, without action, by a married woman is void, although the consideration be money borrowed for and applied to the improvement of her separate estate. When husband and wife unite in confessing a judgment, it may be retained as good against the husband, though void as to the wife. *Watkins v. Abrahams* (1861), 24 N. Y. 72.

Confession of judgment by married woman held invalid, as she was not the owner of an undivided interest in the property. *Gardenier v. Furey* (1888), 50 Hun 82, 4 N. Y. Supp. 512.

Married woman may confess a judgment to secure a debt contracted by her in her separate business. *First National Bank of Canandaigua v. Garlinghouse* (1868), 53 Barb. 615.

Prior to the statute a judgment confessed by a wife was not void but only voidable. *Roseback v. Stebbins* (1866), 3 Keyes 62.

Judgment for or against married woman.—This section abolishes all distinctions between a *feme sole* and a *feme covert* as to the form of judgment. Judgment is to be rendered and enforced as if she were single. *Brainard v. White* (1885), 7 Civ. Pro. Rep. 43, 1 How. Pr. (N. S.) 156. As to former practice, see *Hier v.*

bles (1872), 51 N. Y. 136; *Morris v. Wheeler* (1871), 45 N. Y. 708; *Corn Exchange Ins. Co. v. Babcock* (1870), 42 N. Y. 613, 1 Am. Rep. 601, 9 Abb. Pr. (N. S.) Vosburgh v. Brown (1873), 66 Barb. 421; *Andrews v. Monilaws* (1876), 8 Hun Baldwin v. Kimmel (1863), 16 Abb. Pr. 353, 24 N. Y. Super. Ct. (1 Rob.) 109; *Hitt v. Costa* (1867), 3 Abb. Pr. (N. S.) 188, 2 Daly 251; *Thompson v. Sargent* (1862), 15 Abb. Pr. 452.

resort to equity.—Since a married woman can now contract directly with her husband and is liable thereon as if single, resort to equity is no longer necessary or reasonable. All courts are open to her and she can enter them with the freedom of a man. *Winter v. Winter* (1908), 191 N. Y. 462, 84 N. E. 382, 16 L. R. A. (N. S.) 710.

A married woman may form a partnership with her husband to carry on a business. *Suau v. Caffé* 1890, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593. See also *W. v. Kinney* (1885), 37 Hun 405; *Zimmerman v. Erhard* (1879), 8 Daly 311; but *Kaufman v. Schoeffel*, 37 Hun 140; *Fabilee v. Bloomingdale* (1884), 67 How. 292.

A mortgage was given by husband and wife to secure the bond of her husband who had no other property than the mortgaged premises in consideration for which the mortgagee surrendered a joint and several note of the husband and wife; six years previously the husband had given the wife a mortgage covering the same premises, the existence of which mortgage was unknown to the subsequent mortgagee and it was not recorded until the day after recording the second mortgage; the mortgage given to the wife was subordinate to the other. *Kingman v. Spaugh* (1897), 19 App. Div. 545, 46 N. Y. Supp. 602.

The fact alone that a wife joins with her husband in the execution of a mortgage on the husband's real estate does not impair her right to priority as a holder of a prior mortgage. *Gillig v. Maass* (1863), 28 N. Y. 191. See also *Kingman v. Dunscomb* (1897), 19 App. Div. 545, 549, 46 N. Y. Supp. 602; *Hewitt v. Suits* (1897), 22 App. Div. 210, 47 N. Y. Supp. 1038.

The marriage of a female mortgagee with the mortgagor does not extinguish her right of action on the mortgage; and where she unites with her husband in a subsequent mortgage, the act affects her inchoate dower interest only. *Power v. Lester* (1861), 23 N. Y. 527.

The obligation resting on the husband to support the wife does not spring from contract, but arises from the marital relation and is imposed by law. It is not within the power of the parties to contract to the contrary. Such was the rule of the common law, and it is expressly enacted in this state by section 21 (now § 21 of the Domestic Relations Law.) *Hawkins v. Hawkins* (1908), 193 N. Y. 409, 86 N. E. 468, 19 L. R. A. (N. S.) 468.

Contracts between husband and wife.—A wife may contract with her husband, in regard to her separate estate only. *Blaechinska v. Howard Mission* (1892), 19 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215. The act of 1884 did not relieve a married woman from the disabilities of coverture to the extent of permitting her to contract with her husband. *Lawrence v. Lawrence* (1900), 32 Misc. 503, 66 N. Y. 393.

Where a wife joined with her husband in a power of attorney authorizing the attorney to sell and convey certain real property owned by the husband, and recited in our names good and sufficient deeds," etc., the attorney may execute a conveyance sufficient to convey the wife's inchoate right of dower, although the power of attorney does not specifically name such interest. *Platt v. Finck* (1901), 19 App. Div. 312, 70 N. Y. Supp. 74.

An agreement by a wife to compensate her attorney for his services in an action brought against her husband for a separation by giving her attorney a certain percentage of what she may receive for her support and maintenance, is void as

against public policy." *Matter of Brackett* (1906), 114 App. Div. 257, 99 N. Y. Supp. 802, *affd.* 189 N. Y. 502, 81 N. E. 1160.

Contracts to alter or dissolve marriage and relieve husband from liability for support.—A separation agreement executed between husband and wife, when they are living together as such, is void as against public policy where it is an essential part thereof that they should thereafter separate. But otherwise as to a contract for support executed by a husband and wife who have lived apart for a number of years. *Winter v. Winter* (1908), 191 N. Y. 462, 84 N. E. 382, 16 L. R. A. (N. S.) 710, *affg.* 115 App. Div. 899, 101 N. Y. Supp. 1149; *Maney v. Maney* (1907), 115 App. Div. 765, 104 N. Y. Supp. 541; *Beach v. Beach* (1842), 2 Hill 260, 38 Am. Dec. 584. An executory separation agreement is void. *Poillon v. Poillon* (1900), 45 App. Div. 341, 63 N. Y. Supp. 301. See also *Hungerford v. Hungerford* (1900), 161 N. Y. 550, 56 N. E. 117; *Bolen v. Bolen* (1887), 44 Hun 362, 8 N. Y. St. Rep. 821.

A contract by a husband to pay his wife a certain sum per week for life, in consideration of their living apart as if unmarried, constitutes a practical dissolution of the obligation of marriage and is against public policy. *Whitney v. Whitney* (1896), 4 App. Div. 597, 39 N. Y. Supp. 1136.

Conveyance of property by the husband to the wife for her support under an agreement for their separation, when husband not entitled to have the conveyance set aside, see *Holihan v. Holihan* (1903), 79 App. Div. 475, 80 N. Y. Supp. 44.

Where, by the terms of separation agreement, the wife accepts the provision in satisfaction of her support and maintenance, and relieves the husband from any and all claims upon his personal property and from liability for her debts, the agreement will not be sustained on the theory that it is made to secure to the wife a legal division of the husband's property. *Gray v. Butler* (1907), 116 App. Div. 816, 102 N. Y. Supp. 106.

A contract between a husband and wife who have separated, to thereafter live apart, is not void on the ground of public policy. *Duryea v. Bliven* (1890), 122 N. Y. 567, 25 N. E. 908; *Pettit v. Pettit* (1887), 107 N. Y. 677, 14 N. E. 500; *Galusha v. Galusha* (1889), 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487; *Clark v. Fosdick* (1889), 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132. But a contract between a husband and wife for a future separation is void. *Galusha v. Galusha* (1889), 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487; *Boyd v. Boyd* (1909), 130 App. Div. 161, 114 N. Y. Supp. 361.

A separation agreement, since the enactment of the Domestic Relations Law, made while the parties are living apart, does not need the intervention of a trustee. So the assignee of such an agreement may sue without joining the trustee if the latter has not obligated himself to indemnify the husband for the wife's debts. *Spence v. Woods* (1909), 134 App. Div. 182, 118 N. Y. Supp. 807.

A separation agreement, made while the parties are living apart, and while an action for separation is pending against the husband, is valid. *McCormack v. McCormack* (1908), 127 App. Div. 406, 111 N. Y. Supp. 563.

The voluntary acceptance of a gross sum by a wife in settlement of all claims against the husband, made while they are living apart, is not in violation of this section, providing that husband and wife cannot contract to relieve the husband from his liability for support, as in fact the payment is made in compliance with his duty to support. *Greenfield v. Greenfield* (1914), 161 App. Div. 573, 146 N. Y. Supp. 865.

A provision in a contract under seal between a husband and wife, under which the wife, in order to induce her husband to refrain from re-entering the police department as an employee, agrees to pay him a certain sum annually that nothing therein contained shall obligate the husband to pay his wife's debts, and that he "shall receive the said net annual income of \$10,000," does not "relieve the husband

from his liability to support his wife" within the meaning of this section. *Werner v. Werner* (1915), 169 App. Div. 9, 154 N. Y. Supp. 570.

A husband and wife after separation may enter into a valid and binding contract for the separate support and maintenance of the wife. *Levy v. Levy* (1912), 149 App. Div. 561, 133 N. Y. Supp. 1084.

A contract by a husband to support his wife, made when a separation has already taken place, is valid. The intervention of a third person as trustee is not necessary. If the husband and wife were living together and agreed to separate, the rule would be different. *Effray v. Effray* (1906), 110 App. Div. 545, 97 N. Y. Supp. 286; *Dower v. Dower* (1901), 36 Misc. 559, 73 N. Y. Supp. 1080.

The rule that the contract of a husband to support his wife, made after the separation, is enforceable, was not altered by this section. An action on such a contract is not necessarily in equity and the municipal court of the city of New York has jurisdiction. *Reardon v. Woerner* (1906), 111 App. Div. 259, 97 N. Y. Supp. 747.

The proviso in this section that "a husband and wife cannot contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife," should be construed as a legislative declaration of the state's intention to maintain the marriage status and the husband's obligation to support his wife, free from all contractual control of the spouses. *Carling v. Carling* (1904), 42 Misc. 492, 86 N. Y. Supp. 46.

A contract involving a violation or intentional evasion of the provisions of this section is invalid and will not be enforced. *Matter of Kopf* (1911), 73 Misc. 198, 132 N. Y. Supp. 719.

It is not necessary that formal or express words be used by husband and wife to effect a contract to dissolve their marriage. It is sufficient if by collusion or connivance there be a corrupt consent of the one party to the commission of the acts of the other which furnishes cause for divorce. *Levine v. Klein* (1909), 65 Misc. 498, 120 N. Y. Supp. 196.

During the pendency of an action for a separation instituted by a wife, the parties entered into a written contract by which the husband, in consideration of the withdrawal of the suit, agreed to resume marital relations with his wife, and that, whenever he ceased to live with her or to support her, she should immediately become vested with her dower interest in certain property of which her husband owned a half interest, and that she should be entitled to collect one-third of the rent due the husband for his half interest in said premises during her natural life; it was held that the contract was based upon a good consideration and was not in contravention of the Domestic Relations Law. *Sommer v. Sommer* (1903), 87 App. Div. 434, 84 N. Y. Supp. 444.

Bond, given by a husband for the support of his wife, held not to be an executory "contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife," within the meaning of the statute. *Lauson v. Lauson* (1900), 56 App. Div. 535, 67 N. Y. Supp. 356; *France v. France* (1902), 38 Misc. 459, 77 N. Y. Supp. 1015, *affd.* 79 App. Div. 291, 79 N. Y. Supp. 579.

When agreement of a husband to support his wife living apart from him not void as against public policy. *Mann v. Hulbert* (1885), 38 Hun 27.

Contact contemplating divorce.—A contract was drawn up between a husband and wife pending an action brought by the wife for a divorce which after reciting the differences existing between the parties by reason whereof they were living apart, stated that the defendant would permit his wife to go where she might elect and would not make any claim to her services or society or property, and that the plaintiff would not make any claim to any property of the defendant, that she would accept the provisions of the contract in full satisfaction of all claims against

the defendant, that she should have as her own certain specific household furniture and that the defendant should pay the sum of \$2,000 in full satisfaction. It was held that such contract is void as against public policy and as contrary to the spirit of this section, its tendency being to defeat its provisions. Even though this contract be void it will not stand in the way of such provision for the support and maintenance of the plaintiff as the court may deem proper, and an action to have it vacated on that ground is unnecessary. And while the court will not vacate the contract, neither will it enforce it except to take into consideration the benefits which plaintiff may have already received thereunder when she makes application in proper form for provision for her support. And she should be required to make restoration of what she has received under the contract so far as it is in her power so to do. *Lake v. Lake* (1909), 136 App. Div. 47, 119 N. Y. Supp. 686.

"In support of good morals public policy declares all agreements between husband and wife tending to facilitate a divorce to be void." *France v. France* (1903), 79 App. Div. 291, 79 N. Y. Supp. 579.

Plaintiff having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for \$1,000, agreed to and did discontinue the action without costs. In an action upon the note, it was held that it was given for a good consideration and was valid; that the transaction could not be regarded as against public policy. *Adams v. Adams* (1883), 91 N. Y. 381.

The deposit by a husband of money with a third party, to be paid to his wife, with whom he is living at the time, upon her obtaining a divorce or separation, is against public policy and void, and the owner of the money can recover it from the depository. *Levine v. Klein* (1908), 58 Misc. 389, 111 N. Y. Supp. 174, *revd.* 113 N. Y. Supp. 95.

An agreement, made after the entry of a decree of divorce, to pay the former wife a certain sum in consideration of her withdrawing her appeal from the decree, is not against public policy. *Bloom v. Bloom* (1912), 134 N. Y. Supp. 581.

A stipulation between a husband and wife, entered into after their separation and the commencement of an action for divorce, fixing the amount of counsel fees and alimony *pendente lite*, and determining the amount of alimony, costs and expenses which should be paid upon the granting of a final decree, and providing that the final decree, if procured, should not contain any mention of counsel fees, alimony or provisions for the payment of money by the defendant to the plaintiff, and further providing that, if the defendant default in making payments, the plaintiff may, upon three days' notice, move to amend the final decree so as to conform to the terms of the stipulation, is valid and enforceable. *Werner v. Werner* (1912), 153 App. Div. 719, 138 N. Y. Supp. 653.

An agreement by a husband to pay a certain sum *in presenti* to his wife in consideration of a release by her of his liability to pay alimony under a foreign decree of divorce does not "relieve the husband from his liability to support his wife," within the meaning of this section of the Domestic Relations Law, and will be upheld where the provision is adequate. If, however, such provision is inadequate or has been accepted by the wife unadvisedly or imprudently, a court of equity has power to intervene. *Levy v. Doekendorff* (1917), 177 App. Div. 249.

The right to enforce payment under a separation agreement is not affected by a change in the husband's financial condition, nor by an order for alimony in an action for divorce. *Chamberlain v. Cuming* (1904), 99 App. Div. 561, 91 N. Y. Supp. 105, *affd.* 184 N. Y. 526, 79 N. E. 1091.

The rule that contracts between husband and wife are only upheld in equity where they are fair, applies to a separation agreement, found to afford an inadequate support to the wife and executed by her unadvisedly and imprudently as a

It of her husband's prior ill-treatment; and she will be permitted to rescind agreement upon restoring to him so much of the consideration as she has not already expended for her own support. *Hungerford v. Hungerford* (1900), 161 N. Y. 56 N. E. 117. Annulment of the separation agreement granted. *Pelz v. Pelz* (1903), 156 App. Div. 765, 142 N. Y. Supp. 54.

An agreement by a wife releasing her husband from liability for maintenance and support is not enforceable where the consideration is clearly inadequate. *Uhler* (1911), 128 N. Y. Supp. 963.

The rule that an executory contract between husband and wife in order to be enforced must be shown by the husband to have an adequate consideration, and that good faith in obtaining the same, only applies where the marital relations have not been disturbed and the parties are living upon terms of intimacy. Such rule does not apply to a contract between husband and wife where they have been living apart for a period of five years, when by such contract the wife agrees to pay a trustee a certain sum weekly for the support and maintenance of her husband. *Minor v. Parker* (1901), 65 App. Div. 120, 72 N. Y. Supp. 549.

A parol agreement to provide for a wife by will in consideration of the abatement of an action for separation and her returning to live with her husband, which agreement is executed upon her part, constitutes a valid executed contract which may enforce in equity against her husband's legatees and devisees under a subsequent will in contravention of the contract. The statute of frauds is not a bar to such an action, as the wife has made a full performance. *Goldstein v. Goldstein* (1901), 35 Misc. 251, 71 N. Y. Supp. 807.

An oral agreement made by a wife with her husband to the effect that she will convey a certain real estate, and whenever it is sold will pay him one-half the proceeds, after deducting the purchase price, cannot be enforced unless its terms and conditions are clearly proven and it is shown to have been based upon a good and valuable consideration—a meritorious consideration is not sufficient. *Gouge* (1898), 26 App. Div. 154, 49 N. Y. Supp. 879.

Her contracts affecting marriage relations.—When husband and wife have parted by mutual consent, the wife's agreement to return is a good consideration for a promise by the husband. *Dewey v. Durham*, 19 Wk. Dig. 47 (1884). The rights of the wife under a trust deed given by the husband for her support, when their separating, are not abrogated by their subsequent cohabitation. *Smith v. Berry* (1899), 38 App. Div. 394, 56 N. Y. Supp. 447, *affd.* 166 N. Y. 632, 60 N. E. 101.

A promise by a husband to pay money to his wife in consideration of her foregoing his adultery is void as against public policy. *Van Order v. Van Order* (1876), 8 Hun 315. A contract whereby a husband was to pay his wife a certain sum semi-annually, which appears to have been part of a larger agreement whereby she was to assist her to procure an absolute divorce, is unenforceable as against public policy. *Train v. Davidson* (1897), 20 App. Div. 577, 47 N. Y. Supp. 289; *Van Vleck v. Van Vleck* (1897), 21 App. Div. 272, 47 N. Y. Supp. 470.

52. Insurance of husband's life.—A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, use the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased

by excess of premium above five hundred dollars, is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendants surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely.

A policy of insurance on the life of any person for the benefit of a married woman is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 22; originally revised from L. 1840, ch. 80, as amended by L. 1858, ch. 178; L. 1870, ch. 277; L. 1866, ch. 656; L. 1877, ch. 272, § 2; L. 1879, ch. 248.

References.—Exemption of money received by widow of member of co-operative, assessment, or fraternal beneficiary societies from execution, Insurance Law, §§ 212, 238. Insurance of husband's life by wife, *Id.* § 55.

Object and effect of section.—By the common law if a person undertook to insure the life of another he could only insure the interest which he had in such other life. This principle the legislature by the act of 1840 relaxed in respect to insurances as effected by a married woman for any sum which she and the insurance company might see fit to contract for; in case of her surviving her husband the amount payable was to be paid to her for her use free from all claims of the representatives or creditors of her husband; by this act also the contract may be continued in favor of the children of the insured's wife after her death; hence it would be a violation of the spirit of the provision to hold that a wife under this act could sell her interest in the policy. *Eadie v. Slimmon* (1862), 26 N. Y. 9, 17, 82 Am. Dec. 395. See also *Tiemeyer v. Turnquist* (1881), 85 N. Y. 516, 39 Am. Rep. 674.

The common-law right of survivorship in the husband is not abrogated, even though the wife cannot assign the policy and the husband cannot compel it, during her lifetime. *Olmsted v. Keyes* (1881), 85 N. Y. 593. The act of 1873 simply authorized the assignment of such policy where the wife had no child or issue of any child living. *Brick v. Campbell* (1890), 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259.

Application.—This section, which is a substantial re-enactment of Laws of 1840, chapter 80, making it lawful for a married woman, for her sole use, to insure the life of her husband, includes within its terms insurance negotiated by him and made payable to the wife as well as insurance which she herself placed upon his life. *Grems v. Traver* (1914), 87 Misc. 644, 148 N. Y. Supp. 200, *affd.* 164 App. Div. 968, 149 N. Y. Supp. 1085.

It applies only to ante-nuptial contracts in writing subscribed by the party to be charged. *Lamb v. Lamb* (1897), 18 App. Div. 250, 46 N. Y. Supp. 219.

It is applicable to policies negotiated by a husband and payable to his wife as well as to policies which are negotiated by the wife herself. *Guardian Trust Co. v. Strauss* (1910), 139 App. Div. 884, 123 N. Y. Supp. 852, *affd.* 201 N. Y. 546, 95 N. E. 1129.

the policies referred to are such as are the absolute property of a married man or her children; that is, which are payable to her or to her children or her estate. They may be taken out by the husband, and the premiums up to five hundred dollars per annum paid by him, but the policy must be one which the married woman may dispose of by will, or may with the written consent of her husband assign or surrender to the company. This requirement of the husband's consent is not because he is the owner of the policy, but is to protect widows and heirs in respect to such insurance. The general legislation enlarging the power of married women does not affect the special legislation restricting their powers in respect to insurance policies. In *re White* (1909), 174 Fed. 333.

This statute only contemplates and only applies to a policy that in terms assures the wife, and cannot be extended to a case where the interest of the wife is but a property right acquired by her through an ordinary assignment made many years after the original issue of the policy. *Morschauser v. Pierce* (1901), 64 App. Div. 558, 72 N. Y. Supp. 328.

A policy payable to the wife upon the husband's death, although not issued in the name of the wife or of any third person as her trustee is substantially in conformity with this statute and for that reason within its protection. *Bloomington v. Lisberger* (1881), 24 Hun 355. It is not essential that it should appear by the terms of the policy or by intrinsic evidence that it was the intention of the insured to avail himself of the provision of the statute; the intention is to be presumed from the beneficial nature of the policy. *Brick v. Campbell* (1890), 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259; *Matter of Wendell* (1885), 3 How. Pr. (S.) 68. A policy payable to legal representatives is not for the use and benefit of the wife within the meaning of this section, *Dannhauser v. Wallenstein* (1901), 120 N. Y. 199, 62 N. E. 160; *Griswold v. Sawyer* (1890), 56 Hun 12, 8 N. Y. Supp. 565, 960, revd. 125 N. Y. 411, 26 N. E. 464.

A person taking out a policy on his own life for the benefit of his wife, is not a trustee of an express trust and if a cause of action accrues thereon in his lifetime he may bring suit thereon in his own name without joining his wife's estate. *Union Mutual Life Ins. Co.* (1893), 69 Hun 393, 23 N. Y. Supp. 619.

The wife's right to the insurance fund created by the husband's annual appropriation, or investment, of his moneys in premiums upon life insurance does not rest upon contract, but upon legislative grant exempting the fund from the claims of the husband's creditors; the right is contingent upon her surviving her husband, and the statute is enabling and relates to the remedy; the state has the right to change or regulate such exemption before the fund reaches the wife, and, therefore, the proceeds of policies issued before the enactment of the statute are subject to its provisions. *Kittel v. Domeyer* (1903), 175 N. Y. 205, 67 N. E. 433.

This statute does not apply to insurance in a Mutual Accident Association. *Steinbocker v. Preferred Mutual Accident Association* (1891), 59 Hun 336, 13 N. Y. Supp. 36.

The right of a wife to insure the life of her husband for her own benefit is not a property right. It is more in the nature of a power or a privilege to make a valid contract. It is a *status* and not a property right. The common law upon motives of public policy held that there must be what was termed an insurable interest in the life which was insured or else the policy was a dangerous kind of a wager and, therefore, void. To take a policy out of such a class it was necessary to show that the insured had some interest in the continuance of the life of the *cestui que vie*. *Holmes v. Gilman* (1893), 138 N. Y. 369, 379, 34 N. E. 205, 20 L. R. A. 566.

Assignment by wife.—An assignment by the wife, with the consent of the husband, is good even though the assignee have no interest in the life of the husband. *Miller v. Kent* (1897), 13 App. Div. 529, 43 N. Y. Supp. 649. The non-assignability of a policy for the benefit of a married woman does not depend upon whether the

premiums were paid by the husband, wife or a third person. *Frank v. Mutual Life Ins. Co.* (1886), 102 N. Y. 266, 6 N. E. 667, 55 Am. R. 807.

When a wife, who is beneficiary in a policy of insurance on her husband's life, assigns her interest therein to him on their separation, the assignment is avoided by subsequent reconciliation, if the rights of no third parties have intervened. Moreover, the assignment of such policy is void under this section of the Domestic Relations Law unless the insured consented thereto in writing. The fact that the husband required the wife to assign the policy to him as a condition of executing a separation agreement is immaterial, as his consent to the assignment must be in writing. *Dudley v. Fifth Ave. Trust Co.* (1906), 115 App. Div. 396, 100 N. Y. Supp. 934, *affd.* 188 N. Y. 565, 80 N. E. 1109.

Where policy is made payable to wife and children, assignment by wife without consent of children cannot affect rights of children. *Travelers' Ins. Co. v. Healey* (1895), 86 Hun 524, 33 N. Y. Supp. 911.

Assignment of policy by wife entitled to the amount thereof in case she survives her husband. *Rathborne v. Hatch* (1904), 90 App. Div. 161, 85 N. Y. Supp. 775, *affd.* 181 N. Y. 584, 74 N. E. 1125.

Assignment of benefit insurance certificate. *Dexter v. Supreme Council of Royal Templars of Temperance* (1904), 97 App. Div. 545, 90 N. Y. Supp. 292.

Before 1873 it was the undoubted law that a policy upon the life of the husband for the benefit of his wife was not assignable by her, and that such assignments were absolutely void. (*Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. Equitable Life Assurance Society*, 59 *id.* 587.) *Dannhauser v. Wallenstein* (1900), 65 N. Y. Supp. 219, 52 App. Div. 312, 315, *revd.* on other grounds 169 N. Y. 199, 62 N. E. 160.

Chapter 248 of the Laws of 1879, authorizing a married woman to assign a policy of insurance issued upon the life of her husband, was an enabling act, and the power conferred thereby could be exercised only in the manner prescribed by the statute; consequently, where a married woman, at the time that statute was in force, signed an assignment of a policy issued to her upon her husband's life, and delivered it to her husband, who, without executing his written consent as required by the statute, delivered the policy and the assignment thereof for a valuable consideration to the transferee named therein, the latter acquired no title to the policy as against the wife. *Dannhauser v. Wallenstein* (1900), 52 App. Div. 312, 65 N. Y. Supp. 219, *revd.* on other grounds 169 N. Y. 199, 62 N. E. 160.

The policy on a husband's life payable to his wife, the premiums being paid by him, is not assignable by the wife; the presumption is that the policy was taken out with reference to the statute, although no reference is made thereto. *Brunner v. Cohn* (1881), 86 N. Y. 11.

Written consent of husband.—"In every case which has arisen since the assignability of a wife's policy was first provided for by statute the courts have been inflexible in insisting that the written consent of the husband is indispensable to the validity of such an assignment, and have refused to give effect to any consent, not evidenced by a writing, even where the assignment was sought to be made for the husband's benefit." *Dudley v. Fifth Avenue Trust Co.* (1906), 115 App. Div. 396, 100 N. Y. Supp. 934, *affd.* 188 N. Y. 565, 80 N. E. 1109.

Nothing short of a written consent by a husband to an assignment of a policy of insurance upon his life for her use and benefit will amount to a compliance with the provision of this section as to an assignment of such a policy. *Dannhauser v. Wallenstein* (1901), 169 N. Y. 199, 62 N. E. 160.

The provision that such a policy may be assigned by the wife with the written consent of the assured, is fully complied with where he unites with her in the assignment; the mere fact that she had children, who had a contingent interest in the policy at the time of the execution of the assignment does not render it

she having survived the maturity of the policy the children possessed no interest whatever therein. *Anderson v. Goldsmidt* (1886), 103 N. Y. 617, 9 N. E.

The signing of a note by a husband with his wife, to secure the payment of which she assigned a policy on the life of her husband, is not equivalent to a written consent. *Milhous v. Johnson* (1889), 51 Hun 639 (mem.), 4 N. Y. Supp. 199.

An insurance policy upon the life of a husband made payable to his legal representatives and assigned to his wife, passes upon her death to her administrator, where he exchanges said policy for a paid-up policy, he may assign the latter without the assent of the husband. *Morschauser v. Pierce* (1901), 64 App. Div. 72 N. Y. Supp. 328.

Assignment or exchange of policy by husband.—Where the husband exchanged his life policy for a paid-up policy, obtained a certificate for same and assigned it to a third party, all without the knowledge of the wife, she may ratify the exchange, as a continuation of the old policy, and repudiate his surrender of the old policy. *People v. Globe Mutual Life Ins. Co.* (1884), 96 N. Y. 675, 15 Abb. 75.

A policy payable to wife, or in case of her death to children, and containing an option to surrender for a cash value after a certain number of premiums are paid, may be assigned by the husband, without the consent of the wife. *Travelers' Ins. Co. v. Healey* (1898), 25 App. Div. 53, 49 N. Y. Supp. 29, *affd.* 164 N. Y. 607, 58 N. E. 1093.

A policy payable to the insured at the end of a certain number of years, or in case of his earlier death to his wife, gives her a direct interest which is not destroyed by an assignment made by her husband, nor by an assignment to which her signature is obtained by compulsion. *Geraty v. Reid* (1879), 78 N. Y. 64.

Where a husband having an insurance policy payable to his representatives, assigned the same to his wife and her administrator subsequently surrendered the policy and received a paid-up policy therefor, the assignment of such paid-up policy by the administrator does not require the consent of the husband under the Act of 1879, ch. 248, because the original policy was not issued for the benefit of the wife. *Morschauser v. Pierce* (1901), 64 App. Div. 558, 72 N. Y. Supp. 328.

An assignment by husband and wife of an interest in a fifteen year endowment policy on the life of the husband for her benefit, though of no avail during that term, is perfected at the end of the period, the whole interest vesting in him then. *Or v. Campbell* (1893), 140 N. Y. 457, 35 N. E. 651.

During the lifetime of the assured or the running of the endowment period the husband and wife are equally interested in such policy; neither has the right to destroy or discharge the policy without the consent of the other to destroy or discharge the policy. It is not then to be known to whom it will be ultimately payable. *Newcomb v. Almy* (1894), 96 N. Y. 308.

The fact that the covenant in the policy was with the assured and the legal interest was in him, if he lived until the time named, does not establish an intention to keep control of the policy, otherwise than as specified, or deprive the wife of the right which she had by virtue of the same. *Fowler v. Butterly* (1899), 78 N. Y. 68, 34 Am. Rep. 507.

Where a husband assigns to his wife a policy of insurance on his life, he thereby vests himself of any right which he might have had by the terms of the policy to change the beneficiary. *Jacobs v. Strumwasser* (1914), 84 Misc. 28, 145 N. Y. 916.

Where a husband applies for and receives a policy of insurance on his life for his wife as her agent, he has no power or authority to surrender or rescind it without her consent. *Stillwell v. Mutual Life Ins. Co.* (1878), 72 N. Y. 385.

The right of a married woman to dispose of an insurance policy upon her husband's

life is dependent upon her dying leaving no descendants surviving. *Matter Pool* (1910), 66 Misc. 122, 122 N. Y. Supp. 1118.

Assignment of policies issued by foreign companies.—The statute applies to policies issued by foreign insurance companies. *Spencer v. Myers* (1896), N. Y. 269, 44 N. E. 942, 34 L. R. A. 175, 55 Am. St. Rep. 675, affg. 73 Hun 274, N. Y. Supp. 371. In such cases the contract between the corporation and the assured, it seems, would be governed by the laws of the state of its origin but the validity of the assignment depends upon the capacity of the assignor to make under the laws of this state. *Miller v. Campbell* (1893), 140 N. Y. 457.

Who may avoid an assignment.—Only the wife or her personal representative can avoid an assignment made contrary to the statute; but she cannot be compelled to do so, it being the purpose of the provision merely to secure her. The validity of the assignment cannot be attacked by creditors or strangers. *Smill v. Quinn* (1882), 90 N. Y. 492. See also *Frank v. Mutual Life Ins. Co.* (1886), 100 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807.

When a wife who is a beneficiary in a policy of insurance on her husband's life, assigns her interest to him on their separation the assignment is avoided by subsequent reconciliation. An assignment upon separation by the wife to the husband is not valid unless the consent of the husband is in writing. *Dudley v. Fifth Avenue Trust Co.* (1906), 115 App. Div. 396, 100 N. Y. Supp. 934, affg. 188 N. Y. 565, 80 N. E. 1109.

Disposal of policies by will.—The provisions of this section authorizing a married woman to dispose by will of a policy of insurance on the life of her husband refers to a contract made by her in her name or in the name of a third person with his assent as her trustee, for insurance upon the life of her husband, and not to a contract made by him for her benefit. *Bradshaw v. Mutual Life Insurance Co.* (1907), 187 N. Y. 347, 80 N. E. 203, revg. 109 App. Div. 375, 95 N. Y. Supp. 780 (1905).

Wife's claim subject to conditions of policy.—Though wife's consent to surrender of policy be void as forged, yet she is not relieved from responsibility of paying the premiums, and where not paid the policy lapses notwithstanding her ignorance of the surrender; in those cases where the beneficiary has been allowed to recover in spite of a surrender and release, the company was in some way connected with the fraud or was shown to have been negligent, so that the payment of the premiums was excused. *Schneider v. U. S. Life Ins. Co.* (1890), 123 N. Y. 109, 2 N. E. 321, 20 Am. St. Rep. 727. See also *Whitehead v. N. Y. Life Ins. Co.*, 102 N. Y. 143 (1886), 6 N. E. 267, 55 Am. Rep. 787.

The wife's claim to such a policy is subject to the stipulations and conditions entered into by the husband; so where he gave notes as a substitute for cash on condition that the policy be void if they be not paid at maturity, the policy will be forfeited on failure of payment. *Baker v. Union Mutual Life Ins. Co.* (1871), 43 N. Y. 283.

The right of a wife to insure the life of her husband is not property, and where he uses trust funds in his hands to procure therewith insurance for her benefit, paying the premiums entirely out of the fund, it may not be said that he has mingled such fund with other property, and that the policy is the product of both; but the *cestui que trust* is entitled to the benefit of the whole policy. Where, therefore, a member of a firm misappropriated its funds, using a portion thereof to procure insurance on his life in the name and for the benefit of his wife, and paid the premiums of the policies wholly out of such funds until his death, held that the surviving member of the firm was entitled to the whole amount of the insurance; it appearing that such amount was less than the amount of firm funds misappropriated by the deceased partner. *Holmes v. Gilman* (1893), 138 N. Y. 365, 34 N. E. 205, 20 L. R. A. 566.

Where the wife dies prior to the husband without issue them surviving the interest in such a policy passes to the husband. *Waldheim v. John Hancock Mutual Life Ins. Co.* (1894), 8 Misc. 506, 28 N. Y. Supp. 766.

The proceeds of a policy of insurance taken out by a wife on her husband's life, which describes her as being "the assured," and is payable to "said assured, his executors, administrators and assigns," belong to the estate of the wife, although she died before her husband and made him her sole legatee and devisee. *Waldheim v. New England Mut. Life Ins. Co.* (1908), 123 App. Div. 885, 108 N. Y. Supp. 108.

Survivorship.—When husband, wife and only child perish at sea in the same vessel, there is no presumption that the child survived the mother, though the court is probably bound to presume that the husband survived the wife because the strength of the male would enable him to sustain life longer. *Moehring v. Mitchell* (1846), 1 Barb. Ch. 264, *affd.* 4 How. Pr. 292, 3 Denio 618.

Beneficiaries' interest in policies.—Where by the terms of a policy it is payable to the children in the event of the death of the wife before the husband, the children living at her death only can take and the children of a child who had previously died have no interest therein. *U. S. Trust Co. v. Mut. Ben. Life Ins. Co.* (1889), 115 N. Y. 152, 21 N. E. 1025. See also *Walsh v. Mutual Life Ins. Co.* (1892), 133 N. Y. 408, 31 N. E. 228, 28 Am. St. Rep. 651.

Policies of life insurance, one, payable upon the death of the husband to his wife, or to his executors, administrators or assigns for her sole use, "if she survived him, or in case she died first the amount to be paid to her children for their use, or to their guardian, if under age;" the other, payable to his wife "or to her legal representatives" upon his death, but if she was not then living to be paid "to her children or to their guardian if under age," upon the death of the wife before the insured, vest in the children living at that time, who take, not through their mother, but become substituted as the beneficiaries by virtue of the stipulations of the contract, and such children, if living at the death of the insured, or their representatives, if dead, are entitled to share in the proceeds of the policies. *Fidelity & Deposit Co. of Buffalo v. Marshall* (1904), 178 N. Y. 468, 71 N. E. 8.

A beneficiary in a certificate of insurance has no vested interest until the death of the insured. The declarations of the insured made subsequent to the issuing of the certificate are admissible against the beneficiary in an action on such certificate. *Steinhausen v. Preferred Mutual Acc. Ass'n* (1891), 59 Hun 336, 10 N. Y. Supp. 36.

Where the N. Y. Produce Exchange establishes a fund to make provision for the widows and families of deceased members, the wife of a member during his life can assign no interest in such fund. *McCord v. McCord* (1899), 40 App. Div. 57, 57 N. Y. Supp. 1049.

Claims of creditors.—The legislature intended by this act that such policies should not be subject to the lien of creditors, either of the husband or of the wife, as to the former by the expressed words of the statute, as to the latter by the determination of the courts. A creditor of the wife cannot compel her to make an assignment of the policy. *Baron v. Brummer* (1885), 100 N. Y. 372, 3 N. E. 474. But upon the husband's death and upon the vesting in the wife of her interest in the policy no exemption attaches in favor of the wife as against her creditors either before or after the money has been paid to her. *Commercial Travelers' Ass'n v. Newkirk* (1888), 16 N. Y. Supp. 177. Creditors of the wife cannot reach money paid on a policy on husband's life, payable to wife and children. *Conard v. Clinton* (1882), 26 Hun 288.

Money due upon a matured insurance policy, written by an ordinary life insurance company upon the life of a husband, payable to his wife, is subject to levy under a warrant of attachment issued against the property of the wife.

in an action brought to recover a debt owing by her. *Amberg v. Manhattan Life Insurance Co.* (1900), 171 N. Y. 314, 63 N. E. 1111, reversing 56 App. Div. 343, 67 N. Y. Supp. 872.

The rights of a creditor to insurance moneys cannot be determined in a proceeding by a creditor to compel a widow to account as executrix. The proper course is for a creditor to maintain an action to establish and enforce the lien after the assets of the estate have been exhausted and the amount required to pay the remainder of the husband's debts has been established by a surrogate's decree. *Matter of Thompson* (1906), 184 N. Y. 36, 76 N. E. 870.

An ordinary policy of insurance on the life of a husband for the benefit of his wife is her property and cannot be reached by his creditors. *Jacobs v. Strumwasser* (1914), 84 Misc. 28, 145 N. Y. Supp. 916.

Claim by receiver in supplementary proceedings.—On a motion for an order requiring a judgment debtor to turn over to his receiver in supplementary proceedings a certain policy of life insurance which, though his wife was named as beneficiary therein, contains a clause reserving to the judgment debtor the right to change the beneficiary, the surrender value of the policy may be applied in payment of his debts under section 52 of the Domestic Relations Law. *Clark v. Shaw* (1915), 91 Misc. 245, 154 N. Y. Supp. 1101.

A receiver in supplementary proceedings may not maintain an action to ascertain the amount of excess of premiums over \$500, to secure a lien on the policy and to restrain the beneficiaries from assigning the policy; and that too during the life of the policy. *Masten v. Amerman* (1889), 51 Hun 244, 4 N. Y. Supp. 681.

Claims of creditors when premiums in excess of \$500 have been paid out of husband's property.—The interest of a creditor which attaches to such a policy by reason of the fact of payment by the judgment debtor of premiums in excess of \$500, may be enforced during the lifetime of the husband before the policy is due. *Stokes v. Amerman* (1890), 121 N. Y. 337, 24 N. E. 819, affg. 55 Hun 178, 8 N. Y. Supp. 150. Company may pay money into court where premium exceeded \$500 per annum and creditors claim proportionate balance. *Ætna Nat. Bank v. U. S. Life Ins. Co.* (1885), 24 Fed. 531.

The provision of the statute, that "that portion of the insurance money, which is purchased by excess of premiums above five hundred dollars is primarily liable for the husband's debts," does not authorize an immediate proceeding by a creditor of the husband against the insurance fund without regard to the condition of the estate generally; the wife is not to be deprived of any portion of the insurance moneys until it is ascertained by administration upon the estate that the other assets thereof will not suffice to satisfy the claims of the creditors, and until such claims are discharged they are a lien upon so much of the insurance money as was purchased by excess of premiums above five hundred dollars, and that money is, as to the wife, primarily liable for her husband's indebtedness, unless otherwise discharged. *Kittel v. Domeyer* (1903), 175 N. Y. 205, 67 N. E. 433.

A creditor can have no lien on an excess of premiums paid unless such excess be paid after his debt had accrued. *Baron v. Brummer* (1885), 100 N. Y. 372, 3 N. E. 474.

The premiums upon policies assigned by a wife and her husband, before his death, to secure the payment of indebtedness due from the husband, should not be considered as a part of the \$500, or be charged against the wife after the husband's death, in determining the amount of life insurance to which she is entitled under the above section. *Kittel v. Domeyer* (1902), 175 N. Y. 205, 67 N. E. 433, revg. 70 App. Div. 134, 75 N. Y. Supp. 150.

Where, in an action brought pursuant to this section by the administrator with the will annexed, for the benefit of the creditors of his testator, to recover from his widow the surplus of insurance purchased by him in excess of annual premiums

of \$500, it appears from the complaint that the testator died insolvent and had been insolvent for many years prior to his death, that the defendant, his wife, caused his life to be insured for her benefit as widow and beneficiary in three "old line" insurance companies and in certain fraternal benefit societies and assessment associations for certain amounts which were paid and received by her after his death, that the aggregate amount of annual premiums amounted to \$260.90 for the straight life insurance and that the assessments in the other associations aggregated \$468.17, that said premiums and assessments were paid by testator out of his own funds, a demurrer to the complaint on the ground that it fails to state a cause of action will be sustained, and a motion for judgment on the pleadings, dismissing the complaint, granted. *Dominick v. Stern* (1913), 79 Misc. 271, 139 N. Y. Supp. 59.

Where a husband, having a large amount of life insurance payable to his wife, under policies issued prior to the enactment of the statute in question, died intestate leaving debts unpaid, and an action is brought against his widow, the administrator of his estate and the companies in which decedent was insured, to have a debt declared a lien upon and be paid out of insurance moneys purchased by premiums in excess of \$500, the insurance purchased by such excess of premiums after deducting the premiums paid upon policies assigned to plaintiff by decedent and his wife, before his death, to secure an indebtedness due plaintiff, should be paid into the hands of the administrator of decedent to hold the same as a separate fund until it shall appear that the assets, other than the insurance money shall be applied in satisfaction of the claims of creditors ratably; in the event of the other assets proving sufficient to pay the debts of deceased, or of there being a surplus of insurance money after paying the debts, the excess insurance, or the surplus thereof, as the case may be, shall be repaid to the widow of decedent. *Kittel v. Domeyer* (1903), 175 N. Y. 205, 67 N. E. 433.

Part payment by wife is not shown by the mere facts that the wife contributed to the household expenses and charged her husband with the rent of the premises used as a residence; such facts merely give her standing as a creditor. Excess premiums need not be paid after a debt is incurred in order that the creditor may share in the proceeds. *Guardian Trust Co. v. Strauss* (1910), 139 App. Div. 884, 123 N. Y. Supp. 852, *affd.* 201 N. Y. 546, 95 N. E. 1129.

§ 53. **Contracts in contemplation of marriage.**—A contract made between persons in contemplation of marriage, remains in full force after the marriage takes place.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 23; originally revised from L. 1848, ch. 200, § 4; L. 1849, ch. 375, § 3.

Construction of contract, made in anticipation of marriage, providing that "All the furniture, plate, horses, carriages, and other personal property in use by the parties for family purposes, at the time of the death of either, shall vest absolutely in the survivor." *Gorham v. Fillmore* (1888), 111 N. Y. 251, 18 N. E. 729.

Courts will scrutinize written ante-nuptial contracts closely and will prevent their being made the instruments of oppression, deception or fraud. *Lamb v. Lamb* (1897), 18 App. Div. 250, 46 N. Y. Supp. 219.

Consideration for a marriage settlement fails if the wife is incompetent to marry. *Hosmer v. Tiffany* (1906), 115 App. Div. 303, 100 N. Y. Supp. 797.

An oral contract made between a husband and wife in consideration of their marriage, by which the husband is to work his wife's farm, provide for their support out of the proceeds and retain the balance as his own property, is void under the Statute of Frauds. *Bromley v. Miles* (1900), 51 App. Div. 95, 64 N. Y. Supp. 353.

A settlement made by a husband upon his wife, after marriage, in pursuance of

a parol agreement entered into before marriage, is not valid. *Borst v. Corey* (1853), 16 Barb. 136, *affd.* 15 N. Y. 505.

An ante-nuptial agreement to give a future wife a portion of a savings bank deposit in consideration of marriage is void if not in writing. *Schneider v. Schneider* (No. 1) (1907), 122 App. Div. 774, 107 N. Y. Supp. 792.

Ante-nuptial contract to adopt daughter of prospective wife, effect of.—An ante-nuptial contract by a prospective husband to adopt the daughter of his prospective wife and make her his heir and also to give her all his property by will, must be construed to mean that he intended to treat the daughter as his own child. *Dickinson v. Seaman* (1908), 193 N. Y. 18, 85 N. E. 818, 20 L. R. A. (N. S.) 1154, *affg.* 117 App. Div. 908, 102 N. Y. Supp. 1134.

Release of dower.—An ante-nuptial contract for the release of dower by the future wife will be scrutinized most rigidly. The presumption is against the validity of such a contract and the burden of proof is upon the husband or his representatives to show good faith. *Pierce v. Pierce* (1877), 71 N. Y. 154, 27 Am. Rep. 22. Such a contract is properly declared void when it appears that the relinquishment of dower was not a condition of the engagement of marriage, that there was no negotiation between the parties prior thereto, that the defendant did not disclose to her that this would mean a relinquishment of her dower right, that no consideration was paid for the surrender and that she acted without the aid of counsel. *Graham v. Graham* (1894), 143 N. Y. 573, 38 N. E. 722.

An ante-nuptial contract, by which the woman agreed to accept a sum in full satisfaction of her dower in her husband's estate, he agreeing to provide therefor in his will, is valid. *Young v. Hicks* (1883), 92 N. Y. 235. The amount agreed to be paid by a future husband in consideration of the release of all her dower rights by his future wife is a debt within the meaning of the usual clause of a will directing the payment of debts. *Warner v. Warner* (1886), 18 Abb. N. C. 151.

"When a man, in contemplation of marriage, agrees to make a settlement on his wife, in consideration of which she agrees to relinquish her rights in his property at his decease, and he fails to make the settlement, the widow is not barred of any right which she might have asserted, if no such agreement had been executed." *Pierce v. Pierce* (1876), 9 Hun 50, *affd.* 71 N. Y. 154.

Property included.—A marriage settlement, which conveyed all of the property of the wife which she may at any time or times thereafter acquire to trustees for her benefit, contemplates only such estate as the wife should acquire during the coverture and does not include property acquired thereafter. *Borland v. Welch* (1900), 162 N. Y. 104, 56 N. E. 556, *affg.* 38 App. Div. 284, 57 N. Y. Supp. 30; *Brown v. Wadsworth* (1901), 168 N. Y. 225, 61 N. E. 250.

Where an ante-nuptial agreement provided that if the husband survived the wife he should have absolute title to all her personal property, the agreement merely operates to give the husband, in the event of survival, title to the residuum of personal property after the wife's estate has been duly administered. *Foehner v. Huber* (1899), 42 App. Div. 439, 59 N. Y. Supp. 447, *affd.* 166 N. Y. 619, 59 N. E. 1122.

Ante-nuptial contract relieving from support is void as against public policy. *Dennison v. Dennison* (1906), 52 Misc. 37, 102 N. Y. Supp. 621.

Effect of contract executed in foreign state or country.—A marriage settlement made in Germany, in contemplation of the parties living in Maryland, may be enforced in New York, and the plaintiff may have a trustee appointed and an accounting between the parties holding the trust property and the trustee so appointed. *Gleitsmann v. Gleitsmann* (1901), 60 App. Div. 371, 70 N. Y. Supp. 1007. A valid ante-nuptial contract executed in a foreign state whereby the husband is to forego all interest in his wife's estate is a bar to curtesy in lands in this state. *White v. White* (1897), 20 App. Div. 560, 47 N. Y. Supp. 273.

Infant's contracts in contemplation of marriage.—A female infant is bound by a settlement of her personal estate made in contemplation of marriage; such a settlement of her real estate is voidable only by her after she becomes of age, but will not be set aside on her application during the coverture after issue born. *Wetmore v. Kissam* (1858) (3 Bosw.), 16 Super. 321. The objection to the validity of a marriage settlement because the parties to it were infants can only be made by the parties themselves. It is not for that cause void but merely voidable at the option of the infants upon arriving at age. *Jones v. Butler* (1859), 30 Barb. 641, 20 How. Pr. 189. As to affirmance or avoidance of an avoidable ante-nuptial contract made by a female infant, see *Beardsley v. Hotchkiss* (1884), 96 N. Y. 201.

Enforcement of ante-nuptial contracts.—A wife may enforce an ante-nuptial agreement in which the husband agreed to convey certain real property to the wife, and to pay her a sum of money. Specific performance may be had of an agreement to convey, and damages for the breach of contract to pay the money. *Van Deventer v. Van Deventer*, 32 App. Div. 578, 53 N. Y. Supp. 236 (1898). A promissory note given in promise of marriage which promise is afterwards fulfilled is for a valid consideration and is enforceable in the hands of the wife against the husband after marriage. *Wright v. Wright* (1873), 54 N. Y. 437.

Ante-nuptial contracts by which it is attempted to regulate the interests which each of the parties to the marriage take in the property of the other during coverture or after death are favored by the courts and will be enforced in equity according to the intention of the parties. *Johnston v. Spicer* (1887), 107 N. Y. 185, 13 N. E. 753.

Presumption of fraud.—As to when ante-nuptial agreement, executed in view of marriage, and which provided that in event of the death of one party the survivor should take the estate of the deceased party, was held not to create a presumption that it was procured by fraud or undue influence, on part of the husband, see *Green v. Benham* (1900), 57 App. Div. 9, 68 N. Y. Supp. 248. Where no fraud is shown and the wife executed the agreement with full knowledge of its contents it will not be set aside because of the smallness of the provision in the wife's favor. *Davis v. Wood* (1890), 31 N. Y. St. Rep. 604, 10 N. Y. Supp. 460.

An ante-nuptial agreement by the future wife to release all her claims on his estate in consideration of a grossly inadequate sum made without opportunity of consulting others and in ignorance of the circumstances of the intended husband throws the burden of proof of fairness upon the representatives of the husband. *Warner v. Warner* (1886), 18 Abb. N. C. 151.

Rights of creditors.—An oral agreement on the part of a single woman to marry and pay the existing debts of her intended husband in consideration that he convey to her a piece of real estate after the marriage is binding upon the husband and such a conveyance of such real estate cannot be impeached by a subsequent creditor of the husband who obtained judgment before the execution of the deed. *Dygert v. Remerschnider* (1865), 32 N. Y. 629. An ante-nuptial agreement to provide the future wife with an annuity upon the death of the husband is void as against his creditors, where the property to be charged with such annuity is not described with certainty. *Mundy v. Munson*, 40 Hun 304 (1886). As to when an oral ante-nuptial agreement is not sufficient consideration for a debt from husband to wife as against the husband's creditors, see *Whyte v. Denike* (1900), 53 App. Div. 320, 65 N. Y. Supp. 577.

The conveyance by a man to a woman of his property in consideration of marriage, with knowledge on her part that his property is not sufficient to satisfy the claims of his creditors, is void as against them. *Keep v. Keep* (1879), 7 Abb. N. C. 240.

§ 54. **Liability of husband for ante-nuptial debts.**—A husband who ac-

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quires property of his wife by ante-nuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 24; originally revised from L. 1853, ch. 576, § 2.

Effect of enabling acts.—The Enabling Act of 1848 did not abrogate the common-law rule making the husband liable for all debts contracted by his wife before marriage and the act of 1853 does not affect a right of action against her husband which was vested before that act took effect. *Berley v. Rampacher* (1856), 12 Super (5 Duer.) 183.

§ 55. Contract of married woman not to bind husband.—A contract made by a married woman does not bind her husband or his property.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 25; originally revised from L. 1860, ch. 90, § 8, as amended by L. 1862, ch. 172. The act of 1860 was modified in language by the Revision of 1896.

The common-law duty of a husband to support his family has not been changed by the legislation respecting married women, and the liability for necessities furnished to the family of a married man rests presumptively and primarily upon the husband, even though the contract therefor is made by the wife. *Ruhl v. Heintze* (1904), 97 App. Div. 442, 89 N. Y. Supp. 1031.

"While the common law duty of a husband to support has not been changed by statute and his is presumptively and primarily the liability for necessities furnished, unless the wife expressly contracts therefor, her ability to contract has been enlarged." *Flurschheim v. Rosenthal* (1908), 112 N. Y. Supp. 1118.

A husband is bound to support his wife in the absence of either an agreement or decree of the court relieving him from that burden. *Ogle v. Dershem* (1901), 67 App. Div. 221, 73 N. Y. Supp. 592.

The obligation to support his wife and their children rests primarily upon the husband; no obligation rests upon the wife to support the family, although she has a separate estate. If by reason of a valid agreement she applies her separate estate to its support equity will not reimburse her; but unless the agreement is plainly and definitely established and is fair, reasonable and just, it will not be enforced. *Young v. Valentine* (1904), 177 N. Y. 347, 69 N. E. 643.

Ordinarily the presumption of the law is that the husband is responsible for all articles needed to support his family. *Strong v. Moul* (1889), 51 Hun 644 (mem.), 22 State Rep. 762, 4 N. Y. Supp. 299.

What are necessities.—"What are included in the word 'necessaries,' when applied to goods purchased by a wife, and for which it is sought to charge the husband, are such articles of utility as are suitable to maintain her according to the degree and estate of her husband and his ability to pay." *Schwartz v. Cohn* (1911), 129 N. Y. Supp. 464.

In an action by an innkeeper to recover from a husband for necessities furnished his wife, who was living apart from him, the plaintiff cannot recover for the board and lodging of the wife's sister, who lived with her for over a month, on the ground that it was a necessary furnished the wife, in the absence of evidence that any peculiar condition of mind or body made the sister's presence a necessity for the wife. *Wilder v. Brokaw* (1910), 141 App. Div. 811, 126 N. Y. Supp. 932.

In order to warrant a recovery against a husband for goods furnished to his wife, it must be shown that the goods so furnished were suitable to the wife's position and necessary to her maintenance, and that she was not otherwise provided for. This rule, however, does not apply to a case where money is loaned to the wife. *Schwartz v. Bisland* (1893), 4 Misc. 534, 24 N. Y. Supp. 700.

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§ 55.

ability of husband for necessities.—The husband is bound for the supply of necessities to his wife, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her himself or by his acts, or by giving her an adequate allowance in money, in which case he is not liable to a tradesman who, without his authority, furnishes her with necessities. *Wells v. Benjamin* (1863), 41 Barb. 558.

A husband living with his wife, who supplies her with necessities suitable to her position and his own or furnishes her with ready money with which to pay her bills, is therefor, not liable for the purchase price of other goods sold to her of the same character as necessities, in the absence of affirmative proof of his prior authority or subsequent sanction. *Wanamaker v. Weaver* (1902), 176 N. Y. 75, 100 N. E. 135, 65 L. R. A. 529, 98 Am. St. Rep. 621, affg. 73 App. Div. 60, 76 N. Y. 390.

There is no obligation upon a husband to pay his wife's debts; his obligation is to supply her with necessities, but those are his debts and not hers. *Werner v. Werner* (1915), 169 App. Div. 9, 154 N. Y. Supp. 570.

Where a married woman living with her husband wrote to a servant to secure domestic service as a nurse and the husband continued the correspondence and paid the railroad fare to his residence, the contract was that of the husband and not the wife's separate estate is not liable thereunder. *Winkler v. Schlager* (1892), 100 Hun 83, 19 N. Y. Supp. 110.

It must be shown that the goods so furnished are suitable to the wife's position and necessary to her maintenance and that she is not otherwise provided for; this rule may not be applied to moneys loaned her. *Schwartz v. Bisland* (1903), 4 Misc. 534, 24 N. Y. Supp. 700.

A husband is not liable for the services of an attorney, rendered on behalf of his wife in proceedings prosecuted by the people against him for nonsupport. *McQuhae v. McQuhae* (1893), 3 Misc. 550, 23 N. Y. Supp. 16.

Where in a matrimonial action the wife has obtained a decree for alimony for her support, her attorney cannot advance money to her for necessities and recover the amount from her husband. *Turner v. Woolworth* (1912), 153 App. Div. 293, 100 N. Y. Supp. 1071.

In an action against a husband for dresses supplied to his wife alleged to have been necessities, evidence that the plaintiff had kept the account in the name of the defendant's wife, had sent bills to her and that all payments had been made by her, does not establish as a matter of law that credit was given exclusively to the wife. Whether it was or not was a question of fact which should have been submitted to the jury. The fact that the wife had already been furnished by the husband with articles of the same character, or that he had supplied her with sufficient means to meet her necessities, is a matter of defense. The question as to what are and what are not necessities in such a case depends in large measure upon the scale and style of living adopted by the husband. *Wickstrom v. Peck* (1914), 100 App. Div. 608, 148 N. Y. Supp. 596.

A judgment dismissing the complaint, in an action brought by a wife against her husband for separate maintenance, is not a bar to an action subsequently brought against the husband for necessities furnished to the wife by a person who was not a party to the former action. *Ogle v. Dershem* (1901), 67 App. Div. 221, 73 N. Y. Supp. 592.

Where a married woman living with her husband and children purchases necessities for family use, the presumption is that the purchases are made as agent for the husband, and that he alone is liable; but a wife may by special agreement charge herself personally for necessities purchased by her for the family while living with her husband. *Valois v. Gardner* (1907), 122 App. Div. 245, 106 N. Y. 808.

Evidence requiring the submission to the jury of the question whether a dress-maker's bill was incurred on the credit of the wife or of her husband. *O'Connell v. Shera* (1901), 66 App. Div. 467, 73 N. Y. Supp. 231.

The use by a wife of her own money for the purchase of necessities for herself does not create a liability against her husband for the amount so expended, in the absence of circumstances, out of which might arise a promise to repay it. *Nostrand v. Dittmis* (1891), 127 N. Y. 355.

Section 51, ante, enabling a married woman to contract as if she were unmarried, does not absolve her husband from liability to pay for such of her purchases as are suitable to her station and his means. *Graham v. Schleimer* (1899), 28 Misc. 535, 59 N. Y. Supp. 689.

Ordinary principles of agency are the basis for the liability of the husband for debts incurred by the wife. *Constable v. Rosener* (1903), 82 App. Div. 155, 157, 81 N. Y. Supp. 376, *affd.* 178 N. Y. 587, 70 N. E. 1097.

The marital relation alone creates no presumption that a wife is agent for her husband. Whether she is such agent is in all cases a question of fact, arising either from his neglect to supply her with necessities or from his authority expressly given or fairly inferable from the circumstances. *Martin v. Oakes* (1903), 42 Misc. 201, 85 N. Y. Supp. 387.

A married woman may, by her special promise, intending to charge her separate estate, bind herself to pay for services of a nature which the law would ordinarily presume to have been performed upon the credit of her husband. *Miller v. Richardson* (1895), 88 Hun 49, 34 N. Y. Supp. 506.

Where a wife purchases groceries for the use of the family the presumption is that she acts as the agent of the husband and he alone is liable for the amount. *Lindholm v. Kane* (1895), 92 Hun 369, 36 N. Y. Supp. 665; see also *Bradt v. Shull* (1899), 46 App. Div. 347, 61 N. Y. Supp. 484.

To entitle the tradesman to recover as against the husband it must appear that the goods were supplied to the wife upon the husband's credit; the presumption that the wife was acting as her husband's agent is overcome by the fact that credit was given to her. *Ehrich v. Bucki* (1894), 7 Misc. 118, 27 N. Y. Supp. 247.

A husband who makes an allowance to his wife sufficient to supply her wants is not liable to a third person for necessities furnished to the wife; an allowance of \$1,200 to \$1,300 per month out of an annual income of \$20,000 is sufficient provision for a wife. *Oatman v. Watrous* (1907), 120 App. Div. 66, 105 N. Y. Supp. 174.

One who furnishes to a wife, with knowledge that she is living apart from her husband, necessities suitable to her condition cannot maintain an action against the husband therefor where he pays her more than half his income in regular weekly payments. *Quinlan v. Westervelt* (1910), 65 Misc. 547, 120 N. Y. Supp. 879.

In an action to recover for necessities furnished by the plaintiff to the defendant's wife, in which evidence is given tending to show that at the time the necessities were furnished the defendant was living apart from his wife and that he had made an adequate allowance for her maintenance and support, it is error for the court to charge that the plaintiff can recover if the jury find that he did not know or have cause to know that the husband and wife were living apart and that the latter was supplied with a suitable allowance. *Hatch v. Leonard* (1902), 71 App. Div. 32, 75 N. Y. Supp. 726.

Where the husband has given a tradesman notice not to supply his wife with goods, the burden is upon the plaintiffs to show that the goods sold were necessary and were not provided by the husband. *Therlott v. Bagioli* (1862), 22 Super. (9 Bosw.) 578; see also *Mott v. Comstock* (1832), 8 Wend. 544.

Liability of a husband for necessities furnished his wife is not affected by the

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lication of a general notice not brought to the attention of the person furnishing the necessities. *Sloane v. Boyer* (1905), 95 N. Y. Supp. 531.

husband is bound to provide for his wife and children whatever is necessary for their suitable clothing and maintenance, according to his and their situation and condition in life. Ordinarily, he will be presumed to assent to her making, on his credit, such purchases as, in the conduct of the domestic concerns, are proper for her management and supervision. But, if he sees fit to destroy such presumption by an express prohibition no one having notice thereof may trust the wife in reliance upon his credit, unless the husband so neglects his duty that necessities become necessary. In such case, the party seeking to recover in the face of such prohibition, takes the burden of proving the neglect of the husband to supply such necessities, and, to that end, it is not enough to show that the goods were in their nature suitable and necessary, and that they came to the use of the family, or even that in part they came to the use of the husband himself, unless there be, also, evidence that the husband knew that they were purchased on his credit. *Keller v. Phillips* (1868), 39 N. Y. 351.

husband, who, for sufficient cause, has separated from his wife, is liable, as long as the marital relation continues, for actual necessities furnished to the wife, unless he has made adequate provision for her maintenance. The fact that a husband notifies a particular physician that he will not be responsible for further services which the physician may render the wife, will not prevent the physician from recovering from the husband compensation for necessary medical attendance rendered by the physician to the wife after receiving the notification, unless it appears that the husband, after giving the notification, made no provision for supplying his wife with necessary medical attendance. *Button v. Weaver* (1903), 87 App. Div. 224, 84 N. Y. Supp. 388.

When the husband has been judicially declared incompetent, and provision is made out of his estate for the support of his family by a committee, who was appointed, the wife, she cannot bind him individually so that he will be liable after his restoration for necessities furnished her during his incompetency. *Thedford v. Thedford* (1898), 25 Misc. 490, 54 N. Y. Supp. 1007. See also *Carter v. Beckwith* (1911), 128 N. Y. 312, 28 N. E. 582.

Liability of husband when marriage bigamous.—Husband may be held liable for necessities furnished to purported wife although marriage was bigamous. *Frank v. Carter* (1917), 219 N. Y. 35, 113 N. E. 549.

husband is presumptively liable for medical services rendered to his wife by a physician employed by him or by her on her implied authority. *Thrall Hospital v. Aren* (1910), 140 App. Div. 171, 124 N. Y. Supp. 1038.

The primary liability for medical treatment rendered to a wife rests upon her husband, and she is not personally liable unless she specifically assume the liability. Where a wife on entering a sanatorium paid board from her separate estate, and subsequently, on receiving a bill for medical services, expressed a willingness to pay a fair sum, and the physician received from her a payment on account, her personal liability is established. *Matter of Totten* (1910), 137 App. Div. 273, 121 N. Y. Supp. 942.

sums paid by a husband to the physician who attended his wife in her last illness are not chargeable to her estate, for, so long as they both lived, he was liable for necessities. *Matter of Stadtmuller* (1905), 110 App. Div. 76, 96 N. Y. Supp. 1.

In the absence of special agreement a married woman is not personally liable for medical services rendered to herself and child at her own request. *Richards v. Young* (1903), 84 N. Y. Supp. 265.

Liability for burial expenses.—A surviving husband is under a legal obligation to bury the corpse of his wife, and may reimburse himself from the separate estate

of the wife if she has left an estate. *Watkins v. Brown* (1903), 89 App. Div. 193, 85 N. Y. Supp. 820; *Pache v. Oppenheim* (1904), 93 App. Div. 221, 87 N. Y. Supp. 704.

Ratification of unauthorized loan by wife.—The bringing of an action by a husband to recover money belonging to him, loaned by his wife is some evidence of ratification of her unauthorized act. *Knowal v. Lehrman* (1911), 144 App. Div. 219, 128 N. Y. Supp. 968.

Liability for necessities purchased by married woman.—Where a married woman purchases groceries to be used for the family, and expressly promises to pay for the same, stating that she owns real estate, she thereby benefits her estate, and is obliged to pay for them, although she does not expressly charge her separate estate with such payment. *Von Mallen v. Fuhrmann* (1890), 56 Hun 402, 9 N. Y. Supp. 878. A married woman is liable for groceries purchased by her on her express promise to pay, although the purchase was made for the benefit of the whole family, including the husband. *Tiemeyer v. Turnquist* (1881), 85 N. Y. 516, 39 Am. Rep. 674.

While, in the absence of any contract with the wife, the common-law liability of the husband for her suitable support still exists, if she avails herself of the powers conferred by the statute, by making an express contract in her own name even for her necessary support, she will not be deemed as acting as agent for her husband, nor will there be any implied agreement on his part to pay for such necessities. *Byrnes v. Rayner* (1895), 84 Hun 199, 32 N. Y. Supp. 542.

A hotel-keeper may maintain a claim of lien on the property of the wife, for the board of husband and wife, by showing that she was the head of the family, the one trusted, and had money and credit, and her husband had none. *Birney v. Wheaton* (1885), 2 How. Pr. (N. S.) 519.

It seems that since the passage of section 51 of the Domestic Relations Law an action may be brought against a married woman for articles of clothing in the nature of necessities, although she has not expressly promised to pay therefor. *Mayer v. Lithauer* (1899), 28 Misc. 171, 58 N. Y. Supp. 1064.

In the absence of an express agreement by the wife to charge her separate estate for medical services, the legal inference is that she acts as agent of her husband. See also *Estate of Shipman* (1889), 22 Abb. N. C. 289; *Ellison v. Sessions* (1892), 44 N. Y. St. Rep. 644, 18 N. Y. Supp. 108; so also for groceries, *Lindholm v. Kane* (1895), 92 Hun 369, 36 N. Y. Supp. 665; for services of domestic, *Winkler v. Schlager* (1892), 64 Hun 83, 19 N. Y. Supp. 110; for clothing for herself and children, *Kegney v. Owens* (1888), 18 N. Y. St. Rep. 482, 2 N. Y. Supp. 319; *Hallock v. Bacon* (1892), 45 N. Y. St. Rep. 484, 19 N. Y. Supp. 101.

A married woman is liable for musical instructions given to her daughter and sheet music furnished at her request. *Muller v. Platt* (1883), 31 Hun 121. As to account for jewelry upon which wife had made payments, see *Dickinson v. Ensign* (1890), 120 N. Y. 650, 25 N. E. 5 (without opinion), 31 N. Y. St. Rep. 651.

Action by tradesman to recover for goods sold to defendant's wife. Held that a dismissal of the complaint was error. *Rosenfeld v. Peck* (1912), 149 App. Div. 663, 134 N. Y. Supp. 392.

If the goods sold were furnished on the wife's credit the husband is not liable for them although they were necessities. *Martin v. Oakes* (1903), 42 Misc. 201, 85 N. Y. Supp. 387.

Liability for rent of house.—A married woman, residing with her husband in a house which they occupy as a home, is not liable for the rent of the house or the value of the use and occupation thereof, unless it appears that she expressly agreed with the lessor that she should be personally liable for the payment of the rent. *Grandy v. Hadcock* (1903), 85 App. Div. 173, 83 N. Y. Supp. 90.

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husband is not liable under a lease signed only by his wife. *Ivy Courts Co. v. Lockwood* (1913), 174 N. Y. St. Rep. 374, 140 N. Y. Supp. 374.

claim against wife upon account stated.—Where a grocer furnishes to a married man living with her husband groceries necessary for the household, he cannot dish a claim against her therefor, as upon an account stated, by sending bills therefor to which she makes no reply. *Blendermann v. Wray* (1908), 60 N. Y. Supp. 117, 111 N. Y. Supp. 827.

attorney's fees in separation suit by wife.—The reasonable value of the services of an attorney rendered in preparing papers in a suit for separation by a wife against her husband, necessary to be brought for her protection while she was living with him, but which papers were never served, the parties having become reconciled, may be recovered from the husband upon the ground of his wife's alleged agency to bind him for necessities. *Langblien v. Schneider* (1891), 27 Abb. 228, 16 N. Y. Supp. 943. An attorney may recover of a husband for services rendered his wife in an action brought by her for a separation where it appears that the conduct of the husband rendered the prosecution of such action reasonable. *Naumer v. Gray* (1898), 28 App. Div. 529, 51 N. Y. Supp. 222.

attorney cannot recover of a husband for legal services he rendered the wife in an action the attorney brought to procure for her a separation from her husband where it appears that that action is still pending by a substituted attorney, in it, the court on an application of the former attorney made an order awarding him a counsel fee and the wife alimony, and that the husband and wife remained unreconciled and live apart. *Damman v. Bancroft* (1904), 43 Misc. 678, 88 N. Y. Supp. 386.

husband is liable for the reasonable value of the services of attorneys rendered to a penniless wife in her defense of her husband's action for a separation, although the parties have been reconciled and the action is discontinued. *Hays v. Ledman* (1909), 28 Misc. 575, 59 N. Y. Supp. 687.

effect of separation on husband's liability.—Where husband and wife are living apart, the presumption that she is authorized to charge him with purchases by necessity ceases; and to recover therefor plaintiff must set up that they were necessities, and that the husband did not supply them or furnish his wife money with which to purchase them. *Hatch v. Leonard* (1899), 38 App. Div. 128, 56 N. Y. Supp. 674, 165 N. Y. 435, 59 N. E. 270. The rule is that during separation the assent of the husband is presumed but when they are living apart the burden is upon the person furnishing the necessities to show that the circumstances are such as to render the husband liable. *Bostwick v. Brower* (1898), 49 N. Y. Supp. 709, 49 N. Y. Supp. 1046.

the rule seems to be that the husband in case of voluntary separation has an alternative; he may trust his wife with a sufficient allowance or he may trust her to pledge his credit for what she deems is necessary. If he trusts her with money, he is not liable for that money, if he trusts her to buy in his name, it may be presumed that she has the right to pledge his credit. *Raymond v. Grey* (1896), 19 Misc. 34, 42 N. Y. Supp. 557.

separation, in the absence of notice to merchants, does not revoke the wife's express authority to charge her husband for necessities. *Anonymous* (1897), 21 Misc. 656, 48 N. Y. Supp. 277.

where the husband pays for goods, obtained by the wife before her voluntary separation, more than a year after they had lived apart, in the absence of notice, it is presumed to ratify her agency, and is liable for necessities thereafter purchased by her of the same tradesman. *Hartjen v. Ruebsamen* (1897), 19 Misc. 149, 48 N. Y. Supp. 466. See also *Clafin v. Lenheim* (1876), 66 N. Y. 301.

where a husband and wife were living in a state of voluntary separation and

during that time he had made her a weekly allowance of \$50 for her maintenance and support, the wife's authority to pledge her husband's credit is negated by the fact of their living apart, and the tradesman who supplies her under such circumstances with necessities, whether he have knowledge of their relations or not, does so at his peril. *Bloomington v. Brinckerhoff* (1892), 2 Misc. 49, 20 N. Y. Supp. 858.

If husband and wife part by consent and he secures to her a separate maintenance he is not answerable even for necessities, and the general reputation of the separation will be sufficient; but where the agreement is not reduced to writing and no evidence of the payment of the allowance by him appears he will be held responsible. *Baker v. Barney* (1811), 8 Johns. 72, 5 Am. Dec. 326. See also *Fenner v. Lewis* (1813), 10 Johns. 38.

In an action against a husband for the value of a dress furnished to his wife with whom he had not lived for eleven years, the burden of proof is upon the plaintiff to show that the wife's act in living apart was justified, as the presumption of her implied agency to pledge her husband's credit for necessities is negated by the separation. *Buxbaum v. Mason* (1905), 48 Misc. 396, 95 N. Y. Supp. 539.

In an action against a husband for medical services rendered to his wife, who is living apart from him, it is essential to show that the separation was due to the husband's fault and the burden of such proof is on the plaintiff. Exclusion of evidence, offered by the defendant to show that there was no cause for his wife refusing to live with him, is error. *Wolf v. Schulman* (1904), 45 Misc. 418, 90 N. Y. Supp. 363.

Where a husband and wife are, pending an action for separation, living apart, he paying her five dollars a week, the services of a nurse engaged by the wife during her confinement are necessities for which he is liable. *Schneider v. Rosenbaum* (1906), 52 Misc. 143, 101 N. Y. Supp. 529.

Where, in an action against a husband for necessities furnished to the wife living apart from her husband by mutual consent, the testimony is clear that credit was given to her with full knowledge that she was supporting herself, the presumption of law that the necessities were furnished to the wife on the husband's credit is rebutted. *Pickhardt v. Pratt* (1907), 55 Misc. 231, 105 N. Y. Supp. 236.

In an action for necessities, while proof of their delivery may generally make out a sufficient case for plaintiff, this does not seem to be the rule where the parties are living separate and apart, and in such a case the burden is on the plaintiff to show that the defendant did not suitably provide for his wife. *Farquharson v. Brokaw* (1910), 67 Misc. 277, 124 N. Y. Supp. 476, *affd.* 142 App. Div. 898, 126 N. Y. Supp. 1128.

Where there is no open separation of the parties, the presumption of the wife's agency to pledge her husband's credit for necessities exists, although he had left his home. *Ball v. Lovett* (1906), 98 N. Y. Supp. 815.

Liability of husband where he has left wife.—One who furnishes necessities to a wife after her husband has abandoned her is not obliged to show in an action against the husband a demand that he support his wife and that he refused to do so. Nor is judgment in favor of the husband in a former action brought by the wife for abandonment conclusive evidence that he did not abandon her. *Hardy v. Eagle* (1898), 25 Misc. 471, 54 N. Y. Supp. 1045.

Where a husband abandons his wife and minor children and fails to support them she has a right to bind his credit for all necessities supplied to her and the children. *Hardy v. Eagle* (1898), 23 Misc. 441, 51 N. Y. Supp. 501, *affd.* 25 Misc. 471, 54 N. Y. Supp. 1045. Where a husband abandons his wife and neglects to support her, he is liable for moneys loaned to her upon his credit for necessities. *Kenny v. Meislahn* (1902), 69 App. Div. 572, 75 N. Y. Supp. 81. Third persons who have dealt with her on the presumption that she was such, based upon the repre-

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tion of the husband, can recover for necessities furnished her, and it is no longer that an action for divorce was pending when such necessities were furnished as alimony had been allowed. *Johnstone v. Allen* (1869), 3 Daly 43, 6 Abb. N. S.) 306, 39 How. Pr. 506.

where the defense of a husband sued for the value of a physician's services attending his wife was that she had deserted him without cause and was living apart from him, and the evidence tended to show that she left him because of his ill-treatment and with his consent, it was held that a dismissal of the complaint was error. *Comstock v. Green* (1895), 88 Hun 64, 34 N. Y. Supp. 605. A husband is liable to a physician, employed by him to attend his wife, for services to his wife continued after separation, if the employment is not revoked and there was no wrongful abandonment by her. *Potter v. Virgil* (1876), 67 Barb. 578. Where a wife leaves her husband in consequence of his adultery, she is entitled to her support from him, and he is liable for necessities furnished her, although he forbids all persons trusting her on his account; such conduct of the husband is equivalent to turning the wife away. *Sykes v. Halstead* (1848), 3 Super (1st) 483. See also *Minck v. Martin* (1886), 54 Super (22 J. & S.) 136, 6 N. Y. Supp. 803.

where a husband turns his wife out of doors she carries with her a credit for necessities; but he has the right to supply her with necessities in such reasonable manner as he may think proper, and if a person other than the one deserted by him furnishes her with necessities he does so at his own risk and does not recover from the husband. *De Long v. Baker* (1880), 9 Wk. Dig. 315; see *Lockwood v. Thomas* (1815), 12 Johns. 248.

where the wife consents to the separation there is no abandonment; so where husband and wife formally agreed to live apart she cannot be allowed counsel and alimony. *Powers v. Powers* (1898), 33 App. Div. 126, 53 N. Y. Supp. 346. A husband who without adequate reason leaves his wife and fails to provide her with a home, or means to provide one for herself, is liable for the reasonable value of her board; but the wife's agreement to pay a certain sum is not conclusive upon the husband. *Sultan v. Misrahi* (1905), 47 Misc. 655, 94 N. Y. Supp. 519.

where an action brought against the husband to recover for necessities furnished the wife by the plaintiff while the wife was living with the plaintiff apart from the husband, testimony given by the defendant that shortly after his wife left his home he demanded her return and told the plaintiff that he did not want her to leave his wife and that he was ready and willing to provide for her at his own expense, does not, as a matter of law, rebut the presumption of the wife's agency with her husband in respect to the necessities, where there is evidence tending to show that the separation of the husband and wife was due to the husband's fault and that he never thereafter contributed anything to her support except by order of the court. *Ogle v. Dershem* (1901), 67 App. Div. 221, 73 N. Y. Supp. 592. A husband who abandons his wife and neglects to support her is liable for moneys expended to the wife on his credit, where it appears that such moneys were used by the wife in the purchase of necessities. *Kenny v. Meislahn* (1902), 69 App. Div. 75 N. Y. Supp. 81.

A husband who abandoned his wife without cause is liable, as upon an implied promise, to pay her son for the value of the care and the necessary support he received from his mother during the last years of her life. *Harrigan v. Cahill* (1917), 100 N. Y. Supp. 48.

A husband is liable in equity to one who furnishes necessities requisite for the support of his deserted wife and infant children or to one who furnishes the wife with money with which to procure such necessities. *De Brauwere v. De Brauwere* (1911), 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508, affg. 144 App. Div. 521, 100 N. Y. Supp. 587, where it was held that when a husband deserts his wife and

there is a legal adjudication requiring him to furnish his wife a certain sum of money for her support, and the wife from her separate property furnishes the money to buy necessities, she has a cause of action against the husband.

Liability where wife has left husband.—Where the wife of the defendant left him against his will and without cause and went to live with her mother and it is shown that the defendant was able and willing to furnish her with proper maintenance if she would live with him and he never promised to maintain her separate from him, the husband is not liable for necessities furnished the wife. *Catlin v. Martin* (1877), 69 N. Y. 393. If the wife leave her husband without just cause, the husband is not answerable for her support, but if in such a case the wife offers to return and the husband refuses to receive her his liability for necessities furnished her is revived. *Blowers v. Sturtevant* (1847), 4 Denio 46; see also *People v. Pettit* (1878), 74 N. Y. 320; *Supervisors of Monroe v. Budlong* (1868), 51 Barb. 493. Offer to return and refusal to accept her revives liability. *McCutchen v. McGahay* (1814), 11 Johns. 281, 6 Am. Dec. 373; *McGahay v. Williams* (1815), 12 Johns. 293.

In an action against the husband for necessities furnished to his wife while living separate from him the plaintiff must show affirmatively that the separation took place in consequence of the husband's misconduct; it is not enough that there were quarrels and personal conflicts between them unless it be shown that the husband was the offending party. *Blowers v. Sturtevant* (1847), 4 Denio 46.

A husband, whose wife abandons him without just cause and refuses his offer to support her if she will return to him, is not liable for necessities furnished to the wife while thus living apart from him. *Constable v. Rosener* (1903), 82 App. Div. 155, 81 N. Y. Supp. 376, *affd.* 178 N. Y. 587, 70 N. E. 1097.

When a wife leaves her husband, on account of his ill-treatment, and lives separate and apart from him for a period of eight years, she has no claim against him or against his estate for moneys expended by her during that period for her support and maintenance. In such a case she must obtain a limited separation and an allowance for her support, or she must purchase such articles as are necessary to her support and maintenance on his credit. *Pierce v. Pierce* (1876), 9 Hun 50, *affd.* 71 N. Y. 154.

A husband, whose wife, without just cause, abandons him and refuses his offer to support her at his home, is not liable for board and lodging furnished to the wife by her sister, who harbored her during the time that her abandonment of her husband continued. *Ogle v. Dershem* (1904), 91 App. Div. 551, 86 N. Y. Supp. 1101.

The infidelity of the wife terminates the husband's obligation to support her, and precludes her from pledging her husband's credit for necessities. *People ex rel Keller v. Shrady* (1899), 40 App. Div. 460, 58 N. Y. Supp. 143.

A father is liable for the funeral expenses of his infant child though he is living separate from his wife and she has had the custody of the child. *Gobber v. Empting* (1911), 72 Misc. 10, 129 N. Y. Supp. 4.

A complaint in an action to recover for necessities furnished to a wife is sufficient if it contains allegations which, if alleged in a declaration at common law would have stated a cause of action for goods furnished. The fact that it also alleges, in a case where the defendant and his wife were living separate and apart from each other, that the purchase was made by her as his agent, will not preclude a recovery without proof of an express agency, and the exclusion of evidence tending to show that the articles furnished were necessities for the wife and children on the ground that it tended to prove a different cause of action, is reversible error. *Hatch v. Leonard* (1901), 165 N. Y. 435, 59 N. E. 270.

A complaint in an action to recover a balance due for goods sold and delivered to the defendant's wife, which alleges that between certain dates and at a certain place the plaintiff furnished to the wife at her special instance and request neces-

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for her use, specifying them, of a certain value, and that the same has not paid, nor any part thereof, except a certain sum, leaving a balance due the husband, for which judgment is demanded, states a cause of action. Under such facts the plaintiff may give evidence from which the jury may determine that the husband's articles were necessities. *Wickstrom v. Peck* (1913), 155 App. Div. 523, 140 Supp. 570.

on cited.—*Frank v. Carter* (1914), 164 App. Div. 913, 915, 149 N. Y. Supp.

3. Husband and wife may convey to each other or make partition.—Husband and wife may convey or transfer real or personal property to each other, the one to the other, without the intervention of a third person; or they may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entirety. If so expressed in the instrument of partition or division, such instrument bars the husband's right to dower in such property, and also, if so expressed, the wife's tenancy by courtesy.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 26; originally revised L. 1880, ch. 472, § 1; L. 1887, ch. 537, § 1.

Validity of conveyances prior to acts of 1887.—The enabling acts of 1848, 1849, and 1862 did not enable either husband or wife to convey directly to the other without the intervention of a trustee. The following cases will indicate the state of the law between 1848 and the act of 1887. *Savage v. O'Neil* (1871), 44 N. Y. 298, revg. 42 Barb. 374; *Abbey v. Deyo* (1871), 44 N. Y. 343; *Knapp v. Smith* (1865), 27 N. Y. 277; *Perkins v. Perkins* (1872), 62 Barb. 531, 7 Lans. 19; *Buckley v. Dauchy* (1865), 33 N. Y. 518; *Gage v. Dauchy* (1866), 34 N. Y. 293; *Draper v. Fenel* (1866), 35 N. Y. 518; *Sammis v. McLaughlin* (1866), 35 N. Y. 647, 51 N. Y. 83; *Blaechenska v. Home Mission* (1892), 130 N. Y. 497, 29 N. E. 755, 12 R. A. 215; *Noel v. Kinney* (1887), 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423; *Wells v. Nat'l Union Bank* (1889), 115 N. Y. 122, 22 N. E. 29; *Suau v. Caffee* (1890), 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593; *Conger v. Corey* (1899), 39 App. Div. 41, 57 N. Y. Supp. 236; *Greenleaf v. Blakeman* (1899), 40 App. Div. 371, 58 Supp. 76, affd. 166 N. Y. 627, 60 N. E. 1111.

Under the act of 1887 a deed of lands from husband to wife was void unless supported upon valuable or meritorious consideration such as would enable a court of equity to sustain it. *Dean v. Metropolitan El. R. Co.* (1890), 119 N. Y. 540, 23 N. Y. 1054; *Johnson v. Rogers* (1885), 35 Hun 267. Before the act of 1887 married women could not convey to or take by conveyance from their husbands. *Winans v. Winans* (1865), 32 N. Y. 423; see also *White v. Wager* (1862), 25 N. Y. 328; *Scott v. Madeline* (1894), 79 Hun 79, 29 N. Y. Supp. 630, affd. 145 N. Y. 639, 41 N. E. 90; *Johnson v. Rogers* (1885), 35 Hun 267. An instrument dated prior to the act of 1887 and delivered subsequent to its passage cannot be set aside as void as it became operative upon its delivery. *Reynolds v. City Nat'l Bank* (1893), 71 Hun 386, 24 App. Div. 1134, affd. 151 N. Y. 641, 45 N. E. 1134. Mortgage by wife to her husband was invalid prior to 1887. *Cheney v. Thornton* (1892), 43 N. Y. St. Rep. 510, 100 N. Y. Supp. 545.

The intention and meaning of this section is simply to authorize the husband and wife to convey their property to others, or among themselves, with the utmost freedom. It permits them to divide or "partition" any real property which they hold as tenants by the entirety, or otherwise. It does not, however, enable a tenant by the entirety to compel partition. *Bartkowalk v. Sampson* (1911), 73 N. Y. 446, 452, 133 N. Y. Supp. 401.

Whatever may have been the status of a woman at common law, she is authorized in this state by statute to convey real or personal property to her husband without the intervention of a third party, and unless she is incompetent, or fraud is practiced upon her, the transaction cannot be questioned by parties who have no interest beyond an expectancy. *Donlon v. Donlon* (1912), 154 App. Div. 212, 138 N. Y. Supp. 1039.

Validity of conveyance.—Under act of 1887 and above section conveyance to husband by wife is valid if in good faith. *Talcott v. Levy* (1893), 47 N. Y. St. Rep. 399, 20 N. Y. Supp. 440, *affd.* 3 Misc. 615, 23 N. Y. Supp. 1162, *affd.* 143 N. Y. 636, 37 N. E. 826; *Spaulding v. Keyes* (1890), 125 N. Y. 113, 26 N. E. 15.

Undue influence will not be presumed where the husband transfers his property to a faithful wife when in failing health. Nor will such transfer be set aside at the instance of relatives upon the mere proof of vagaries and eccentricities. *Hoey v. Hoey* (1899), 28 Misc. 396, 59 N. Y. Supp. 946, *affd.* 53 App. Div. 208, 65 N. Y. Supp. 778.

Conveyance sustained in equity.—Although a conveyance executed by a wife to her husband was at law void if made directly between them for a suitable consideration it might have been sustained in equity. *Scott v. Calladine* (1894), 79 Hun 79, 29 N. Y. Supp. 630, *affd.* 145 N. Y. 639, 41 N. E. 90; see also *Jaycox v. Caldwell* (1873), 51 N. Y. 395; *Manchester v. Tibbetts* (1890), 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; *Hulse v. Bacon* (1899), 40 App. Div. 89, 57 N. Y. Supp. 537, *affd.* 167 N. Y. 599, 60 N. E. 1113, *affg.* 26 Misc. 455, 57 N. Y. Supp. 537; *Hunt v. Johnson* (1870), 44 N. Y. 27, 44 Am. Rep. 631; *Mason v. Libbey* (1882), 90 N. Y. 683, 64 How. Pr. 259, *affg.* 19 Hun 119 (1879); *Meeker v. Wright* (1879), 76 N. Y. 262; *Boyd v. De La Montagnie* (1878), 73 N. Y. 498, 29 Am. Rep. 197; *Fitzpatrick v. Burchill* (1893), 7 Misc. 463, 28 N. Y. Supp. 389; *Hendricks v. Isaacs* (1889), 117 N. Y. 411, 22 N. E. 1029, 6 L. R. A. 559. But where the conveyance to the wife was complete, the husband cannot seek to be relieved though the contract was illegal. *Tallinger v. Mandeville* (1889), 113 N. Y. 427, 21 N. E. 125.

Gifts from husband to wife.—A husband could make a valid gift of personal property to his wife, and it was only void as against creditors at the time. *Armitage v. Mace* (1884), 96 N. Y. 538; *Rawson v. Penn. R. R. Co.* (1872), 48 N. Y. 212, 8 Am. Rep. 543, *affg.* 2 Abb. Pr. (N. S.) 220; *Jaycox v. Caldwell* (1868), 37 How. Pr. 240, *affd.* 51 N. Y. 395. A gift of a mortgage by a husband to the wife is void against creditors where he was insolvent at the time though she accept in good faith. *Doty v. Baker* (1877), 11 Hun 222.

A gift is not rendered invalid because of the existence of the relation of husband and wife between the donor and donee; but the fact of the gift having been made must be clearly proved. *Shuttleworth v. Winter* (1874), 55 N. Y. 624.

If one loaning money takes a promissory note therefor, payable to the order of himself and his wife, this imports a gift to the wife in case she survives him, and delivery of the note to her by the husband is not necessary to perfect the gift. *Sanford v. Sanford* (1871), 45 N. Y. 723.

A husband may make a valid gift to his wife of his interest as a purchaser in a contract for the sale of land, and may transfer to her a legal title thereto by a written assignment. *Fruhauf v. Bendheim* (1891), 127 N. Y. 587, 28 N. E. 417.

Mortgages may be made the subject of a gift from husband to wife. *Betts v. Betts* (1896), 9 App. Div. 210, 41 N. Y. Supp. 285, *affd.* 159 N. Y. 547, 54 N. E. 1089.

See also cases cited under section 50, ante.

Contracts for separation and support.—In view of the legislation which permits husbands and wives to contract indirectly with each other, any contract for separation and support which they could formerly have made by means of a trustee, they can now make without one. *Winter v. Winter* (1908), 191 N. Y. 462,

§ 19. Conveyances of husband and wife to each other. § 56.

E. 382, 16 L. R. A. (N. S.) 710, affg. 115 App. Div. 899, 101 N. Y. Supp. 1149. also cases cited under section 51, ante.

tenancy in common.—Since the act of 1860 where lands are conveyed to husband and wife, without statement as to manner in which they are to be held, they are tenants in common and not by the entirety. *Meeker v. Wright* (1879), 76 N. Y. 36, 51 N. E. 291.

joint tenants.—A married woman may take and hold real property as a joint tenant with her husband; and may convey her interest independently of him. *Wright v. Fey* (1891), 129 N. Y. 17, 29 N. E. 136; *Banzer v. Banzer* (1898), 156 N. Y. 36, 51 N. E. 291.

tenancy by the entirety may be created by a conveyance by a husband to himself and wife, thereby reserving to himself the same rights he would have under a deed to a third person. *Matter of Klatzl* (1915), 216 N. Y. 83, 85, 110 N. E. 181.

Though the married women's acts have not abrogated tenancy by the entirety, a husband is no longer entitled exclusively to the usufruct of lands so held by their joint lives; but they are tenants in common or joint tenants of the lands, each being entitled to one-half the rents and profits, so long as the question of survivorship is in abeyance. *Hiles v. Fisher* (1895), 144 N. Y. 306, 39 N. E. 337, 13 L. R. A. 305, 43 Am. St. Rep. 762. See also *Grosser v. City of Rochester* (1896), 156 N. Y. 235, 42 N. E. 672.

The act of 1880 allowing husband and wife to make division between themselves of land held by the entirety does not abrogate the common law as to rights of survivorship. *Zornitlein v. Bram* (1885), 100 N. Y. 12, 2 N. E. 388.

The common-law rule of unity which, upon conveyance of land to husband and wife, vests an estate by the entirety in the grantees, does not apply to a conveyance from a husband to his wife made under this section. *Saxon v. Saxon* (1904), 46 Misc. 202, 93 N. Y. Supp. 191. This section authorizes a husband to convey to his wife his interest in lands of which they are seized as tenants by the entirety. After a subsequent conveyance by the wife of the whole title in the lands, both she and her husband cannot question the title of the grantee. *Wick v. Salzl* (1904), 46 Misc. 1, 93 N. Y. Supp. 265.

Where lands are conveyed to a husband and wife by a third person without words to signify an intention that they shall take otherwise than as tenants by the entirety, it will be held that they become vested with such an estate. *Lerbs v. Lerbs* (1911), 71 Misc. 51, 129 N. Y. Supp. 903.

Where land is conveyed to husband and wife without any express restriction as to the character of their holding, they take as tenants by the entirety. As such tenancy is founded upon the marital relation and upon the legal theory that the husband and wife are one, it depends for its continuance upon the continuance of the relation, and when the unity is broken by a divorce the tenancy is severed; each takes a proportionate share of the property as a tenant in common. *Stelz v. Stelz* (1891), 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325.

The interest of a husband as tenant by the entirety is subject to sale on execution, the purchaser taking subject to the wife's right of survivorship. *Mardt v. Scharf* (1909), 65 Misc. 124, 119 N. Y. Supp. 449.

A husband, a tenant by the entirety, cannot maintain an action to partition the lands against the will of his cotenant. *Vollaro v. Vollaro* (1911), 144 App. Div. 242, 129 N. Y. Supp. 43.

A release of dower rights by wife for a valuable consideration is binding upon both parties. *Greenleaf v. Blakeman* (1899), 40 App. Div. 371, 58 N. Y. Supp. 76, 166 N. Y. 327, 60 N. E. 1111. A release of an inchoate right of dower is a valuable consideration for the payment of money by the husband to the wife, except as to creditors, and is valid as to them to the value of such inchoate dower. *Smart v. Smart* (1878), 14 Hun 276. See also *Doty v. Baker* (1877), 11 Hun 222.

§ 57.

Rights of action against married woman.

L. 1909, ch. 19.

Where a wife having only an inchoate dower in real property joins with her husband in the conveyance to a third party, and the husband takes back a joint mortgage payable to himself and his wife, there is a presumption that he intends to give the bond and mortgage to his wife if she survives him. *Willcox v. Murtha* (1899), 41 App. Div. 408, 58 N. Y. Supp. 783.

A wife may release inchoate dower directly to her husband after decree of separation. *Schlesinger v. Klinger* (1906), 112 App. Div. 853, 98 N. Y. Supp. 545. Separation agreement releasing dower rights. *Hogg v. Lindridge* (1912), 151 App. Div. 513, 135 N. Y. Supp. 928.

Rights of creditors.—A voluntary conveyance of real estate from a husband to his wife is good as against subsequent creditors unless made with intent to defraud them, or without their knowledge. *Neuberger v. Keim* (1892), 134 N. Y. 35, 31 N. E. 268. See also *Ebbitt v. Dunham* (1898), 25 Misc. 232, 55 N. Y. Supp. 78; *Teed v. Valentine* (1875), 65 N. Y. 471; so where property exceeded liabilities at time of transfer. *American Forcite Powder Mfg. Co. v. Hanna* (1898), 31 App. Div. 117, 52 N. Y. Supp. 547.

A transfer of property by a husband to his wife in payment for her services rendered in the household is void as against creditors. *Conger v. Corey* (1899), 39 App. Div. 241, 57 N. Y. Supp. 236.

§ 57. **Right of action by or against married woman for torts.**—A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved. This section does not affect any right, cause of action or defense existing before the eighteenth day of March, eighteen hundred and ninety.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 27; originally revised from L. 1890, ch. 51, §§ 1-3.

Reference.—Liability of husband for debts of deceased wife, Decedent Estate Law, § 103. Husband need not be joined with wife as party to action or proceeding, Code Civil Procedure, § 450. Damages for slander are wife's separate property, *Id.* § 1906.

Action for loss of service caused by personal injuries.—Prior to the act of 1890, an action could not be brought by a wife for loss of service occasioned by personal injury. *Filer v. N. Y. Railroad Co.* (1872), 49 N. Y. 47, 10 Am. Rep. 327; *Brooks v. Schwerin* (1873), 54 N. Y. 343; *Clark v. Dillon* (1876), 6 Daly 526; *Perkins v. Perkins* (1872), 62 Barb. 531, 7 Lans. 19; *Coleman v. Burr* (1883), 93 N. Y. 17, 45 Am. Rep. 160. Prior to 1890 a wife could maintain an action for damages caused by negligence to her separate property. *Rawson v. Penn. R. R. Co.* (1867), 2 Abb. Pr. (N. S.), 220, *affd.* 48 N. Y. 212, 8 Am. Rep. 543. As to whether the rule laid down in such cases is changed by the above section, see *Thuringer v. N. Y. C. Railroad Co.* (1893), 71 Hun 526, 24 N. Y. Supp. 1087.

A married woman may recover in her own name for pain and suffering from personal injuries. *Bennett v. Bennett* (1889), 116 N. Y. 584, 23 N. E. 17; *Haden v. Clarke* (1890), 32 N. Y. St. Rep. 478, 10 N. Y. Supp. 291.

In an action for personal injuries prior to the passage of the act of 1890, it was held that a married woman might recover for inability to labor on her own account occasioned by the injury; but not for loss of earnings unless she was

fully engaged in business or performing services on her sole and separate account. *Becker v. Janinski* (1891), 27 Abb. N. C. 45, 15 N. Y. Supp. 675.
 A wife is entitled to recover actual damages only and the consequential damages for the loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. *Chinska v. Howard Mission and Home* (1892), 130 N. Y. 497, 503, 29 N. E. 755, 1 R. A. 215.

Liability of husband for wife's torts.—A husband, who has purchased an automobile for the mutual pleasure of himself and family, is not liable for personal injuries caused by the wife while operating the machine for her own recreation and not in connection with any business of the husband. *Tanzer v. Read* (1914), 160 App. 584, 145 N. Y. Supp. 708.

Before the act of 1890, the husband was, jointly liable with the wife for her torts. *Rowe v. Smith* (1871), 45 N. Y. 230; *Baum v. Mullen* (1872), 47 N. Y. 577; *Es v. Nunan* (1883), 92 N. Y. 152, 44 Am. Rep. 361; *Fitzgerald v. Quann* (1888), 100 N. Y. 441, 17 N. E. 354; *Mangam v. Peck* (1888), 111 N. Y. 401, 18 N. E. 617; *Don v. Cunningham* (1892), 1 Misc. 408, 20 N. Y. Supp. 882; *Dean v. Metropolitan Elevated Ry. Co.* (1890), 119 N. Y. 540, 23 N. E. 1054.

The act of 1890 changed the common-law rule, and as the law now stands, the husband is not liable for the wrongful or tortious acts of the wife, whether perpetrated in their nature or committed in respect to the wife's sole and separate property, unless occasioned by the actual coercion or instigation of the husband. *Bank v. Goldman* (1894), 9 Misc. 34, 29 N. Y. Supp. 294, *affd.* 150 N. Y. 176, 44 N. Y. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670; *Strubing v. Mahar* (1899), 46 App. 409, 61 N. Y. Supp. 799. A married woman is liable for injury inflicted by a dog kept upon premises owned by her separately though the animal be owned by her husband. *Quilty v. Battle* (1892), 135 N. Y. 201, 32 N. E. 47, 17 R. A. 521; *Valentine v. Cole* (1886), 1 N. Y. St. Rep. 719.

At common law the husband was liable to be sued jointly with his wife for all torts committed by her prior to or during coverture, and therefore where she wrongfully took and converted personal property belonging to another, the action lay properly against both husband and wife, though he was in fact innocent of any fault and never received any part of the property. *Kowing v. Manly* (1872), 49 N. Y. 192, 10 Am. Rep. 346.

Action in tort by wife against husband.—There is nothing in this section which indicates any change in the common-law rule that a wife cannot bring an action against her husband to recover damages for assault and battery. *Abbe v. Abbe* (1877), 22 App. Div. 483, 48 N. Y. Supp. 25; *Schultz v. Schultz* (1882), 89 N. Y. 644, 27 Hun 26; *Longendyke v. Longendyke* (1863), 44 Barb. 366; *Minier v. Minier* (1870), 4 Lans. 421. A wife cannot maintain an action against her husband for conversion. *Freethy v. Freethy* (1865), 42 Barb. 641; *Minier v. Minier* (1870), 4 Lans.

A wife cannot maintain an action for the loss of her husband's support, companionship and personal care, resulting from the fact that he has been injured by the defendant's negligence in managing a horse, as neither the common nor the statute law affords any ground for such an action. *Goldman v. Cohen* (1900), 30 Misc. 336, 1 N. Y. Supp. 459.

Conversion.—A husband may maintain an action for conversion for property taken from him by his wife. *Berdell v. Parkhurst* (1879), 19 Hun 358, 58 How. 102; *Mason v. Mason* (1892), 66 Hun 386, 21 N. Y. Supp. 306.

A wife may maintain an action against her husband for the conversion of her property. *Ryerson v. Ryerson* (1890), 55 Hun 611 (mem.), 8 N. Y. Supp. 738.

§ 58. Pardon not to restore marital rights.—A pardon granted to a

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Right of action for wages.

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person sentenced to imprisonment for life within this state does not restore that person to the rights of a previous marriage or to the guardianship of a child, the issue of such a marriage.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 28; originally revised from R. S., pt. 2, ch. 8, tit. 1, § 7.

Effect of pardon upon right to curtesy.—Where a married man of whose marriage children were born capable of inheriting their estate is sentenced to imprisonment for life, and thereafter his wife marries again and he is subsequently pardoned, and his wife afterward dies seized of real estate which she acquired after her second marriage, the first husband is not entitled to curtesy therein. *Ghehin v. Ghehin* (1911), 72 Misc. 511, 131 N. Y. Supp. 373.

§ 59. Compelling transfer of trust property.—A person who holds property as trustee of a married woman, under a deed of conveyance or otherwise, may, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court, that he has examined the condition and situation of the property, and made inquiry into the capacity of such married woman to manage and control the same, convey to such married woman all or any portion of such property, or the rents, issues or profits thereof.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 29; originally revised from L. 1849, ch. 375.

§ 60. Married woman's right of action for wages.—A married woman shall have a cause of action in her own sole and separate right for all wages, salary, profits, compensation or other remuneration for which she may render work, labor or services, or which may be derived from any trade, business or occupation carried on by her, and her husband shall have no right of action therefor unless she or he with her knowledge and consent has otherwise expressly agreed with the person obligated to pay such wages, salary, profits, compensation or other remuneration. In any action or proceeding in which a married woman or her husband shall seek to recover wages, salary, profits, compensation or other remuneration for which such married woman has rendered work, labor or services or which was derived from any trade, business or occupation carried on by her or in which the loss of such wages, salary, profits, compensation or other remuneration shall be an item of damage claimed by a married woman or her husband, the presumption of law in all such cases shall be that such married woman is alone entitled thereto, unless the contrary expressly appears. This section shall not affect any right, cause of action or defense existing prior to May seventeenth, nineteen hundred and five.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 30; as added by L. 1902, ch. 289, and amended by L. 1905, ch. 495.

Application.—This section, giving a married woman a cause of action in her own sole and separate right for all wages, etc., for which she may render work, labor or services, etc., relates rather to services rendered by her to others in occupations or business disconnected from the duties performed by her as a member of her husband's household. Where at the time plaintiff took into his family his father-in-law who was old and infirm, requiring to quite a degree the personal

care and nursing of his daughter, which was given, nothing was said as to his paying for the board, nursing and services to be rendered, plaintiff is entitled to recover the reasonable value thereof as upon an implied promise to pay therefor. The value of the services of plaintiff's wife to her father while at her home cannot be separated from those rendered by her husband. *Johnson v. Tait* (1916), 97 Misc. 48, 160 N. Y. Supp. 1000.

Object of section.—This section was not passed to overcome any presumption in the husband's favor existing at common law, but is evidently designed to make perfectly clear the principle which is to be found in many of the decisions, construing the enabling statutes in the interest of married women and providing a presumption in their favor. *Stevens v. Cunningham* (1902), 181 N. Y. 454, 74 N. E. 434, revg. 75 App. Div. 125, 77 N. Y. Supp. 364.

Right to earnings in furnishing board.—Right to recover for board belongs to husband, where the expenses of the household are borne by him. *Stamp v. Franklin* (1895), 144 N. Y. 607, 39 N. E. 634. See also *Birkbeck v. Ackroyd* (1878), 74 N. Y. 356; *Farrell v. Harrison* (1895), 14 Misc. 462, 35 N. Y. Supp. 1029. In an action by a married woman for services rendered and for board furnished, while she is living with her husband, the presumption is that the husband furnished the provisions; but she may recover for her services which are "her sole and separate property." *Stamp v. Franklin* (1891), 35 N. Y. St. Rep. 828, 12 N. Y. Supp. 391.

Where a wife renders services and furnishes meals to a stranger under an agreement between herself and her husband that she alone shall receive the recompense and that it shall become her separate property, the common-law rights of the husband are abrogated, and she may enforce the claim in her own name. *Lashaw v. Croissant* (1895), 88 Hun 206, 34 N. Y. Supp. 667. See also *Sands v. Sparling* (1894), 82 Hun 401, 31 N. Y. Supp. 251; *Matter of Kinmer and Gay* (1888), 14 N. Y. St. Rep. 618; *Burley v. Barnhard* (1887), 9 N. Y. St. Rep. 587; *Bowers v. Smith* (1889), 28 N. Y. St. Rep. 346, 8 N. Y. Supp. 226.

Where a wife supports her husband, as in a case where she keeps a boarding-house upon her own account, an acknowledgment of indebtedness for the support by husband creates a valid obligation against his estate. *Matter of Hamilton* (1902), 70 App. Div. 73, 75 N. Y. Supp. 66, affd. 172 N. Y. 652, 65 N. E. 1117.

A married woman owning real property upon which she resides with her husband and family, the husband paying expenses, who is authorized by her husband to take boarders and receive pay therefor, is entitled to recover for board furnished. Under such circumstances she is entitled to recover notwithstanding that the boarder may have paid her husband if the payment were made without authority from her. *Perry v. Blumenthal* (1907), 119 App. Div. 663, 104 N. Y. Supp. 127.

Where a husband as the head of the household takes boarders into his house and his wife takes charge of the house, and thus aids the husband in carrying on the business so maintained in the house, her services and earnings belong to the husband. Where, however, a wife renders services and furnishes meals to a stranger within the household under an agreement made between herself and her husband that, in case she renders such services and furnishes such meals, she alone shall receive the recompense therefor and that it shall become her separate property, the common-law rights of the husband to his wife's services are abrogated and she may enforce the claim in her own name and right. *Briggs v. Devoe* (1903), 89 App. Div. 115, 84 N. Y. Supp. 1063.

The earnings of wife from services rendered to a third party, distinct from the common-law duties she owes her husband in the marital relation, belong to the wife, and she is entitled to recover therefor. *Stevens v. Cunningham* (1902), 181 N. Y. 454, 74 N. E. 434, revg. 75 App. Div. 125, 77 N. Y. Supp. 364; *Brooks v. Schwerin* (1873), 54 N. Y. 343.

Under this section a wife has the exclusive cause of action for the rendition of personal services and, in an action by her husband for services rendered by her on her own account as a nurse to one since deceased, her testimony as to transactions with the decedent is inadmissible under section 829 of the Code of Civil Procedure as that of a person "interested in the event." *Janz v. Schwender* (1916), 95 Misc. 142, 159 N. Y. Supp. 200.

Where a married woman makes a contract for her own personal services, and payment is to be made to her, it will be presumed, in the absence of proof to the contrary, that they were performed on her sole and separate account, and she is entitled to sue for and recover such earnings. *Rowe v. Comley* (1882), 11 Daly 317. The husband can forego his right to his wife's earnings, and unless done in fraud of creditors, the property she acquires with his knowledge and assent, whether in the household or outside, vests in her; this does not violate the rule that he is entitled to her services, and that no claim can be established against him by her. *Carver v. Wagner* (1900), 51 App. Div. 47, 64 N. Y. Supp. 747.

Where an attorney employs a woman as clerk for so long a time as he practices law, payment not to be made until he retires from practice, and the parties are subsequently married, the contract is merged; the husband, after that event, is entitled to her services and she cannot recover for such as are rendered during the period of the married relation—except as permitted by L. 1892, ch. 594; L. 1896, ch. 272. *Matter of Callister* (1897), 153 N. Y. 294, 47 N. E. 268.

Right of husband to services of wife.—The legislation in this state upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not by express provision nor by implication deprived the husband of his common-law right to avail himself of a profit or benefit from the services of his wife. *Porter v. Dunn* (1892), 131 N. Y. 314, 30 N. E. 122. When not engaged in separate business, services of wife belong to husband. *Reynolds v. Robinson* (1876), 64 N. Y. 589. See also *Coleman v. Burr* (1883), 93 N. Y. 17, 25, 45 Am. Rep. 160; *Whitaker v. Whitaker* (1873), 52 N. Y. 368, 11 Am. Rep. 711.

This section has reference to services which the wife may render for others, but does not give the wife a right of action against her husband for services rendered by her in the household. *Matter of Goff* (1909), 62 Misc. 510, 512, 116 N. Y. Supp. 650.

A contract by a husband to pay his wife for household services is void, as against his creditors, and property transferred to the wife in pursuance thereof, and purchased by the wife with the avails of such contract, may be reached by creditors. *Conger v. Corey* (1899), 39 App. Div. 241, 57 N. Y. Supp. 236.

A married woman cannot make a binding contract with her husband for her services having no connection with a separate business or estate, although to be rendered outside her household duties and although he cannot require her to perform such duties. *Blaechinska v. Howard Mission* (1892), 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215.

Where a husband and wife live and work together the presumption is that the services of the wife are performed in her relation of wife, and that the business is that of the husband. The wife may, however, engage in a business separate from that of her husband, and conduct such business on her own account and have the benefit of it. *Schlitz Brewing Co. v. Ester* (1895), 86 Hun 22, 33 N. Y. Supp. 143, affd. 157 N. Y. 714, 53 N. E. 1126; *Matter of Hamilton* (1902), 70 App. Div. 73, 75 N. Y. Supp. 66, affd. 172 N. Y. 652, 65 N. E. 1117; *Matter of Mallory* (1895), 13 Misc. 595, 35 N. Y. Supp. 155.

The common-law right of the husband to the earnings and services of his wife when not received or rendered expressly upon her sole and separate account, is not affected by section 51, and where the services are rendered by her while living

with her husband under a contract made by him, an action to recover therefor is properly brought in his name. *Holcomb v. Harris* (1901), 166 N. Y. 257, 59 N. E. 820. See under law as it existed prior to 1902, when the act from which this section was derived took effect. *Birkbeck v. Ackroyd* (1878), 74 N. Y. 356, 30 Am. Rep. 304; *Stokes v. Pease* (1894), 79 Hun 304, 29 N. Y. Supp. 430; *Adams v. Curtis* (1870), 4 Lans. 164; *Sheldon v. Button* (1875), 5 Hun 110; *Snow v. Cable* (1879), 19 Hun 280; *Robinson v. Raynor* (1864), 28 N. Y. 494; *Graf v. Feist* (1894), 9 Misc. 479, 30 N. Y. Supp. 241; *In re Kaufman* (1900), 104 Fed. 768; *Mason v. Libbey* (1879), 19 Hun 119; *Root v. Strang* (1894), 77 Hun 14, 28 N. Y. Supp. 273; *Stamp v. Franklin* (1891), 59 Hun 615 (mem.), 12 N. Y. Supp. 391; *Bowers v. Smith* (1889), 54 Hun 639 (mem.), 5 Silv. 107.

Prior to the amendment, made in 1902, to the Domestic Relations Law, giving a married woman a cause of action in her own and separate right for all wages for which she might render work, a husband could, where no rights of creditors were involved, forego his legal right to her earnings by expressly agreeing with her that they should belong to her and not to him, and when such an agreement is established she alone is entitled to recover for the services and he is estopped from making any claim to them. *Matter of Dailey* (1904), 43 Misc. 552, 89 N. Y. Supp. 538.

ARTICLE V.

THE CUSTODY AND WAGES OF CHILDREN.

Section 70. Habeas corpus for child detained by parent.

71. Habeas corpus for child detained by Shakers.

72. Payment of wages to minor; when valid.

§ 70. Habeas corpus for child detained by parent.—A husband or wife, being an inhabitant of this state, living in a state of separation, without being divorced, who has a minor child, may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 40; originally revised from R. S., pt. 2, ch. 8, tit. 2, §§ 1-3. Under the old Revised Statutes the wife alone could apply for the writ.

References.—Code provisions respecting procedure on applications for writs of *habeas corpus*, Code Civ. Pro. §§ 2015-2066.

Habeas corpus; nature and extent of remedy.—The only proceeding at common law to inquire into the custody of children is by *habeas corpus*, and where once begun it will not lose its character as such and must be carried on in conformity with the rules of practice governing procedure as to that writ. *People ex rel. Keator v. Moss* (1896), 6 App. Div. 414, 39 N. Y. Supp. 690. Where the wife has the custody of the children secured by *habeas corpus* the only remedy of the husband is by another proceeding of a like nature, whenever the condition of things should have changed, to again investigate as to the future custody of the children. *Simon v. Simon* (1896), 6 App. Div. 469, 39 N. Y. Supp. 573, *affd.* 159 N. Y. 549, 54 N. E. 1094.

The decision of a judge on *habeas corpus* relative to the custody of an infant

child is at most only conclusive in respect to facts and circumstances then existing and not as to such as arise afterwards. *People ex rel. Barry v. Mercein* (1842), 3 Hill 399, 38 Am. Dec. 644.

Application for the writ may be made without privity of the child. *People ex rel. Barry v. Mercein* (1842), 3 Hill 399, 38 Am. Dec. 644.

This section is not exclusive, or the only authority for the exercise of the power of the court over the custody and possession of minor children in whose proper training and education the state, as *parens patriae*, has an interest. *Matter of Stewart* (1912), 77 Misc. 524, 137 N. Y. Supp. 202.

The existence of the remedy under this section does not tend to show that the custody of children may be adjudged to a wife, in her action for separation, after she has failed in the very foundation thereof. *Davis v. Davis* (1878), 75 N. Y. 221, 228.

The statute is only permissive and does not give an absolute right to either parent. *In re Reynolds* (1889), 8 N. Y. Supp. 172, 28 N. Y. St. Rep. 538.

Separation; what constitutes.—It is not necessary that the wife's separation from her husband is one resultant from some arrangement placing the parties in such a situation recognized by law, and technically defined and established; nor is it necessary that a case be made, sufficiently strong to authorize a decree for some one of the causes mentioned in the statute relating to divorces. *People ex rel. Sternberger v. Sternberger* (1896), 12 App. Div. 398, 42 N. Y. Supp. 423.

But see *People v. —*, 19 Wend. 16, where it was held that the power could only be exercised in case of separation of husband and wife by judicial decree. See also *People ex rel. Rhoades v. Humphreys* (1857), 24 Barb. 521; *People ex rel. Barry v. Mercein* (1842), 3 Hill 399, 38 Am. Dec. 644; *People ex rel. Olmstead v. Olmstead* (1857), 27 Barb. 9. Where the mother is successful in a bill for a limited divorce the *prima facie* right to the custody is reversed, subject, however, to final disposition by the court. *Ahrenfeldt v. Ahrenfeldt* (1840), Hoffm. Ch. 497.

Jurisdiction of court.—The supreme court has jurisdiction to issue *habeas corpus* to inquire into the cause of a person's detention, notwithstanding that it appears in the petition that such person is not within the state, if it be shown that the respondent may have the power to produce such person. But if it appears affirmatively that it is physically impossible for the respondent to obey the writ, it will be vacated and the petitioner left to his remedy in another state, or to the criminal law. *People ex rel. Billotti v. New York Asylum* (1901), 57 App. Div. 383, 68 N. Y. Supp. 279, revg. 32 Misc. 74, 66 N. Y. Supp. 157.

Where a mother, unable to support her infant child, had it committed to an asylum for a period of two years, and upon the expiration of that time sues out a writ of *habeas corpus* to obtain custody of the child, and the corporation makes return stating that the child has been indentured to a person in Illinois and is without the state and without the custody or control of defendant, which latter fact is denied in the traverse, it is error for the court to make an order requiring the corporation to deliver the child to the custody of the relator without taking proof as to whether the corporation will be able to comply with the order. *People ex rel. Dunlap v. New York Asylum* (1901), 58 App. Div. 133, 68 N. Y. Supp. 656.

Where it appears that the child is not actually a resident of or within this state or not in the custody of a person who is a resident of this state, the court then has no jurisdiction to determine the question of the custody of such non-resident. *People ex rel. Winston v. Winston* (1898), 31 App. Div. 121, 52 N. Y. Supp. 814.

Where a mother, being the actual custodian of her child, after a divorce for abandonment, which made no disposition of the child, establishes a domicile in this state and maintains the same for four years, her civil status establishes that of the child and a foreign court has no power while she and the child are tem-

porarily in that state to regulate the relations between them upon *habeas corpus*. *People v. Dewey* (1898), 23 Misc. 267, 50 N. Y. Supp. 1013. The petition must allege that the petitioner is an inhabitant of the state of New York or it fails to confer jurisdiction. *Matter of Colebrook* (1899), 26 Misc. 139, 55 N. Y. Supp. 861.

The court cannot award the custody of the child to a party to the proceeding without the child being brought before the court and without an examination into the merits of the application, even though the person in whom the custody of the child was had failed to make a return and was in contempt. *People ex rel. Winston v. Winston* (1898), 31 App. Div. 121, 52 N. Y. Supp. 814.

County court has no jurisdiction; the supreme court and not a judge thereof is vested with the power. *People ex rel. Rhoades v. Humphreys* (1857), 24 Barb. 521; *People ex rel. Hoyle v. Osborne* (1884), 6 Civ. Pro. Rep. 299; *People ex rel. Williams v. Corey* (1887), 46 Hun 408. And the writ must not only be granted by but returnable before the supreme court. *People ex rel. Ward v. Ward* (1879), 59 How. Pr. 174; *People ex rel. Parr v. Parr* (1888), 49 Hun 473, 2 N. Y. Supp. 263; *affd.* 121 N. Y. 679, 24 N. E. 481.

An Indian woman, a ward of the United States, living on an Indian reservation, apart from her husband without a divorce, is entitled to maintain a proceeding under this section. *People v. Rubin* (1905), 98 N. Y. Supp. 787.

Father entitled to custody of child; forfeiture of right.—Where there is no substantial ground for a conclusion that a husband and wife, who have separated because unable to agree in their domestic relations, are not equally fit custodians of their five-year old son, so far as the matter depends upon their personal qualities, their moral standing and their ability financially to accord to the child all that its welfare would require, the father, by reason of his paramount right in law, is entitled to the custody of the child. *People ex rel. Sinclair v. Sinclair* (1905), 47 Misc. 230, 95 N. Y. Supp. 861. The law awards the custody to the father unless the welfare of the child demands an award to the mother. Where the infant is of tender years requiring the care and nurture of a mother, the custody may be awarded to her. *People ex rel. Sinclair v. Sinclair* (1904), 91 App. Div. 322, 86 N. Y. Supp. 539.

The father may forfeit his right by misconduct, and the right be transferred to the mother. *People v. Chegaray* (1836), 18 Wend. 637. The father in the absence of good and sufficient reasons, such as ill usage, grossly immoral principles or habits, want of ability, etc., is entitled to the custody, care and education of the children. *People v. —* (1837), 19 Wend. 16; *People ex rel. Byrne v. Brugman* (1896), 3 App. Div. 155, 38 N. Y. Supp. 193.

Where the mother sues out such a writ and thereafter abandons it, the children should be given back into the custody of the father, his being the *prima facie* right to them. *Matter of Viele* (1872), 44 How. Pr. 14.

The superior right of the father to the custody of the children is subject to the control of the court in two cases; first, where the father has forfeited the right by misconduct toward the child; second, where the father and mother are living apart under such circumstances as would warrant a divorce *a mensa et thoro*. *People ex rel. Olmstead v. Olmstead* (1857), 27 Barb. 9.

Where a wife secured a divorce from her husband in Oklahoma, and afterwards remarried in this state, and it was adjudged that the Oklahoma divorce was invalid, whereupon she ceased to live with her supposed second husband, it was held, in a proceeding brought by her for the custody of a child by the first marriage, that an order awarding her such child should be affirmed. *People ex rel. Winston v. Winston* (1901), 65 App. Div. 231, 72 N. Y. Supp. 456.

At common law a father had the superior right to the custody of his children and, although the rule may have been modified by the Domestic Relations Law,

said preference should prevail where the mother abandons the family without justification. But in all cases the welfare of the child is the primary consideration. *Ullman v. Ullman* (1912), 151 App. Div. 419, 135 N. Y. Supp. 1080.

The welfare of the child is the chief end in view in a proceeding under this section. *People ex rel. Duryee v. Duryee* (1907), 188 N. Y. 440, 446, 81 N. E. 313; *Matter of Tierney* (1908), 128 App. Div. 835, 112 N. Y. Supp. 1039; *People ex rel. Lawson v. Lawson* (1906), 111 App. Div. 473, 98 N. Y. Supp. 130; *People ex rel. Elder v. Elder* (1904), 98 App. Div. 244, 90 N. Y. Supp. 703.

The jurisdiction of the court is equitable in its character; and the welfare of the child is the chief object to be attained and must be the guide for the judgment of the court. *People ex rel. Pruyne v. Walts* (1890), 122 N. Y. 238, 25 N. E. 266. The one consideration is the welfare of the child, and the custody of the child will not be taken from one parent and given to another merely to punish one of the parents for a failure to comply with an order of the court. *People ex rel. Winston v. Winston* (1898), 31 App. Div. 121, 52 N. Y. Supp. 814.

Considerations affecting health and morals of child may justify the court in withholding its custody from its legal guardians. *Matter of Welch* (1878), 74 N. Y. 299; *People ex rel. Wehle v. Weissenback* (1875), 60 N. Y. 385; *Matter of Watson* (1882), 10 Abb. N. C. 215; *People ex rel. Rhoades v. Humphreys* (1857), 24 Barb. 521; *People ex rel. Barry v. Mercein* (1839), 8 Paige 47, *revid. on other grounds* 3 Hill 399, 38 Am. Dec. 644.

Irrespective of the validity of a testamentary provision made by a father appointing guardians of the person and property of his children where the mother survives, she will not be awarded custody if she be morally unfit. *People ex rel. Wright v. Gerow* (1910), 136 App. Div. 824, 121 N. Y. Supp. 652.

When on habeas corpus to determine the custody of children pending an action for divorce it is shown that the children are boys not of such tender years that the mother is essential to their daily living; that the mother is indiscreet, intemperate of speech and infirm of temper, and associates with men whose influence is bad, etc., while the father offers to such children a home in refined surroundings, their custody should be awarded to the father. *People ex rel. Lawson v. Lawson* (1906), 111 App. Div. 473, 98 N. Y. Supp. 130.

The real question in a controversy between a husband and wife who have separated over the care and custody of an infant child, is not what are the legal rights of the father and of the mother, but what are the rights of the child and what is required in respect to its custody for its own best interest. *Matter of Hartman* (1886), 23 Wk. Dig. 128; *Matter of Maurer* (1884), 18 Wk. Dig. 568; *Matter of Reynolds* (1889), 28 N. Y. St. Rep. 538, 8 N. Y. Supp. 172.

Where a father forces daughter into a distasteful marriage at the age of sixteen, and where such marriage was annulled, and of her own will she took up residence with a stranger, it was held that she would not be compelled upon *habeas corpus* proceedings to abandon her home of adoption and return to her father. *People ex rel. Oprandy v. Clarcia* (1900), 49 App. Div. 90, 63 N. Y. Supp. 497.

The child in question upon the death of its mother was left with her grandfather, the petitioner, who was abundantly able to take care of it; later its custody was given to its father, who took it to an orphan asylum almost immediately; the father was unmarried and had no female relatives and was boarding; held, that the interest of the child required that its custody be given to the petitioner. *Matter of Riemann* (1890), 31 N. Y. St. Rep. 13, 10 N. Y. Supp. 516.

As a general rule a father is entitled to the custody of his minor children; but when the parents live apart under a voluntary separation, and the father has left an infant child in the custody of its mother, such custody will not be transferred to the father by the process of *habeas corpus*, when the infant is of tender age, and

of a delicate and sickly habit, peculiarly requiring a mother's care and attention; and especially will not an order for such transfer be made where the qualifications of the father for the proper discharge of the parental office are not equal to those of the mother. *Mercein v. People ex rel. Barry* (1840), 25 Wend. 64.

It is not ability to provide physical comforts and care only that weighs in deciding such issue, but the moral surroundings of the children are to be considered. *People ex rel. Lawson v. Lawson* (1906), 111 App. Div. 473, 98 N. Y. Supp. 130.

Where the mother is a woman of refinement and education, who has time and the money to devote herself to the care of the child, and although the husband occupies a similar station in life, and is not unfitted by his habits, morals or associates to keep the child with him, it appears that he lives in the country, that he is absent in the city every day, and that he has no relatives living in the house to whom the boy can be intrusted during the day, the custody of the child will be awarded to the mother. *People ex rel. Elder v. Elder* (1904), 98 App. Div. 244, 90 N. Y. Supp. 703.

Habeas corpus by mother to obtain custody of minor child in the possession of the father's mother with the consent of both parents. Held on all the evidence that the child should not be taken from the grandmother. *In re Reynolds* (1889), 8 N. Y. Supp. 172, 28 N. Y. St. Rep. 538.

Right of husband to custody of children where wife leaves him without justification.—Where a wife, upon leaving her husband without justifiable cause, takes with her their two daughters aged respectively nine and fourteen years, and persistently refuses to return though her husband repeatedly requests he so to do, and it appears that both parents are equally fit custodians of the children, so far as their moral standing and affection are concerned, the husband, who had always supported his family comfortably and according to his means and station in life, will be awarded the custody of the children as against the wife who, having no means of her own, will be unable to care for and educate the children except through the charity of her relatives. *People ex rel. Snell v. Snell* (1912), 77 Misc. 538, 137 N. Y. Supp. 193.

Where by a prior decree it has been established that the mother of the child was not justified in abandoning her husband, and had not conducted herself as a dutiful wife and mother, and it appears that she is without means to support the child, who is now living with an aunt, etc., the father should be awarded custody. *Matter of Tierney* (1908), 128 App. Div. 835, 112 N. Y. Supp. 1039.

Proceeding by non-resident husband; foreign decree of divorce not a bar.—A foreign decree of absolute divorce awarding the custody of minor children to the defendant, their mother, is not a bar to a proceeding by the husband, who is a non-resident, to obtain the possession of the children who, with their mother, are residents of this state. *Matter of Stewart* (1912), 77 Misc. 524, 137 N. Y. Supp. 202.

Non-residence of child.—Where the court has gained jurisdiction of the custodian of a child and he can produce her, the fact that the child actually resides in another State does not preclude the court from ordering the custodian to produce her. *People ex rel. Ludden v. Winston* (1901), 34 Misc. 21, 69 N. Y. Supp. 452, *affd.* 61 App. Div. 614, 70 N. Y. Supp. 1146.

Practice on habeas corpus, brought pursuant to this section, should be governed by the usual rules. (See Code Civ. Pro. § 2031) *Matter of Mather* (1910), 140 App. Div. 478, 125 N. Y. Supp. 483.

An adjudication of a court of record or of an officer having authority to act in the matter on the question of the custody of an infant child brought up on *habeas corpus*, may be pleaded as *res adjudicata*, and is conclusive upon the same parties in all future controversies relating to the same matter, and upon the same state of facts. *Mercein v. People ex rel. Barry* (1840), 25 Wend. 64.

An order, awarding to the mother the custody of two minor children is not

conclusive upon the father in a second habeas corpus proceeding by the mother to obtain the custody of another child, where it does not appear that the father opposed it or that there was an adjudication as to his character or conduct. *Matter of Reynolds* (1889), 8 N. Y. Supp. 172, 28 N. Y. St. Rep. 538.

Scope of inquiry.—Inquiry as to brutal conduct of the husband toward the wife bears upon the question as to who should have the custody of the children. *Matter of Pray* (1881), 60 How. Pr. 194. A full disclosure of all the facts and circumstances in relation to the ability of both parents will be required before allowing the writ to bring the children into court. *People ex rel. Manley v. Manley* (1846), 2 How. Pr. 61.

Discretionary with court.—The statute does not declare on what grounds the court shall proceed, but confides the whole matter to its discretion. *People ex rel. Brooks v. Brooks* (1861), 35 Barb. 85, 89; *People ex rel. Manley v. Manley* (1846), 2 How. Pr. 61. The court is bound to set the child free from restraint of an indenture, but it is discretionary as to whom the child shall be delivered. *Matter of McDowle* (1811), 8 Johns. 328; *Matter of Waldron* (1816), 13 Johns. 418; *People ex rel. Barry v. Mercein* (1839), 8 Paige 47, revd. 3 Hill 399, 38 Am. Dec. 644; *People ex rel. Olmstead v. Olmstead* (1857), 27 Barb. 9.

Costs.—Proceedings on *habeas corpus* are special proceedings and costs are allowable in the discretion of the court. *Matter of Barnett* (1877), 11 Hun 468; 53 How. Pr. 247.

A non-resident relator suing out a writ of *habeas corpus* for the custody of his child, cannot be required to give security for the costs. *People ex rel. James v. Soc. for Prevention of Cruelty to Children* (1897), 19 Misc. 677, 44 N. Y. Supp. 1100.

Commitment of children; review.—Where an infant has been committed to a house of industry, the court cannot review such commitment when made by a competent tribunal upon returns to writ of *habeas corpus and certiorari*, the remedy being by appeal taken under section 749 of the Code of Criminal Procedure. *People ex rel. Stern v. New York Society, etc.* (1889), 27 Misc. 457, 58 N. Y. Supp. 118.

A proceeding for the commitment of destitute children, under section 486 of Penal Law, is not a criminal proceeding. The child committed under such section may be restored to its parents by virtue of the general chancery jurisdiction where the parents have reformed and are able to care for the child, even without the consent of the institution. The chancery powers of the court in this respect seem only to be limited by the necessities of the case, having due regard for the welfare of the child. The same rules exist as to the discharge of children from custody under the Poor Law. *Matter of Knowack* (1899), 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699.

Section cited.—*People ex rel. Armstrong v. Quigley* (1912), 75 Misc. 151, 156, 134 N. Y. Supp. 953; *People v. Workman* (1916), 94 Misc. 374, 376, 157 N. Y. Supp. 594.

§ 71. **Habeas corpus for child detained by Shakers.**—If it shall appear on such application, or the return of the writ, that the husband or wife of the applicant has become attached to the society of Shakers, and detains a child of the marriage among them, and that such child is secreted or concealed among them, the court may issue a warrant in aid of such writ of habeas corpus, directed to the sheriff of the county where the child is suspected to be, commanding such sheriff, in the day time, to search the dwelling-houses and other buildings of such society, or of any members thereof, or any other building specified in the warrant, for such child, and to bring

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him before the court, and the sheriff must forthwith execute such warrant.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 41; originally revised from R. S., pt. 2, ch. 8, tit. 2, §§ 4-6.

§ 72. **Payment of wages to minor; when valid.**—Where a minor is in the employment of a person other than his parent or guardian, payment to such minor of his wages is valid, unless such parent or guardian notify the employer in writing, within thirty days after the commencement of such service, that such wages are claimed by such parent or guardian, but whenever such notice is given at any time payments to the minor shall not be valid for services rendered thereafter.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 42; originally revised from L. 1850, ch. 266. The words "in writing" and "but whenever such notice is given at any time, payments to the minor shall not be valid for services rendered thereafter" were new in the Revision of 1896.

Notice to employer.—Under the terms of this statute title to wages earned by a minor under a contract of service, unless notice is given within thirty days by the parent, vests, *as between the employer and the employee*, in the employee, and the parent or guardian can thereafter by notice obtain title only to those wages earned thereafter. *Langer v. Kaufman* (1916), 94 Misc. 216, 157 N. Y. Supp. 825.

The act contemplates the protection of the employer and does not intend to deprive the parent of the wages or services of his child. The only effect of the thirty days' limitation is to defeat the effect of payment before the thirty days, in case notice was served in that time. Subsequent notice would enable the parent to collect the infant's future earnings, but would not affect prior payments. *McClurg v. McKercher* (1890), 56 Hun 305, 9 N. Y. Supp. 572. Person collecting money from employer of minor, or order given to him for a debt due from the minor, is not liable in an action brought by the father, unless notice was given as provided by statute. *Herrick v. Fritcher* (1867), 47 Barb. 589.

Section cited as to notice of claim for services of child required to be given by parent. *Doyle v. Carney* (1907), 190 N. Y. 386, 83 N. E. 37, revg. 115 App. Div. 921, 101 N. Y. Supp. 1119.

Emancipation.—A parent may emancipate an infant child and confer a right upon it to acquire property and possess it as against all persons whatsoever, and hence may contract with such minor to pay him for services rendered to the parent. *Stanley v. Nat'l Union Bank* (1889), 115 N. Y. 122, 22 N. E. 29 *Burlingame v. Burlingame* (1827), 7 Cow. 92.

The father can waive his right to his child's earnings by emancipation of consent, and these may be inferred from circumstances; in the absence of notice, payment to the minor is valid and his title to the money is valid. *Watson v. Kemp* (1899), 42 App. Div. 372, 59 N. Y. Supp. 142.

And where a child has become emancipated by his father's consent he becomes entitled to receive the fruits of his labor for his own use. The intent of the father to emancipate the child is a question of fact and may be inferred from circumstances. *Canovar v. Cooper* (1848), 3 Barb. 115; *McCoy v. Huffman* (1827), 8 Cow. 84; *Shute v. Dorr* (1830), 5 Wend. 204. The law will sometimes imply an emancipation from parental control as when the father compels or consents that his minor child shall go abroad and earn his own livelihood or neglects to support him. *Lind v. Sullestadt* (1880), 21 Hun 364.

A mother after the death of the children's father is entitled to their custody and control, but she may effectually part with this right by contract. *Lind v. Sullestadt* (1880), 21 Hun 364.

Assent of father to contract for services of minor is implied if father makes no objection. *Armstrong v. McDonald* (1851), 10 Barb. 300.

Action by parent for services of child.—Where there is no agreement, either expressed or implied, that payment be made to the child, the parent alone is entitled to the earnings and the action must be brought in his name; and although a parol agreement between the parent and a third party be void under the statute of frauds, yet the plaintiff has a right to recover upon a *quantum meruit* for the services actually rendered by his son without reference to any agreement. *Shute v. Dorr* (1830), 5 Wend. 204.

Action for negligence.—Where the father of an infant has consented that he have his own wages, he may recover for loss thereof by reason of negligence. If he is not emancipated he cannot recover for loss of wages. *Lieberman v. Third Ave. R. R. Co.* (1899), 25 Misc. 704, 55 N. Y. Supp. 677.

ARTICLE VI.

GUARDIANS.

Section 80. Guardians in socage.

81. Appointment of guardians by parent.
82. Powers and duties of such guardians.
83. Duties and liabilities of all general guardians.
84. Guardianship of married woman.
85. Investment of trust funds by guardian.
86. Guardianship of indigent children by incorporated orphan asylums.
87. Record of children to be kept by orphan asylums.
88. Care and custody of poor children in institutions.

§ 80. **Guardians in socage.**—Where a minor for whom a general guardian of the property has not been appointed shall acquire real property, the guardianship of his property with the rights, powers and duties of a guardian in socage belongs:

1. To the father;
2. If there be no father, to the mother;
3. If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred.

The rights and authority of every such guardian shall be superseded by a testamentary or other guardian appointed in pursuance of this article.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 50; originally revised from R. S., pt. 2, ch. 1, tit. 1, §§ 5-7. The words "for whom a general guardian of the property had not been appointed," were inserted by the Revision of 1896.

References.—As to appointment of general guardians, Code Civil Procedure (Surrogates' Code) §§ 2642-2653. Trust company may act as guardian, Banking Law, § 188. Use of force by guardian, when not unlawful, Penal Law, § 246.

Application and effect.—Where an infant has no real property there is no guardian in socage, and, therefore, this section is not applicable. Whatever the effect of this section may be on the rights of the father and mother *inter se* to be appointed guardians it does not take away the power of the surrogate to appoint guardians in the best interest of the infant. *Matter of Wagner* (1912), 75 Misc. 419, 427, 135 N. Y. Supp. 678.

Under this section in regard to real estate, if there be no general guardian of infants the mother becomes the general guardian. *Matter of Woodcock v. Walker* (1915), 170 App. Div. 4, 155 N. Y. Supp. 702.

A widow may be regarded as the guardian in socage of her minor children. *Foster v. Foster* (1911), 71 Misc. 263, 129 N. Y. Supp. 1108.

History of guardianship in socage.—*Foley et al. v. Mutual Life Ins. Co.* (1893), 138 N. Y. 333, 339.

Common-law guardians in socage continued until the ward was 14 years of age and then ended; and could only be relatives to whom the ward's lands could not descend. *Byrne v. Van Hoesen* (1809), 5 Johns. 66; *Jackson v. Combs* (1827), 7 Cow. 36. Previous to Revised Statutes the father could not be guardian in socage. *Fonda v. Van Horne* (1836), 15 Wend. 631, 30 Am. Dec. 77.

At common law a guardian in socage has no right to surrender a lease in fee belonging to her wards; neither can she lease their freehold estate for a longer period than during the probable continuance of such guardianship. *Putnam v. Ritchie* (1837), 6 Paige 390.

Powers of guardian in socage.—The father of an infant son who owns real estate as a tenant in common may receive rent due to the infant as his guardian in socage under this section. *Anderson v. Dodge* (1913), 158 App. Div. 201, 143 N. Y. Supp. 132.

The guardian in socage has the custody of the infant's real property and is entitled to receive its rents and profits, lease it and recover the rent in her own name, and otherwise exercise control over such property. *Gallagher v. Stevenson Brewing Co.* (1895), 13 Misc. 40, 34 N. Y. Supp. 94. A guardian in socage may lease the lands of his wards until they become 14 years of age or another guardian is duly appointed. *Emerson v. Spicer* (1871), 46 N. Y. 594, affg. 55 Barb. 428, 38 How. Pr. 114. A lease made by a guardian in socage will bind the infant as effectually as if made in the infant's name. *Thacker v. Henderson* (1862), 63 Barb. 271.

Guardian in socage has right to possession of real estate of ward, and with it the duty to obtain possession, if it be wrongfully withheld. *Matter of Hynes* (1887), 105 N. Y. 560, 12 N. E. 60.

The mother of infants, who is their guardian in socage, may, for the protection of their common interests, or for her own protection alone, purchase upon foreclosure real estate in which they have interests, and in which she has dower rights, and may take a deed therefor in her own name, and convey a good title to subsequent grantee. *Boyer v. East* (1900), 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290.

A savings bank is not protected in paying money to the father of an infant who is not her general or testamentary guardian, even though he produces the bank-book at the time of payment. *Ficken v. Emigrants' Industrial Savings Bank* (1900), 33 Misc. 92, 67 N. Y. Supp. 143.

A guardian in socage of an infant cannot impose an obligation upon her real estate, and, therefore, when he of his own motion invests his own money in the improvement of such property, his judgment creditor cannot reach the money so invested. *Hickey v. Dixon* (1903), 42 Misc. 4, 85 N. Y. Supp. 551.

A guardian in socage has no power to surrender a policy of insurance belonging to his ward; the duties of such guardian relate solely to the care, custody and protection of the real property. *Foley v. Mutual Life Ins. Co.* (1893), 138 N. Y. 333, 34 N. E. 211, 20 L. R. A. 620, 34 Am. St. Rep. 456, affg. 64 Hun 63, 18 N. Y. Supp. 615. See also *Peters v. Tallchief* (1907), 121 App. Div. 309, 106 N. Y. Supp. 64; *Foley v. Mutual Life Ins. Co.* (1892), 64 Hun 63, 18 N. Y. Supp. 615. A guardian in socage has no power to commit waste by cutting and removing timber from the land nor can he assent to the committing of such waste. *Torry v. Black* (1874),

58 N. Y. 185. A guardian in socage is superseded by the appointment of a guardian by the surrogate. *Holley v. Chamberlain* (1860), 1 Redf. 333.

Where a man owning real property situated in the State of New York dies intestate, leaving surviving him a wife and two children, one of whom is a minor, the wife, if she is not possessed of sufficient means to support and educate the minor child, may, as the guardian in socage of such minor child, use so much of the infant's property as is necessary for that purpose, but, before doing so, she should obtain permission from the court. Where the minor, after attaining his majority, brings an action for the partition of the property and for an accounting by the widow of the rents and profits thereof, the failure of the widow to obtain permission from the court, before applying the rents and profits of the real estate to the support and education of the minor child, will not prevent her from interposing a counterclaim for the amount thus expended. Such a counterclaim is, however, demurrable unless it alleges that the money which was expended was derived from the real estate sought to be partitioned. *Williams v. Clarke* (1903), 82 App. Div. 199, 81 N. Y. Supp. 381.

A mother as guardian in socage may enforce the rights of infant children in an action for ejectment. *Cagger v. Lansing* (1876), 64 N. Y. 417.

Actions in name of infant.—The better practice in bringing an action, designed for the protection of the property of an infant, or for its recovery, is to bring the action in the name of the infant, represented by a guardian appointed for the purposes of the particular action. *Carr v. Huff* (1890), 57 Hun 18, 10 N. Y. Supp. 361. And see also *Perkins v. Stimmel* (1889), 114 N. Y. 359, 21 N. E. 729, 11 Am. St. Rep. 659; *Coakley v. Mahar* (1885), 36 Hun 157; *Bayer v. Phillips* (1886), 17 Abb. N. C. 425; *Weiler v. Nembach* (1889), 114 N. Y. 36, 20 N. E. 623.

If during minority of the heirs the relation of landlord and tenant exists in respect to their lands it must be between the guardian in socage and the tenant, and an action to recover rents must be brought by such guardian and not by the heirs. *Sylvester v. Ralston* (1859), 31 Barb. 286; *Seaton v. Davis* (1873), 1 T. & C. 91; *Koke v. Balken* (1893), 73 Hun 145, 25 N. Y. Supp. 1038, *affd.* 148 N. Y. 732, 42 N. E. 724; *Beecher v. Crouse* (1838), 19 Wend. 306.

A guardian in socage could maintain actions for injuries to the real and personal estate of his ward. *Torry v. Black* (1874), 58 N. Y. 185; *Jackson v. DeWalt* (1810), 7 Johns. 157; and for ejectment, *Holmes v. Seely* (1837), 17 Wend. 75; *Byrne v. Van Hoesen* (1809), 5 Johns. 66. Guardian in socage may sue for claims covering the real estate of his ward, but cannot sue to recover his personal property. *Thomas v. Bennett* (1868), 56 Barb. 197.

§ 81. **Appointment of guardians by parent.**—A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority or for any less time, to any person or persons. Either the father or mother may in the life-time of them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority. A person appointed guardian in pursuance of this section shall not exercise the power or authority thereof unless such will is admitted to probate, or such

deed executed and recorded as provided by section twenty-eight hundred and fifty-one of the code of civil procedure.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 51, as amended by L. 1899, ch. 159; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 1, as amended by L. 1893, ch. 175; L. 1871, ch. 32, as amended by L. 1888, ch. 454.

References.—As to the appointment, qualification, letters, security, accounts and resignation of testamentary guardians, Code Civil Procedure (Surrogates' Code), §§ 2657-2663. Direction as to infant's maintenance by surrogate Id. § 2664.

Application.—This section does not apply after the divorce of the parents. *Matter of Wagner* (1912), 75 Misc. 419, 135 N. Y. Supp. 678.

The words "custody and tuition," as used in this section, include guardianship of the estate as well as of the person, and were intended to embrace both. *Matter of Zwickert* (1893), 5 Misc. 272, 26 N. Y. Supp. 773.

Disposition by father of custody and tuition of infant children is valid and effectual against every other person claiming the custody or tuition of such infants as guardian in socage or otherwise. *People ex rel. Brooklyn Industrial School and Home for Destitute Children v. Kearney* (1860), 19 How. Pr. 493.

Object and effect.—Since the enactment of this section a guardian of a child cannot be appointed on the father's petition without notice to the mother. *Matter of Drowne* (1907), 56 Misc. 417, 107 N. Y. Supp. 1029. The husband cannot lawfully give the custody of his children to a third person without the consent of his wife. *People ex rel. Beaudoin v. Beaudoin* (1908), 126 App. Div. 505, 110 N. Y. Supp. 592, *affd.* 193 N. Y. 611, 86 N. E. 1129.

Prior to the amendment of 1899 (ch. 159), father could not appoint the mother as testamentary guardian of his children. *Matter of Alexandre* (1895), 70 N. Y. St. Rep. 431, 35 N. Y. Supp. 658. Only surviving husband could formerly appoint. *Matter of Schmidt* (1894), 77 Hun 201, 28 N. Y. Supp. 350; *Matter of Howard* (1893), 5 Misc. 293, 25 N. Y. Supp. 832. Mother may designate. *Matter of Welsh* (1900), 50 App. Div. 189, 63 N. Y. Supp. 737. The law now places father and mother upon strict legal equality. *Corey v. Bolton* (1900), 31 Misc. 138, 142, 63 N. Y. Supp. 915. See also *Matter of Brigg* (1899), 39 App. Div. 485, 57 N. Y. Supp. 390, *affd.* 165 N. Y. 673, 59 N. E. 1119; *Fitzgerald v. Fitzgerald* (1881), 24 Hun 370, 61 How. Pr. 90; *Matter of Murphy* (1856), 12 How. Pr. 513.

L. 1893, ch. 175, repealing the authority of the father of an infant to appoint a testamentary guardian during the lifetime of the mother, operates to prevent her appointment. *Matter of Alexandre* (1895), 25 Civ. Pro. 42.

Common-law rule changed.—At common law the father had the legal right to control his minor child and was entitled to its custody to the exclusion of its mother. This rule has been modified by the statutes, 2 R. S., 150, § 1, and Laws of 1871, ch. 32; Laws of 1888, ch. 454; Laws of 1893, ch. 175, so that now the right of the surviving husband or wife to the custody of the children cannot be affected by any testamentary disposition by the decedent. *People ex rel. Byrne v. Brugman* (1896), 3 App. Div. 155, 38 N. Y. Supp. 193.

Rights of mother as guardian.—Mother and father are now equal in their rights of guardianship over their child, and therefore the mother is not confronted now, as heretofore, with the common-law preference for the father. Where it appears that the mother is well fitted to care for the child, its guardianship will not be given to the father, who is equally well fitted, but whose business requires him to be away from his place of residence every day. *People ex rel. Elder v. Elder* (1904), 98 App. Div. 244, 90 N. Y. Supp. 703.

"The right of a mother to the guardianship, custody and control of the children is plainly recognized as being equal to that of the father." *Osterhondt v. Oster-*

hondt (1900), 48 App. Div. 74, 78, 62 N. Y. Supp. 529, appeal dismissed 168 N. Y. 358, 61 N. E. 285.

"It is the law of this state that a married mother is entitled to the custody, control, care and management of her children to the same extent and degree as the father in the absence of an adjudication awarding such custody to another." *People v. Workman* (1916), 94 Misc. 374, 157 N. Y. Supp. 594.

The mother of an infant is not its "guardian" within the meaning of section 2746 of the Code of Civil Procedure and is not a person authorized to receive payment of the distributive share to which it is entitled upon the accounting of its father's estate. *Matter of Schuler* (1905), 46 Misc. 373, 94 N. Y. Supp. 1063.

A wife, while living in a state of voluntary separation from her husband, has no rights in respect to the care and custody of her children, under L. 1860, ch. 90, § 9. *People ex rel. Brooks v. Brooks* (1861), 35 Barb. 85.

Appointment of a guardian by will is authorized by this section, and a will to that end only is not dispositive, yet it is probative. Whether the appointment is or is not effective is *dehors* the instrument, and should not be considered on the probate. *Matter of Meyer* (1911), 72 Misc. 566, 572, 131 N. Y. Supp. 27.

The statute is exclusive and controlling as to who may be "statutory" or testamentary guardians. While an attempt to appoint a person guardian of property given to an infant by the last will and testament of one not his parent is imperative as an appointment of a guardian, it gives to such person the same power he would have possessed over the property had he been a duly appointed guardian or trustee of a power. *Matter of Scoville* (1911), 72 Misc. 310, 131 N. Y. Supp. 205.

The question of the validity of a clause in the will of a married woman appointing a guardian for her infant son other than the father does not affect the proceeding for the probate of the will, but said clause is void during the life of the father. *Matter of Walker* (1907), 54 Misc. 177, 105 N. Y. Supp. 890.

Testator by his will appointed two persons to be the guardians of his three infant children and three others to be the joint guardians of the estate of each of said children, and directed that all funds and securities belonging to each of said children should be received, held and paid out by them jointly as such guardians. It was held that the attempted appointments were without authority of law. *Matter of Burdick* (1905), 47 Misc. 28, 95 N. Y. Supp. 206.

Appointment by deed.—The power to appoint by deed is construed as meaning a testamentary instrument in the form of a deed, to operate only after the death of the parent. *Wuesthoff v. Germania Life Ins. Co.* (1888), 107 N. Y. 580, 14 N. E. 811.

Right to appoint by will statutory.—The right to appoint a testamentary guardian is statutory, and as such is within the power of the legislature to regulate not only the power of appointment, but to limit the authority of the guardian and prescribe the conditions under which it may be exercised. *Wuesthoff v. Germania Life Ins. Co.* (1888), 107 N. Y. 580, 14 N. E. 811. Appointment of a testamentary guardian by the will of the mother operates to prevent appointment of a guardian on the petition of the infant. *Matter of Reynolds* (1877), 11 Hun 41.

The grandfather has no right to appoint by will a guardian to his grandchild, but he may give his estate on what conditions he pleases, and if the father does not submit to the will it may work a forfeiture of his son's inheritance. *Fullerton v. Jackson* (1821), 5 Johns. Ch. 278.

A grandfather has no power to appoint a guardian for his grandchildren by last will. *Post v. Hover* (1865), 33 N. Y. 593, 600.

A grandmother may not appoint a testamentary guardian of her infant grandchildren who are her devisees or legatees. *Matter of Scoville* (1911), 72 Misc. 310, 131 N. Y. Supp. 205.

Appointment of testamentary guardian to exclusion of mother.—Under ch. 175 of

1893 a father has no power while the mother is living to appoint by will a guardian of his infant children; nor will her subsequent assent validate such attempted appointment. *Matter of Schmidt* (1894), 77 Hun 201, 28 N. Y. Supp. 350.

While the testamentary appointment of a guardian to the exclusion of a mother is void, a direction that "all funds in security belonging to each of my children shall be received, held and paid out by them jointly as such guardians" is effective. *Matter of Kellogg* (1907), 187 N. Y. 355, 80 N. E. 207, 13 L. R. A. (N. S.) 288, revg. 110 App. Div. 472, 96 N. Y. Supp. 965 (1906).

The guardianship of the wife is not limited to coverture, but survives to the wife on the death of the husband, and her rights are not superseded by the pretended appointment of a testamentary guardian by the deceased husband. *People ex rel. Boice* (1862), 39 Barb. 307.

A testamentary guardian will be given custody of children of tender years in preference to their mother when it is shown that an habitual laxity of conduct on her part, indifference to conventionalities and looseness of morals indicate not only a disinclination for the duties of motherhood, but also an inherent moral unfitness to discharge them. *People ex rel. Wright v. Gerow* (1910), 136 App. Div. 824, 121 N. Y. Supp. 652.

Where a husband obtains a decree annulling his marriage upon the ground that his wife was a lunatic at the time the marriage was contracted, and further declaring that a child of the marriage is the legitimate child of the husband who is awarded custody, he may appoint a guardian of his child by last will and testament, although the mother of the infant is still living. *Matter of Tombo* (1914), 164 App. Div. 392, 149 N. Y. Supp. 688.

Appointment by surviving parent.—It is a surviving parent only who may appoint a testamentary guardian, except that each may, in the lifetime of both, appoint by will the other as such guardian. Where the father is living, letters of testamentary guardianship will be denied to a guardian appointed by the will of a married woman to whom the care and custody of her children was awarded in an action for divorce. *Matter of Waring* (1905), 46 Misc. 222, 94 N. Y. Supp. 82.

Where upon the probate of the will of a widower leaving him surviving as his sole heir at law and next of kin an infant daughter, letters of testamentary guardianship were duly issued to testator's brother and sister, and it is not shown that the child is not being well and properly cared for in her present relations, the petition of her maternal grandmother, in which her husband joins, for the revocation of said letters, on the ground that the infant had not been provided with any permanent home, will be denied in the absence of any sufficient reason. *Matter of Pearce* (1912), 77 Misc. 415, 137 N. Y. Supp. 755.

The management and control of both the person and estate of an infant are by law in the surviving parent and may not be taken away except by the most controlling and preponderating evidence of unfitness. *Matter of Burdick* (1905), 47 Misc. 28, 95 N. Y. Supp. 206.

Appointment of general guardian by surrogate.—It is unusual for the surrogate to appoint a general guardian for an infant having a father, yet it is sometimes done; and then the guardian succeeds to the rights and duties of the father and is entitled to the custody of the child and it is his duty to provide for its support and education. *Clark v. Montgomery* (1856), 23 Barb 464, 472. Appointment by will or deed will not be defeated by a surrogate's appointment. *People ex rel. Brooklyn Industrial School v. Kearney* (1860), 31 Barb. 430, 19 How. Pr. 493 (1860).

The supreme court under its equity powers may, in a proper case, having regard for the welfare of an infant, take its custody from the one legally entitled thereto and give it to another. *People ex rel. Beaudoin v. Beaudoin* (1908), 126 App. Div. 505, 110 N. Y. Supp. 592, *affd.* 193 N. Y. 611, 86 N. E. 1129.

Commitment of children to charitable association by father subject to the provisions contained in the act incorporating the said association held to be valid and effectual. *People ex rel. Brooklyn Industrial School and Home for Destitute Children v. Kearney* 1860), 19 How. Pr. 493.

Section cited.—*Matter of Lichtenstadter* (1886), 5 Dem. 214; *Dwyer v. Corrugated Paper Products Co.* (1913), 80 Misc. 412, 141 N. Y. Supp. 240.

§ 82. Powers and duties of such guardians.—Every such disposition, from the time it takes effect, shall vest in the person to whom made, if he accepts the appointment, all the rights and powers, and subject him to all the duties and obligations of a guardian of such minor, and shall be valid and effectual against every other person claiming the custody and tuition of such minor, as guardian in socage or otherwise. He may take the custody and charge of the tuition of such minor, and may maintain all proper actions for the wrongful taking or detention of the minor, and shall recover damages in such actions for the benefit of his ward. He shall also take the custody and management of the personal estate of such minor and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian in socage might by law.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 52; originally revised from R. S., pt. 2, ch. 8, tit. 3, §§ 2, 3. The words "if he accepts the appointment" were new in the Revision of 1896.

Custody of ward.—The right of a testamentary guardian to the custody of his ward is no greater than that of the father, and the court will not, unless it is for the welfare of the child, interfere with the custody of the person to whom it was committed by the mother. *People ex rel. Pruyn v. Walts* (1890), 122 N. Y. 238, 25 N. E. 266. See also *Gelston v. Shields* (1878), 16 Hun 143, *affd.* 78 N. Y. 275.

Considerations affecting the health and welfare of a child may justify a court in withholding the custody of it temporarily even from its legal guardians; and they are so purely matters of discretion with the court of original jurisdiction that this court will not review the conclusions thereon, unless some manifest error or abuse of discretion is made to appear. *Matter of Welch* (1878), 74 N. Y. 299.

Custody of property.—The power of a testamentary guardian, when not restricted, extends to the control of the person of the ward, and the custody and management of her real and personal property. *Wuesthoff v. Germania Life Ins. Co.* (1888), 107 N. Y. 580, 14 N. E. 811. A guardian cannot, without the authority of the court, erect a house on the minor's land and charge the expense upon the ward; hence he cannot subject the land to a lien for such building. *Copley v. O'Neil* (1869), 57 Barb. 299, 39 How. Pr. 41.

Actions by guardians.—This section does not supersede the practice of maintaining actions by a guardian *ad litem*. *Carr v. Huff* (1890), 57 Hun 18, 10 N. Y. Supp. 361.

The legislature intended to confer the same right upon the general guardian to sue in relation to any of the property under his control, that the guardian in socage possessed in reference to the property of which he had charge, and would have more clearly expressed its intention if it had added at the end of the last sentence the words "in regard to the real estate." *Thomas v. Bennett* (1868), 56 Barb. 197, 199.

At common law a testamentary or general guardian has power to settle and compromise claims on behalf of his ward. *Dwyer v. Corrugated Paper Products Co.* (1913), 80 Misc. 412, 141 N. Y. Supp. 240.

Section cited.—*Matter of Brigg* (1899), 39 App. Div. 485, 57 N. Y. Supp. 390, *affd.* 165 N. Y. 673, 59 N. E. 1119.

§ 83. **Duties and liabilities of all general guardians.**—A general guardian or guardian in socage shall safely keep the property of his ward that shall come into his custody, and shall not make or suffer any waste, sale or destruction of such property or inheritance, but shall keep in repair and maintain the houses, gardens and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his possession; and shall deliver the same to his ward, when he comes to full age, in at least as good condition as such guardian received the same, inevitable decay and injury only excepted; and shall answer to his ward for the issues and profits of the real estate, received by him, by a lawful account, to be settled before any court, judge or surrogate having authority to settle the accounts of general and testamentary guardians; and any order, judgment or decree in any action or proceeding to settle such accounts may be enforced to the same extent, and in like manner as in the case of general and testamentary guardians. If any guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward, he shall lose the custody of the same, and of such ward, and shall forfeit to the ward treble damages.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 53, as amended by L. 1903, ch. 369; originally revised from R. S., pt. 2, ch. 8, tit. 3, §§ 20, 51.

References.—As to powers, duties and liabilities of guardians appointed by the court, Code Civ. Pro. §§ 2642-2664.

Allowance for support of ward.—Allowance should be made to the guardian for boarding, clothing and schooling his wards while they lived with their father under contract between them. *Clark v. Montgomery* (1856), 23 Barb. 464. Guardian should be allowed in the settlement of his account the value of board and necessities furnished the ward even though this be furnished within his own family. *Le Prohon v. Becker* (1880), 9 Wk. 482.

An allowance may be made to a guardian for necessities furnished by him to the infant, before the issue of letters of guardianship. *In re Bangs* (1885), 22 Wk. Dig. 160; *Matter of Miller* (1884), 34 Hun 267.

When the ward boards in the family of the guardian and performs services, a claim for service should be allowed as an offset against charge for board. *Matter of Clark* (1885), 36 Hun 301. It is a breach of duty for guardian to permit ward to live in idleness if he is able to earn his support. *Clark v. Clark* (1840), 8 Paige 152, 35 Am. Dec. 676.

Advances made by a guardian to his ward to furnish a house will be allowed to the guardian upon accounting, where the ward affirms the transaction upon her majority. *Matter of Plumb* (1898), 24 Misc. 249, 53 N. Y. Supp. 558.

By the terms of a will, the guardian and executor were to apply the rents, and if necessary, the proceeds of the realty, to the support of an infant; the guardian, in the discharge of this duty, contracted with another for the infant's support, the executor consenting thereto; it was held that such person must look to the guardian only for payment. *Nethercott v. Kelly* (1889), 57 Super. (25 J. & S.) 27, 5 N. Y. Supp. 259.

It is the duty of the general guardian of an infant to provide for the support, maintenance and education of the infant out of his estate, notwithstanding the infant has a father living; provided the father is poor and unable to support him. *Clark v. Montgomery* (1856), 23 Barb. 464.

The petition by a mother of an infant for an order directing the guardian of the estate of the infant to pay over to her a certain sum for past and future maintenance may be granted where the guardian joins in the request. In re *Ogg's Estate* (1888), 4 N. Y. Supp. 341, 1 Connolly 10, 20 N. Y. St. Rep. 867.

A guardian in socage, if not possessed of sufficient means to support and educate a minor child, may use so much of the infant's property as is necessary for such purpose. *Williams v. Clarke* (1903), 82 App. Div. 199, 81 N. Y. Supp. 381.

Where father is guardian.—Where by a decree a former guardian was directed to pay the entire net income of a trust estate to his ward's father, to be used by him for support, and where the father was subsequently appointed guardian, he is entitled to the protection of the former decree upon his accounting and should not be held to the same strictness in furnishing vouchers for his payments as is ordinarily required of guardians. *Matter of Plumb* (1898), 24 Misc. 249, 53 N. Y. Supp. 558.

If the parent be also the guardian of a minor having an estate of his own, then the circumstances of the parent as well as the amount of property of the ward may be taken into consideration in determining the degree of liability of the parent for the child's support. *Voëssing v. Voëssing* (1880), 4 Redf. 360; *Matter of Wilber* (1899), 27 Misc. 53, 57 N. Y. Supp. 942.

A parent is bound to furnish his children with necessaries, and if he fail to do so, a third person may supply them, in accordance with child's station in life, and charge the parent therefor. *Van Valkinburgh v. Watson* (1816), 13 Johns. 480, 7 Am. Dec. 395. The court will not direct an allowance to the father of infants out of their estate where he is of sufficient ability to bring them up without it. *Matter of Kane* (1847), 2 Barb. Ch. 375.

Where the relation of parent and child exists between guardian and ward, no charge for maintenance can be made by the former, nor for services by the latter. *Otis v. Hall* (1889), 117 N. Y. 131, 22 N. E. 563; *Hyland v. Baxter* (1885), 98 N. Y. 610; *Matter of Ryder* (1844), 11 Paige 185, 42 Am. Dec. 109.

A Surrogate's Court, upon the judicial settlement of the accounts of a guardian, may make an allowance to him for the expenses incurred in the support of his ward, who was his son, although no order permitting such expenditures had been procured before making them. *Matter of Putney* (1908), 61 Misc. 1, 114 N. Y. Supp. 556.

Where a mother is general guardian of an infant, the mother should on the final accounting be allowed such sum as she would be allowed for the support of the child if she had made an application to the surrogate at the earliest possible date for an order fixing a sum for such purpose. *Matter of Klunck* (1900), 33 Misc. 267, 68 N. Y. Supp. 629.

A mother who secured the custody of her child on *habeas corpus* proceedings is not entitled to charge the expenses thereof to the infant's estate upon being appointed his general guardian. *Matter of Grant* (1900), 56 App. Div. 176, 67 N. Y. Supp. 654, *affd.* 166 N. Y. 640, 60 N. E. 1111.

Where a mother is appointed general guardian and the child lives with its mother and stepfather in the latter's house, and the mother pays nothing for his board, she is not entitled to an allowance out of the child's estate for the board thus furnished to the child. *Matter of Grant* (1900), 56 App. Div. 176, 67 N. Y. Supp. 654, *affd.* 166 N. Y. 640, 60 N. E. 1111.

Where a mother takes out a paid-up policy on her life for the benefit of her

son, she may, as his guardian, borrow on such policy for his benefit. *Clarke v. Mutual Life Ins. Co.* (1911), 201 N. Y. 492, 94 N. E. 1075.

Support of stepdaughter.—A man is under no legal obligation to support his stepdaughter, and the guardian may contract with him for her support. *Matter of Ackerman* (1889), 116 N. Y. 654, 22 N. E. 552.

Encroachments on principal.—Where the fund is small and more means are necessary for the due maintenance of the ward than can be derived from the income, the principal may be encroached upon to the extent necessary to supply the proper needs of the ward. The burden of showing an encroachment upon the principal to be necessary and proper rests upon the guardian. *Matter of Wandell* (1884), 32 Hun 545. But where, by the will, it is directed that the principal be paid the ward upon obtaining his majority, a guardian has no right to encroach upon the principal. *Smith v. Bixby* (1881), 5 Redf. 196. The guardian should restrict the expenditures within the income of the estate, or show clear and satisfactory reasons for exceeding it. *Kelahr v. McCahill* (1881), 26 Hun 148.

Where the guardian takes the responsibility of encroaching upon the capital without the sanction of the court, he must make out as clear a case for subsequent sanction as he would have been required to do for permission in advance. *Oakley v. Oakley* (1884), 3 Dem. 140.

Commission of waste.—A guardian has no power to commit waste by cutting timber from land of his ward except for necessary repair of buildings, and his assent to such waste is no defense in an action by the ward. *Torry v. Black* (1874), 58 N. Y. 185. Guardian may set up that proceeds of timber cut from lands of ward were used for support of ward. *Holbrook v. Wells* (1879), 8 Wk. Dig. 391. A guardian guilty of *devastavit* is not entitled to commissions. *Martin v. Hann* (1898), 32 App. Div. 602, 53 N. Y. Supp. 186. In re *Kopp* (1888), 15 Civ. Pro. 282.

The employment by the guardian of the property of an infant in business has been uniformly condemned as constituting a *devastavit* of the estate. *Warren v. Union Bank of Rochester* (1898), 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777.

Where the guardian of an infant unnecessarily sells, at private sale under a final order of the county court, her lands for about half their value and all his proceedings in the matter indicate carelessness and indifference to her interest, if not dishonesty, the surrogate will charge him upon his accounting as guardian with the resulting loss and interest thereon from the time of the sale and will also deny him commissions. *Matter of Nowak* (1902), 38 Misc. 713, 78 N. Y. Supp. 288.

Guardians should keep buildings and fences on farms of their wards in repair so as to prevent waste. *Shepard v. Stebbins* (1888), 48 Hun 247.

Guardians should pay taxes on the property of their wards. *Shepard v. Stebbins* (1888), 48 Hun 247.

Liability for loss by robbery.—A general guardian robbed of money belonging to his ward may be held liable therefor. *Matter of Jackson* (1866), 1 Tuck. 71.

Contracts of guardians.—It is beyond the power of a guardian to bind the estate of his ward by contract with third persons who have knowledge of the character of the property transferred except in the ordinary and usual course of administration of his office. *Warren v. Union Bank of Rochester* (1898), 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777. Contracts of guardians touching the property of their wards will not be enforced unless they are strictly equitable and in the interest of the infant. *Sherman v. Wright* (1872), 49 N. Y. 227; *White v. Parker* (1850), 8 Barb. 48.

A general guardian has the same power in respect to leasing the lands of his ward as has a guardian in socage. *Thacker v. Henderson* (1862), 63 Barb. 271.

Guardian dealing with ward's property.—The purchase by a testamentary guard-

ian of his ward's land at partition sale is merely voidable and not void. *Munsell v. Munsell* (1900), 33 Misc. 185, 68 N. Y. Supp. 329. A guardian of an infant cannot contract for an exchange of real estate of the minor nor can the minor by any act of his ratify such contract; it is absolutely void and an action to compel the specific performance cannot be maintained. *Bellinger v. Roatstone* (1878), 6 Wkly. Dig. 69.

A guardian should not purchase the dower interest in the lands of his ward, or remove a cloud upon the title of such lands, without proper application to the court and obtaining an order therefor. *Rickard's Case* (1873), 15 Abb. Pr. (N. S.) 6.

The restriction of section 1679 of the Code, which prohibits the guardian of an infant party from purchasing or being interested in the purchase of any property sold, etc., applies only to guardians *ad litem* and not to guardians in socage. *Boyer v. East* (1900), 161 N. Y. 580, 56 N. E. 114, 76 Am. St. Rep. 290.

Where the guardian, having moneys belonging to the ward in his hands, executed to himself as guardian a bond and mortgage for the amount, a court of equity will hold it a valid security against the guardian and give full effect to the mortgage for the purpose of protecting the interest of the ward. *Lyon v. Lyon* (1876), 67 N. Y. 250; *Lucky v. Odell* (1880), 46 Super (14 J. & S.) 547.

A general guardian, who himself occupies premises in which his ward has an interest, is properly charged with his ward's share of the rents thereof. *In re Kopp* (1888), 15 Civ. Pro. 282.

Where the guardian erects buildings upon the land of his ward with his own money without an order of a court of equity, he cannot recover the amount thereof from the ward. *Hassard v. Rowe* (1851), 11 Barb. 22; *Copley v. O'Neil* (1869), 57 Barb. 299, 39 How. Pr. 41.

A general guardian cannot invest his ward's personalty in realty without first obtaining authority to do so from the Supreme Court nor can he invest in bank stock or in a bond of a foreign corporation. *Matter of Decker* (1902), 37 Misc. 527, 76 N. Y. Supp. 315.

Where a general guardian has converted his ward's personalty into realty, the ward, on coming of age, may elect whether he will take the realty or the money. *Cromwell v. Kirk* (1883), 1 Dem. 599; *Eckford v. De Kay* (1840), 8 Paige 88.

Where a general guardian of a minor leases year after year his ward's property in an unusual manner, and at times of the year when there is a limited demand for it (in this case by auction in the month of January), at a rent much less than the rental value of the property, he is properly chargeable, on an accounting before the surrogate, with the difference between the value of the rent of such property and the amount of rent actually received by him. In such case, he is also properly chargeable with the contestant's costs on the accounting. *Knothe v. Kaiser* (1874), 2 Hun 515.

The fact that the assignee of a mortgage and the purchaser of the premises is the guardian in socage of his daughter, the devisee of the fee, does not render the purchase by him absolutely void. It is merely voidable at the election of the daughter. *Jefferson v. Bangs* (1909), 197 N. Y. 35, 90 N. E. 109.

A testamentary guardian of an infant devisee has no right to purchase the real estate of the testator at a sale under a surrogate's order. The sale, however, is not absolutely void, but its validity is at the election of the ward. *Bostwick v. Atkins* (1849), 3 N. Y. 53.

It is illegal for a guardian to purchase land of his ward and pay him the consideration; and restitution of money so paid should not be required when the infant on coming of age seeks a disaffirmance of his contract. *Green v. Green* (1876), 7 Hun 492.

Where a guardian purchases property with money of his wards and takes title in the name of himself and wife, such property is subject to a lien in favor of the wards. *Rebesh v. Rebesh* (1910), 126 N. Y. Supp. 572.

A guardian has no authority to purchase mortgaged premises upon foreclosure of a mortgage held in trust for his wards, and must account for the amount realized. *Burtis v. Brush* (1862), 1 Redf. 448.

The purchase of mortgaged premises at the mortgage foreclosure sale, by the guardian in socage of the infant owner of the equity of redemption, is voidable by the infant, and it is not incumbent upon her to show actual fraud or injury. In such a case the infant cannot effectually ratify the voidable purchase until she attains her majority, but she may, during her infancy, maintain an action to disaffirm the purchase. The title of a person who purchases the premises from the guardian in socage, for value and without notice of the relations existing between his grantor and the infant, is superior to the infant's claims. *Cahill v. Seitz* (1904), 93 App. Div. 105, 86 N. Y. Supp. 1009.

The purchase, by the general guardian of an infant for his individual benefit, of real property belonging to the infant, at a mortgage foreclosure sale thereof, constitutes a violation of the guardian's duty, and if the latter is guilty of such violation, the ward may maintain an action against him to obtain an adjudication that he holds the property simply as trustee, and to compel an accounting for the rents and profits thereof. *Coley v. Tallman* (1905), 107 App. Div. 445, 95 N. Y. Supp. 339, *affd.* 186 N. Y. 569, 79 N. E. 1103.

Where a guardian advanced his own money and purchased in his own name the real property of his wards on foreclosure, and it appears that but for such act the wards would have lost the property and realized no surplus, and the guardian is ready to convey to his wards, he should be allowed interest at the rate of four per cent on the moneys advanced by him. A guardian so purchasing his wards' lands and thereafter appropriating the rents to himself, should be charged with the legal rate of interest on the rents received. *McCormick v. Shannon* (1908), 127 App. Div. 745, 111 N. Y. Supp. 875.

Where the mother and surviving parent of an infant who had an interest in certain real estate acquired the title thereto a few days after it had been sold, under an order in a proceeding to sell the infant's real estate instituted upon the petition of the mother, the circumstances are sufficient to create a reasonable doubt as to the good faith of the proceeding and as to the marketability of the title, and the vendees, under a contract of sale with the mother as owner, are entitled to recover back their deposit and the expenses incurred in the examination of the title. *Feller v. Mitchell* (1907), 53 Misc. 486, 103 N. Y. Supp. 269.

Mortgages on ward's property.—The general guardian of an infant has power to discharge a mortgage before it becomes due. *Chapman v. Tibbets* (1865), 33 N. Y. 289. In the absence of collusion, he may extend the time of payment of a mortgage until the ward attains full age. *Willick v. Taggart* (1879), 17 Hun 511.

A mortgage upon an infant's real estate, in pursuance of a collusive agreement between the guardian and a creditor of the guardian, the purpose of which was to substitute the property of the infant for the debt of the guardian, should be set aside. *Warren v. Union Bank of Rochester* (1898), 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777.

A guardian in socage of an infant cannot impose an obligation upon her real estate and therefore where he of his own motion invests his money in it to improve it his judgment creditor cannot reach the money. *Hickey v. Dixon* (1903), 42 Misc. 4, 85 N. Y. Supp. 551.

Employment of attorney.—A general guardian under ordinary circumstances

is justified in employing an attorney at a reasonable compensation to prepare his final account. *Matter of Decker* (1902), 37 Misc. 527, 531, 76 N. Y. Supp. 315.

Change of domicile.—The court has power to restrain a guardian from changing the domicile of the ward and such change must always be made in good faith. *Wood v. Wood* (1836), 5 Paige 596, 28 Am. Dec. 451; *Wilcox v. Wilcox* (1856), 14 N. Y. 575. Domicile may be changed from one county to another. *Ex parte Bartlett* (1857), 4 Bradf. 221.

Actions by and against guardians.—A general guardian may sue in his own name to recover a debt due his ward. Code Civ. Pro. § 469, relates only to actions brought in the name of the infant, and does not conflict with the right of a general guardian to maintain an action in his own name. *Harnett v. Morris* (1886), 10 Civ. Pro. R. 223. See also *Hauenstein v. Kull* (1880), 59 How. Pr. 24; *Thomas v. Bennett* (1868), 56 Barb. 197; *Segelken v. Meyer* (1878), 14 Hun 593; *Davis v. Carpenter* (1856), 12 How. Pr. 287.

The general guardian of an infant is answerable for and entitled to receive the profits of the land of the ward and so may maintain an action for the rents. *Coakley v. Mahar* (1885), 36 Hun 157; *Field v. Schieffelin* (1823), 7 Johns. Ch. 150, 154, 11 Am. Dec. 441; *Pond v. Curtiss* (1831), 7 Wend. 45.

It is not proper for the court to deplete a small fund belonging to infants by the costs and allowances of an equity action which was needless. *Sands v. Sands* (1900), 30 Misc. 338, 63 N. Y. Supp. 481.

A general guardian has no power to submit a cause of action either on behalf of or against an infant, so as to give the court jurisdiction to adjudicate upon the rights of the infant. *Coughlin v. Fay* (1893), 68 Hun 521, 22 N. Y. Supp. 1095.

A general guardian may sue on an administrator's bond, where, on the settlement of the administrator's accounts, a payment is ordered to be made to him, and execution on the judgment therefor is returned unsatisfied. *Prentiss v. Weatherly* (1893), 68 Hun 114, 22 N. Y. Supp. 680, *affd.* 144 N. Y. 707, 39 N. E. 858, citing Code Civ. Pro. § 2607.

A female ward upon reaching majority was permitted to maintain an action against her general guardian to recover damages for her seduction while under the age of consent. *Graham v. Wallace* (1900), 50 App. Div. 101, 63 N. Y. Supp. 372.

§ 84. Guardianship of married woman.—The lawful marriage of a woman before she attains her majority terminates a general guardianship with respect to her person, but not with respect to her property.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 54.

§ 85. Investment of trust funds by guardian.—A guardian holding trust funds for investment has the powers provided by section one hundred and eleven of the decedent estate law for an executor or administrator.

Source.—Personal Property L. (L. 1897, ch. 417) § 9, as amended by L. 1902, ch. 295; L. 1907, ch. 669; originally revised from L. 1889, ch. 63.

Investments by guardians.—A guardian must keep the money of his ward properly invested and a neglect to do so renders him chargeable for interest on the unemployed funds. *DePeyster v. Clarkson* (1828), 2 Wend. 77.

A guardian cannot invest his wards' funds in a mortgage upon his own property, which he conveys to the wards' father after the receipt of such funds, and which mortgage proves to be insufficient security. The wards may disaffirm the transaction and recover the funds. The court charged the guardian with only 3 per cent. interest. *Matter of Terry* (1900), 31 Misc. 477, 65 N. Y. Supp. 655.

Charge against trust fund by guardian.—Where money belonging to an infant was

applied by his general guardian to her personal use, her estate is chargeable with the amount so applied, less the expense of her appointment. Where, by her son's will, such guardian was bequeathed all his interest in certain real estate on condition that she should take care of his son until he became of age, it was the guardian's duty, having qualified as executrix, to care for and maintain her infant grandson, and a charge for his board and maintenance cannot be allowed on her accounting for his money which she had illegally expended for her own use. *Matter of Klein* (1913), 80 Misc. 377, 142 N. Y. Supp. 557.

§ 86. Guardianship of indigent children by incorporated orphan asylums.—The guardianship of the person and the custody of an indigent child may be committed to an incorporated orphan asylum or other institution incorporated for the care of orphan, friendless or destitute children, by an instrument in writing signed:

1. By the parents of such child, if both such parents shall then be living, or by the surviving parent, if either parent of such child be dead;

2. If either one of such parents shall have for a period of six months then next preceding abandoned such child, by the other of such parents;

3. If the father of such child shall have neglected to provide for his family during the six months next preceding, or if such child is a bastard, by the mother of such child;

4. If both parents of such child are dead, by the guardian of the person of such child lawfully appointed, with the approval of the court or officer which appointed such guardian to be entered of record;

5. If both parents of such child are dead, and no legal guardian of the person of such child has been appointed, and no such guardian has been appointed by will or by deed by either parent thereof, or if the parents have abandoned such child for the period of six months, then next preceding, by the mayor of the city or by the county judge of the county in which such asylum or such other institution is located.

Such instrument shall be upon such terms, for such time and subject to such conditions as may be agreed upon by the parties thereto. It may also provide for the absolute surrender of such child to such corporation. But no such corporation shall draw or receive money from public funds for the support of any such child committed under the provisions of this section, unless it shall have been determined by a court of competent jurisdiction that such child has no relative, parent or guardian living, or that such relative, parent or guardian, if living, is destitute and actually unable to provide for the support of such child.

Source.—L. 1884, ch. 438.

References.—Commitment of poor children to institutions, Poor Law, § 56. Destitute and indigent children may be placed out by charitable institutions, State Charities Law, §§ 300–308. Labor of children in charitable institutions not to be hired out, *Id.* § 459. Indigent children placed in homes to be reported, Poor Law, § 146.

L. 1884, ch. 438, from which this section was derived contemplated commitment of children upon consent of parents. The provisions of L. 1875, ch 173 which were substantially re-enacted in section 56 of the Poor Law (L. 1896, ch. 225),

relating to the commitment of pauper children, were not repealed or superseded by L. 1884, ch. 438, from which section 86 of the Domestic Relations Law was derived. *People ex rel. Horton v. Fuller* (1899), 41 App. Div. 404, 58 N. Y. Supp. 835.

Section cited.—*People ex rel. French v. Lyke* (1899), 159 N. Y. 149, 153, 53 N. E. 802.

§ 87. Record of children to be kept by orphan asylums.—All institutions, public or private, incorporated or not incorporated, for the reception of minors, whether as orphans, or as pauper, indigent, destitute, vagrant, disorderly or delinquent persons, are hereby required to provide and keep a record, in which shall be entered the date of reception, and the names and places of birth and residence, as nearly as the same can reasonably be ascertained, of all children admitted in such institutions, and how and by whom and for what cause such children shall be placed therein, and the names, residence, birthplace and religious denomination of the parents of such children so admitted, as nearly as the same can be reasonably ascertained; and whenever any such child shall leave such institution, the proper entry shall be made in such record, showing in what manner such child shall have been disposed of, and if apprenticed to or adopted by any person or family, or otherwise placed out at service or on trial, the name and place of residence of the person or head of the family to or with whom such child shall have been so apprenticed, adopted or otherwise placed out. The supreme court may, upon application by a parent, relative or legal guardian of such child, after due notice to the institution and hearing had thereon, by order direct the officers of such institution to furnish such parent, relative or legal guardian with such extracts from such record relating to such child as such court may deem proper. Nothing in this section shall be construed to prevent visitation by relatives and friends in accordance with the established rules of such institutions.

Source.—L. 1884, ch. 438, § 3, as amended by L. 1894, ch. 54.

Application.—It seems that this section does not apply to an institution such as the New York Foundling Hospital organized solely for the care and custody of foundlings or illegitimate children, where the mother of the child has surrendered it to the institution. If, however, it does apply, the court is not justified in requiring the institution, upon the application of the mother of the child, to furnish the latter with a copy of the record relating to the child, where it appears that the institution, previous to the application, has exercised its statutory power to indenture the child and that the copy of the record sought to be obtained will consequently serve no good purpose, but can only be used to annoy or interfere with the child and those to whom it has been indentured. *Matter of Shapiro* (1905), 103 App. Div. 303, 92 N. Y. Supp. 1027.

An *ex parte* order, requiring an orphan asylum to give to the mother of a child a complete abstract from its records concerning such child, was proper prior to the amendment by L. 1894, ch. 54. *Matter of Karowney* (1894), 79 Hun 195, 29 N. Y. Supp. 649.

§ 88. Care and custody of poor children in institutions.—The parent of a poor child, committed to an asylum or other institution by a county

superintendent, overseer of the poor, board of charities or other officer, shall not be entitled to the custody thereof, except in pursuance of a judgment or order of a court or judicial officer of competent jurisdiction, adjudging or determining that the interests of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in such asylum or institution.

Source.—L. 1884, ch. 438, § 4.

ARTICLE VII.

THE ADOPTION OF CHILDREN.

Section 110. Definitions; effect of article.

111. Whose consent necessary.

112. Requisites of voluntary adoption.

113. Order.

114. Effect of adoption.

115. Adoption from charitable institutions.

116. Abrogation of voluntary adoption.

117. Application in behalf of child for the abrogation of an adoption from a charitable institution.

118. Application by foster parent for the abrogation of such an adoption.

§ 110. Definitions; effect of article.—Adoption is the legal act whereby an adult takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor. Hereafter, in this article, the person adopting is designated the “foster parent.” A voluntary adoption is any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution.

An adult unmarried person, or an adult husband or wife, or an adult husband and his adult wife together, may adopt a person of the age of twenty-one years and upwards or a minor in pursuance of this article, and a child shall not hereafter be adopted except in pursuance thereof. Proof of the lawful adoption of a person of the age of twenty-one years and upwards or a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created; and nothing in this article in regard to an adult adopted pursuant hereto inheriting from the foster parent applies to any will, devise or trust, made or created before April

twenty-second, nineteen hundred and fifteen, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, an adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created. (*Amended by L. 1915, ch. 352, and L. 1917, ch. 149, in effect Apr. 6, 1917.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 60; originally revised from L. 1873, ch. 830, §§ 1, 2, 13.

References.—Licenses for placing out destitute children, State Charities Law, §§ 360–368.

The relation created by adoption is that of parent and child; there is no provision in the statute for the creation of the relation of brother and sister by adoption. *Matter of Benson* (1917), 99 Misc. 222, 163 N. Y. Supp. 670.

At common law adoption of children as now understood did not exist, and as now applied its basis is entirely statutory. *Matter of Livingston* (1912), 151 App. Div. 1, 135 N. Y. Supp. 328; *United States Trust Co. v. Hoyt* (1912), 150 App. Div. 621, 135 N. Y. Supp. 849; *Matter of Ziegler* (1913), 82 Misc. 346, 143 N. Y. Supp. 562; *Matter of Anonymous* (1913), 80 Misc. 10, 141 N. Y. Supp. 700.

Adoption of children was unknown to the common law and exists in this country only by virtue of the statute; the first general statute on this subject in this state was ch. 830 of the Laws of 1873. *Matter of Thorne* (1898), 155 N. Y. 140, 49 N. E. 661; *Carroll v. Collins* (1896), 6 App. Div. 106, 40 N. Y. Supp. 54; *Godine v. Kidd* (1892), 64 Hun 585, 19 N. Y. Supp. 335.

In the Roman law the adoption of children was well known, and our statutes relating thereto find their original basis in Roman jurisprudence. *Matter of Livingston* (1912), 151 App. Div. 1, 135 N. Y. Supp. 328.

Effect of the acts of 1873 and 1887.—The act of 1873 was not retrospective. *Matter of Thorne* (1898), 155 N. Y. 140, 49 N. E. 661; *Hill v. Nye* (1879), 17 Hun 457; *Godine v. Kidd* (1892), 64 Hun 585, 19 N. Y. Supp. 335. While the statute of 1873 placed the child and foster parent in a legal relation of parent and child toward one another, the child was not thereby entitled to inherit from the adopting parent and it was not until the statute of 1887 that such right was given. *Kemp v. N. Y. Produce Exchange* (1898), 34 App. Div. 175, 54 N. Y. Supp. 678.

A child adopted under the statute of 1873 is entitled to inherit under the enactment of 1887; the later statute though not retroactive does not affect the adoption of the child but merely gives such child the capacity to inherit. *Dodin v. Dodin* (1897), 16 App. Div. 42, 44 N. Y. Supp. 800, *affd.* 162 N. Y. 635, 57 N. E. 1108, *affg.* 17 Misc. 35, 40 N. Y. Supp. 748; see also *Simmons v. Burrell* (1894), 8 Misc. 388, 28 N. Y. Supp. 625.

The legislature did not have in contemplation by the passage of the acts of 1873 and 1887 the legalizing of private agreements executed without authority of law and containing no safeguards or restrictions of any kind as to the transmission of property; hence an adoption is not set up by mere entry in a book kept by a charitable organization. *Smith v. Allen* (1900), 161 N. Y. 478, 55 N. E. 1056, *affg.* 32 App. Div. 374, 53 N. Y. Supp. 114 (1898).

Charitable institutions.—The provisions of the act are not applicable to the right of a charitable institution to adopt without the consent of the mother when it appears that the child is abandoned by the mother. *Matter of Larson* (1884), 31 Hun 539, *revd.* on another ground, 96 N. Y. 381.

Presumption of adoption.—There is no presumption that minors living with people whose name they have taken are their adopted children. There must be some evidence tending to show that the statutory method of adoption has been pursued. *Matter of Huyck* (1906), 49 Misc. 391, 99 N. Y. Supp. 502.

The right of an adopted child to inherit from a foster parent is determined by

the law in force at the time of the foster parent's death. *United States Trust Co. v. Hoyt* (1912), 150 App. Div. 621, 135 N. Y. Supp. 849; *Theobald v. Smith* (1905), 103 App. Div. 200, 92 N. Y. Supp. 1019.

The statute giving the right of inheritance to an adopted child applies to a deed of trust executed prior to the statute under which such right was first conferred. So where a deed of trust provides that the corpus of an estate shall go "to the heirs at law," such heirs are to be ascertained as at the death of the *cestui que trust* and include a child adopted subsequent to the act of 1873. *Gilliam v. Guaranty Trust Co.* (1906), 111 App. Div. 656, 97 N. Y. Supp. 758, *affd.* 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536.

This section does not apply to a trust created for the use and benefit of a designated beneficiary during her natural life and after her decease to her heirs at law, although the trust deed was executed and delivered in 1853. *Gilliam v. Guaranty Trust Co.* (1906), 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536, *affg.* 111 App. Div. 656, 97 N. Y. Supp. 758 (1906).

Specific performance of a parol agreement to adopt refused. *Merchant v. White* (1902), 37 Misc. 376, 75 N. Y. Supp. 756, *affd.* 77 App. Div. 539.

Section cited.—*Matter of MacRae* (1907), 189 N. Y. 142, 81 N. E. 956; *Brantingham v. Huff* (1903), 174 N. Y. 53, 66 N. E. 620.

§ 111. **Whose consent necessary.**—Consent to adoption is necessary as follows:

1. Of the minor, if over twelve years of age;
2. Of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor;
3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary; excepting, however, that where such parents are divorced because of his or her adultery or cruelty, notice shall be given to both the parents personally or in such manner as may be directed by a judge of a court of competent jurisdiction. (*Subdivision 3 amended by L. 1913, ch. 569.*)
4. Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living, or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption.
5. Where a minor to be adopted is of the age of eighteen years or upwards, the judge or surrogate may direct, in his discretion, that the consents of the persons referred to in the preceding subdivisions of this section shall be waived, if in his opinion, the moral or temporal interests of such minor will be promoted thereby and such consents cannot, for any reason, be obtained. Where the person to be adopted is of the age of twenty-one years and upwards, the consents of the persons referred to in

the preceding subdivisions of this section shall not be required. (*Sub added by L. 1915, ch. 352.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 61; original revised from L. 1873, ch. 830, §§ 3-7, 11; L. 1889, ch. 58.

Consent of parents.—Adoption under the statute cannot take place without consent of the parents of the minor child, unless such parents have forfeited their natural rights to the custody of the child under circumstances defined by the statute, one of which is an abandonment of the child by the parents. *Matter of Livingston* (1912), 151 App. Div. 1, 135 N. Y. Supp. 328.

Where a mother petitions for a writ of habeas corpus to recover possession of her child and the defendants file a return claiming the custody of the child by virtue of an order of adoption, and it appears that the father had abandoned the child, a reply to this return by the mother setting up that no notice, actual or constructive, had been given to her of the adoption proceeding, is a question of law affecting the validity of the order of adoption, and it is for the Special Term to dismiss the writ. The State cannot interfere with the right of natural parents to the custody of their children simply to better the moral and temporal welfare of the child as against an unoffending parent. *seems*, that the courts are unauthorized to determine in an adoption proceeding without actual or constructive notice to the parents that they have forfeited their natural rights to the custody of their children. *Matter of Livingston* (1912), App. Div. 1, 135 N. Y. Supp. 328.

To confer jurisdiction on a surrogate to make an order confirming an adoption is necessary to obtain the father's consent or the fact of abandonment must be proved. *Matter of Johnston* (1912), 76 Misc. 374, 137 N. Y. Supp. 92.

Consent of wife.—A man may not adopt a child without the consent of his wife. *Middleworth v. Ordway* (1908), 191 N. Y. 404, 84 N. E. 291, affg. 117 App. Div. 102 N. Y. Supp. 143.

The consent of the natural parent may be dispensed with by the state, and where an adulterous mother has been deprived of parental control her consent to the adoption is not required. *Matter of Ziegler* (1913), 82 Misc. 346, 143 N. Y. Supp. 587.

Where a mother, a widow, has been deprived of the custody of her children and they have been committed to a charitable institution upon a judicial determination that the mother is a dissolute person and has neglected them in violation of section 486 of the Penal Law, she cannot attack an order of the Surrogate's Court authorizing the adoption of said children by their uncle merely because the proceedings were had without notice to her. A determination of the Children's Court committing the children to the charitable institution as aforesaid had the effect of judicially depriving the mother of their custody within the meaning of our adoption statute. *Matter of Antonopoulos* (1916), 171 App. Div. 659, 157 N. Y. Supp. 587.

Consent to second adoption.—After an adoption is allowed and confirmed the natural parents cease in law to sustain such relation and the foster parents or the survivor of them, are to be treated as the parents or surviving parent of the child. Consent is necessary under this section. Upon the death of both foster parents the natural parents have no authority in law regarding the minor which would require their consent to a second adoption. *Matter of MacRae* (1907), 189 N. Y. 14, 84 N. E. 956, 12 Ann. Cas. 505.

§ 112. **Requisites of voluntary adoption.**—In adoption the following requirements must be followed:

1. The foster parents or parent, the person to be adopted and all other persons whose consent is necessary under the last section, must ap

before the county judge or the surrogate of the county where the foster parent or parents reside, or, if the foster parents or parent do not reside in this state, in the county where the minor resides, and be examined by such judge or surrogate, except as provided by the next subdivision.

2. They must present to such judge or surrogate an instrument containing substantially the consents required by this chapter, an agreement on the part of the foster parents or parent to adopt and treat the minor as his, or her or their own lawful child, and a statement of the age of the person to be adopted, as nearly as the same can be ascertained, which statement shall be taken *prima facie* as true. If a change in the name of the minor is desired, such instrument may also state the new name by which the minor shall be known. The instrument must be signed by the foster parents or parent and by each person whose consent is necessary to the adoption, and severally acknowledge by said persons before such judge or surrogate; but where a parent or person or institution having the legal custody of the minor resides in some other country, state or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution, certified as conveyances are required to be certified to entitle them to record in a county in this state, is equivalent to his or their appearance and execution of such instrument. In all cases where the consents of the persons mentioned in subdivision one, two, three, and four of section one hundred and eleven have been waived as provided in subdivision five of such section, or where the person to be adopted is of the age of twenty-one years or upwards, notice of such application shall be served upon such persons as the judge or surrogate may direct. (*Amended by L. 1915, ch. 352, and L. 1916, ch. 453.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 62, as amended by L. 1899, ch. 498; originally revised from L. 1873, ch. 830, §§ 2, 8, 9, as amended by L. 1888, ch. 485.

Agreement and consent to voluntary adoption of an infant held to be in compliance with the statute. Matter of McDevitt (1917), 176 App. Div. 418, 162 N. Y. Supp. 1032.

A foster parent must be a resident of the county in which the county judge who makes an order of adoption resides and holds office. Matter of Carpenter (1911), 74 Misc. 127, 133 N. Y. Supp. 735.

Acknowledgment of consent.—It is not necessary under the statute that the county judge should sign the consent of the parties adopting the child; but if it is done before him it will be a sufficient compliance. *People ex rel. Burns v. Bloedel* (1891), 42 N. Y. St. Rep. 453, 16 N. Y. Supp. 837.

Interest of child to be promoted.—The intent of the law was that the adoption should work an advantage to the child. Matter of Gregory (1896), 15 Misc. 407, 37 N. Y. Supp. 925. A father unable to provide for his infant child, may transfer the custody, control, and the right to the services thereof to another, subject to the right of a court of equity to interfere in the interest of the child. *Middleworth v. Ordway* (1908), 191 N. Y. 404, 84 N. E. 291, affg. 117 App. Div. 913, 102 N. Y. Supp. 143.

When parent may transfer custody and control of his child to another.—A father, unable to provide for his infant child, may, by a contract in writing, transfer the

custody, control and the right to the services of such child to another, subject to the right of a court of equity to interfere in the interest of the child. *Middleworth v. Ordway* (1908), 191 N. Y. 404.

When child not legally adopted; validity of contract providing that she should have portion of supposed foster father's estate.—An instrument in writing whereby a father, who was the sole surviving parent, transferred to a husband and wife the right to the custody, control and services of his infant daughter for a limited number of years in consideration of a covenant on their part to adopt the child and to support, educate and maintain her until she reached a certain age, and further providing that the child should remain with them and submit to their government until she became eighteen years old, "when she shall be entitled to her dower right to the property of the" proposed foster parents "the same as though she were their own legitimate offspring," is adequately supported by the mutual promises therein contained. *Middleworth v. Ordway* (1908), 191 N. Y. 404.

An ante-nuptial contract by a prospective husband to adopt the daughter of his prospective wife and make her his heir and also to give her all his property by will, must be construed to mean that he intended to treat the daughter as his own child, and to leave his property to her or to her and his own children if he had any; but the husband cannot be held to have created a trust for his wife's daughter or fettered his estate so that he could not use it for any ordinary or reasonable purpose or give a reasonable amount thereof to charity; so in the absence of fraudulent intent an assignment of the proceeds of a life insurance policy to certain of his relatives as a gift cannot be attacked by the adopted daughter after his death, when it is not shown that the gift was so out of proportion to his estate as to be a violation of the contract. *Dickinson v. Seaman* (1908), 193 N. Y. 18, 85 N. E. 818, 20 L. R. A. (N. S.) 1154, affg. 117 App. Div. 908, 102 N. Y. Supp. 1134.

Agreement of parent to release claim to custody of child is not a legal adoption, and the parent may secure possession of the child. *Matter of Donnelly* (1911), 70 Misc. 584, 129 N. Y. Supp. 120.

Question of the mother's abandonment of the child may be raised on her motion to vacate an order of adoption, in the absence of notice to her of such proceedings, *Matter of Moore* (1911), 72 Misc. 644, 132 N. Y. Supp. 249.

Evidence of adoption.—Parol evidence is admissible to show the true agreement between the mother and the adopting parents of a child where the written instrument of adoption does not purport to state such agreement, and the mother of the child testifies that the agreement was entirely oral and that the written agreement was executed merely to transfer the custody of the child. *Brantingham v. Huff* (1899), 43 App. Div. 414, 60 N. Y. Supp. 157.

§ 113. Order.—If satisfied that the moral and temporal interests of the person to be adopted will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption, reciting the reasons therefor, and directing that the person to be adopted shall henceforth be regarded and treated in all respects as the child of the foster parent or parents. If the judge or surrogate is also satisfied that there is no reasonable objection to the change of name proposed, the order must also direct that the name of the minor be changed to such name as shall have been designated in the instrument mentioned in the last section. Such order, and the instrument and consent, if any, mentioned in the last section must be filed and recorded in the office of the county clerk of such

county. The fact of illegitimacy shall in no case appear upon the record. (*Amended by L. 1915, ch. 352, and L. 1916, ch. 453.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 63; originally revised from L. 1873, ch. 830, § 9. Last sentence was new in the Revision of 1896.

Discretionary power is conferred by this section. *Matter of Ward* (1908), 59 Misc. 328, 330, 112 N. Y. Supp. 282.

Validity of order.—Where an order of adoption recited all the jurisdictional facts necessary to its validity and that it appeared to the satisfaction of the county judge "that said minor has been abandoned by its parents," an allegation in the traverse to the return to a writ of habeas corpus that the mother had no notice of the proceeding raises a question of law affecting the validity of the order of adoption and it is error for the Special Term to dismiss the writ. *Matter of Livingston* (1911), 151 App. Div. 1, 135 N. Y. Supp. 328, revg. 74 Misc. 494, 134 N. Y. Supp. 148.

Judge's order.—An order of adoption bearing the caption and seal of the County Court and signed by the clerk may nevertheless be deemed a judge's order where it recites that the parties "appeared before me, and on examination by me," etc., and is signed by the county judge, without any direction to enter. The fact that such an order was made at a term of the County Court and while the county judge was on the bench does not make it a court order. *Rosekrans v. Rosekrans* (1914), 163 App. Div. 730, 148 N. Y. Supp. 954.

Effect of order.—The objection that the necessary instruments were executed in the presence of persons other than the judge before whom the adoption proceedings were had, is immaterial, if the judge certified in the order of adoption that the adopted child and the adopting parents appeared before him and that the necessary consents and agreement had been executed as provided by the statute. *Von Beck v. Thomsen* (1899), 44 App. Div. 373, 60 N. Y. Supp. 1094, *affd.* 167 N. Y. 601, 60 N. E. 1121.

§ 114. **Effect of adoption.**—Thereafter the parents of the person adopted are relieved from all parental duties toward, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. Where a parent who has procured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the stepfather or the stepmother of such child may adopt such child, such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. If the order allowing and confirming the adoption shall direct that the name of the child be changed, the child shall be known by the new name designated in such order. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the person adopted sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother,

and such right of inheritance extends to the heirs and next of kin of the person adopted, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over a real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the person adopted is not deemed the child of the foster parent so as to defeat the rights of remaindermen. (*Amended by L. 1915, ch. 352, and L. 1916, ch. 453.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 64, as amended by L. 1897, ch. 408; originally revised from L. 1873, ch. 830, §§ 10, 12; L. 1884 ch. 438, §§ 8, 9, 11. The words "or to his property by descent or succession," in the first sentence, and the last sentence in the first paragraph are new.

The status and rights of adopted children in the United States are purely the creation of statute. Adoption was unknown to the common law. Since the Domestic Relations Law took effect, the mutual rights and liabilities of foster parents and children adopted from public institutions, including their mutual rights of inheritance, are the same as if the adoption had been made with the consent of the child's parents rather than from a public institution. *United States Trust Co. v. Hoyt* (1912), 150 App. Div. 621, 135 N. Y. Supp. 849.

The foster parent must bestow parental care on the adopted child, and while the relation of parent and child continues is to be held to all the parental obligations. *Matter of Anonymous* (1913), 80 Misc. 10, 141 N. Y. Supp. 700.

Court to promote best interests of infant.—An order of adoption is ineffectual to prevent the court, on habeas corpus proceeding, from disposing of the custody of the infant so as to promote his best interests. *People ex rel. Cornelius v. Callan* (1910), 69 Misc. 187, 124 N. Y. Supp. 1074.

Legal relations between foster parents and adopted children.—Under the statute relating to adoption, in force since 1896, the legal relations of foster parents and adopted children are the same as those of natural parents and children "including the right of inheritance from each other . . . and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting." *Carpenter v. Buffalo General Electric Co.* (1914), 213 N. Y. 101, 106 N. E. 1026.

An adopted child can only inherit from the foster parents. He has no right to inherit through the foster parents from the latter's collateral kin. *Kettell v. Baxter* (1906), 50 Misc. 428, 100 N. Y. Supp. 529. An adopted child is entitled to take by inheritance from her adopted parent under this section, notwithstanding the fact that at the time of the adoption such child did not have the right of inheritance, under ch. 830, of the Laws of 1873. The right of inheritance is to be determined in accordance with the law as it existed at the time of the death of the intestate. *Theobald v. Smith* (1905), 103 App. Div. 200, 92 N. Y. Supp. 1019.

The amendment conferring the right of inheritance upon an adopted child is applicable to a child adopted prior thereto. *Gilliam v. Guaranty Trust Co.* (1906), 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536, affg. 111 App. Div. 656, 97 N. Y. Supp. 758.

A child adopted under the statute of 1873 is entitled to inherit under the enactment of 1887; the later statute though not retroactive does not affect the adoption of the child but merely gives such child the capacity to inherit. *Dodin v. Dodin* (1897), 16 App. Div. 42, 44 N. Y. Supp. 800, affd. 162 N. Y. 635, 57 N. E. 1108, affg. 17 Misc. 35, 40 N. Y. Supp. 748; see also *Simmons v. Burrell* (1894), 8 Misc. 388, 28 N. Y. Supp. 625. A child adopted under the statute is given all the rights of any other child or heirs subject to the testamentary power of the adopting

parent, save the rights of an after-born child. *Matter of Gregory* (1896), 15 Misc. 407, 37 N. Y. Supp. 925.

Statute in force at time of death controls.—The right of an adopted child to inherit from a foster parent is determined by the law in force at the time of the foster parent's death. Hence, a child adopted from a public institution in 1894 pursuant to the provisions of chapter 438 of the Laws of 1884, is entitled to inherit from her foster parents where they died subsequent to the date on which the Domestic Relations Law took effect. Where the foster parents of such a child die without issue she is their sole next of kin under the Statute of Distribution, and under a deed of trust which left property to her foster parents for life, and on their death without issue to the next of kin of her foster father, she is entitled to the entire remainder, to the exclusion of his collateral relatives. This is so notwithstanding the limitation in this section. *United States Trust Co. v. Hoyt* (1912), 150 App. Div. 621, 135 N. Y. Supp. 849.

The rights of inheritance as between an adopted child, his foster parents and his natural parents must be determined, not by the statute in force at the time of the adoption, but by that in force at the time of his death. Where the statute in force at the time an adopted child was killed by negligence cut off the rights of inheritance and succession of his natural parents and transferred those rights to the foster parent, the moneys recovered for his death should be distributed among his foster parent's next of kin, she having died before the decedent who left no wife or children. The natural mother of the adopted child who was also the sister of the foster parent is entitled to share in the recovery through her, but neither she nor the father of the adopted child may take as his next of kin. *Carpenter v. Buffalo General Electric Co.* (1913), 155 App. Div. 655, 140 N. Y. Supp. 559, *affd.* 213 N. Y. 101, 106 N. E. 1026.

The right of an adopted child to inherit from a foster parent is determined by the law in force at the time of the foster parent's death and is in no manner dependent upon the law in force at the time of the adoption. *Rosekrans v. Rosekrans* (1914), 163 App. Div. 730, 148 N. Y. Supp. 954.

Inheritance from collateral relatives of foster parent.—There is no provision which entitles the adopted child to inherit from the collateral relatives of the foster parent. It has, therefore, been held that an adopted child has no right to inherit through the foster parent from his collateral kin. *Matter of Benson* (1917), 99 Misc. 222, 163 N. Y. Supp. 670.

Right of inheritance of a nephew by adoption.—As between foster parent and adopted child the statute gives the right of inheritance each from the other. But this right has never been extended by statute or by judicial interpretation, to enable the child to inherit from the collateral kin of the foster parent. So where the testator gave the residue of his estate to the children of his brothers and sisters, he intended those persons who held such relation by the operation of usually recognized relations in society and did not intend to include the children of his brothers and sisters by adoption. *Matter of Haight* (1909), 63 Misc. 624, 118 N. Y. Supp. 745.

Limitation in deed or will; when deemed to include adopted child.—In New York and other states having similar statutes of adoption, a limitation, in a deed or will to a child or children or conditioned upon the survivorship of a child or children, is not deemed to include an adopted child where the grantor or testator is a stranger to the adoption. In the case under consideration the words "leaving a child or children" as used by the testator had reference to the natural offspring of the life beneficiary—to the child or children born to him in wedlock and who should survive him. The testator contemplated actual parentage—a relation dependent upon the operation of natural laws in marital intercourse and which could not arise without the intervention of natural laws favorable to the procreation and birth of offspring. In this respect it differs essentially from the

relation of adoptive parentage which may be established by the voluntary act of the parties thereto. The phrase "leaving a child or children" is not one which would naturally be used with reference to an adopted child or children. "Having adopted a child or children who survived him" or some similar phraseology would have been employed if it had been the intention of the testator to include children by adoption in the qualifying clause under consideration. And upon the death of the foster parent without heirs the adopted child is not deemed to be the child of such foster parent so as to defeat the rights of the remainderman. *Matter of Leask* (1910), 197 N. Y. 193, 90 N. E. 652, 27 L. R. A. (N. S.) 1158, 134 Am. St. Rep. 866, 18 Ann. Cas. 516, affg. 130 App. Div. 898, 115 N. Y. Supp. 1124.

An adopted child held not to take under a will giving property to her father and in case of his death to his children. *Matter of Hopkins* (1905), 102 App. Div. 458, 94 N. Y. Supp. 463.

Rights under insurance contracts.—A child adopted under the statute by husband and wife, after policies of insurance have been issued upon the life of the husband, payable to the wife, and in case of her death to her children, is entitled, upon the wife's failure to survive, to share in the proceeds of the policies with the natural children. *Von Beck v. Thomsen* (1899), 44 App. Div. 373, 60 S. Y. Supp. 1094, affd. 167 N. Y. 601, 60 N. E. 1121.

The by-law of an association providing for the payment of a death claim is to be construed as of the time of the decease of the member and where such decease has taken place since 1887 an adopted child will be considered as next of kin within the meaning of such by-law. *Kemp v. N. Y. Produce Exchange* (1898), 34 App. Div. 175, 54 N. Y. Supp. 678.

A contract to leave property at death to an adopted child in consideration of the surrender of the child for adoption may be enforced though the contract was made before the enactment of the statute authorizing adoption and conferring heritable qualities upon an adopted child. *Godine v. Kidd* (1892), 64 Hun 585, 19 N. Y. Supp. 335. See also *Brantingham v. Huff* (1899), 43 App. Div. 414, 60 N. Y. Supp. 157; *Gates v. Gates* (1898), 34 App. Div. 608, 54 N. Y. Supp. 454.

A child taken from a charitable institution by a man and his wife and treated in all respects as an adopted child, but not formally adopted pursuant to the statute, is not an heir at law of the foster parents, although they agreed to leave her all their property. *Hawkes v. Warren* (1910), 140 App. Div. 712, 125 N. Y. Supp. 820.

Where a woman made a written agreement with plaintiff's mother to maintain plaintiff, who was an infant, as her own child, and at her death give him all her property, if the mother would surrender the custody and control of the child, and where the plaintiff and his mother fulfilled their part of the agreement, it was held that the contract was binding upon the heirs and next of kin of the decedent and that the plaintiff was entitled to a specific performance thereof. *Winne v. Winne* (1901), 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647.

When promise to make testamentary gift in consideration of guardian's agreement as to ward's services is not enforceable.—An agreement by a statutory guardian that his ward, who had always lived with a certain person, would continue to live with him as a member of the family and in the position of a daughter during his lifetime, furnishes no consideration for a promise by such person that at his death he would bequeath her a specified sum and in addition would devise to her the house and lot in which they resided, for the reason that the ward is compelled thereby to live with such person during his lifetime, a period which might extend beyond her majority, and the guardian had no power, by contract or otherwise, either before or after her majority, to bind her thereafter in the disposition of her time, services or property; when such person dies, therefore, having failed to fulfill his promise, equity will not decree specific performance thereof against his estate. *Ide v. Brown* (1904), 178 N. Y. 26, 70 N. E. 101.

Next of kin of adopted child who died unmarried and intestate, leaving no one surviving except the brother and sisters of his deceased foster mother, and his natural father.—A young man, who had been legally adopted by a maternal aunt, died from injuries received while engaged in his duty as an employee of the defendant. He died unmarried and intestate, leaving no issue and no one surviving except his natural father, a brother and two sisters of his foster mother, one of whom was his natural mother, the plaintiff as administratrix in this action. The foster mother died several years before the death of the intestate and the defendant contends that, because of that fact, his natural father is the sole next of kin interested in any recovery and that under the circumstances such recovery should be nominal rather than substantial. It was *held*, that the statute relating to adoption in force at the death of decedent, must be read in connection with the provisions of the Decedent Estate Law; and that under the statutes as so read, the natural father of the decedent is excluded as a next of kin and the brother and sisters of decedent's foster mother are entitled to the award in this action. *Carpenter v. Buffalo General Electric Co.* (1914), 213 N. Y. 101, 106 N. E. 1026.

The heirs of an adopted child have the same legal relationship to foster parents as the heirs of a child by nature. *Matter of Cook* (1907), 187 N. Y. 253, 79 N. E. 991, revg. 114 App. Div. 718, 99 N. Y. Supp. 1049 (1906).

Parents of adopted child.—By the adoption the parents of the minor have no further rights, authority or duty in law regarding the child. *Matter of MacRae* (1907), 189 N. Y. 142, 81 N. E. 956, 12 Ann. Cas. 505.

§ 115. Adoption from charitable institutions.—An orphan asylum or charitable institution, incorporated for the care of orphan, friendless or destitute children may place children for adoption and the adoption of every such child, shall, when practicable, be given to persons of the same religious faith as the parents of such child. The adoption shall be effected by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate name to such instruments, and signed by the foster parent or parents and each person whose consent is necessary to the adoption; and may be signed by the child, if over twelve years of age; all of whom shall appear before the county judge or surrogate of the county where such foster parents reside or, if such foster parents do not reside in this state, in the county where the minor resides, and be examined, except that such officers need not appear; and such judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where the foster parent resides and the adoption shall take effect from the time of such filing and recording. (*Amended by L. 1916, ch. 453.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 65; L. 1884, ch. 438, § 7; originally revised from L. 1884, ch. 438, §§ 7, 10.

Adoption must be effected in the manner provided by law or the minor may recover for services. *Manuel v. Beck* (1911), 70 Misc. 357, 127 N. Y. Supp. 266.

The mutual rights and liabilities of foster parents and children adopted from public institutions, including their mutual rights of inheritance, are the same, since the Domestic Relations Law took effect, as if the adoption had been made

with the consent of the child's parents rather than from a public institution. *United States Trust Co. v. Hoyt* (1912), 150 App. Div. 621, 135 N. Y. Supp. 849; *Rosekrans v. Rosekrans* (1914), 163 App. Div. 730, 148 N. Y. Supp. 954.

A Roman Catholic institution stands *in loco parentis* as to children surrendered to its custody pursuant to its statutory power to receive deserted children and those surrendered to it and place them by indenture or adoption. Where two foundlings in such an institution were surrendered to a married couple on condition that said children should be brought up in the Catholic faith and the wife dies a member of the Roman Catholic church, an order for the adoption of the children on the petition of the surviving husband who has no definite religious belief cannot be granted without the consent of the institution. *Matter of Korte* (1912), 78 Misc. 276, 139 N. Y. Supp. 444.

The mere entry in a book kept by a charitable organization does not constitute proof of an adoption. *Smith v. Allen* (1900), 161 N. Y. 478, 55 N. E. 1056, affg. 32 App. Div. 374, 53 N. Y. Supp. 114.

§ 116. **Abrogation of voluntary adoption.**—A person adopted may be deprived of the rights of a voluntary adoption by the following proceedings only:

The foster parent, the person adopted and the persons whose consent would be necessary to an original adoption, must appear before the county judge or surrogate of the county where the foster parent resides, who shall conduct an examination as for an original adoption. If he is satisfied that the abrogation of the adoption is desired by all parties concerned, and will be for the best interests of the person adopted, the foster parent, the person adopted, if over the age of twelve years, and the persons whose consent would have been necessary to an original adoption shall execute an agreement, whereby the foster parent agrees, or whereby the foster parent and person adopted, if the latter is above the age of twelve years and thereby a necessary party as above required, agree to relinquish the relation of parent and child and all rights acquired by such adoption, and the parents or guardian of the person adopted or the institution having the custody thereof agree to reassume such relation. The judge or surrogate shall indorse, upon such agreement, his consent to the abrogation of the adoption. The agreement and consent shall be filed and recorded in the office of the county clerk of the county where the foster parent resides, and a copy thereof filed and recorded in the office of the county clerk of the county where the parents or guardian reside, or such institution is located, if they reside, or such institution is located, within this state. From the time of the filing and recording thereof, the adoption shall be abrogated, and the person adopted shall reassume its original name and the parents or guardian of the person adopted shall reassume such relation. A person so adopted, however, may be adopted directly from such foster parents by another person or by either of such foster parents in the same manner as from parents, and as if such foster parents were the parents of such person so adopted. (*Amended by L. 1910, ch. 154, L. 1913, ch. 38, and L. 1915, ch. 352.*)

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 66; originally revised

from L. 1873, ch. 830, § 18. The provisions requiring a copy of the agreement to be filed in the office of the clerk of the county where the parent or guardian of the child resides, and authorizing an adoption from a foster parent, were inserted in the Revision of 1896.

Constitutionality.—Adoption and abrogation thereof are not contracts between private persons within the meaning of the Federal Constitution relating to the impairment of contracts. *Matter of Ziegler* (1913), 82 Misc. 346, 143 N. Y. Supp. 562.

An abrogation of an adoption requires an agreement executed by the parties interested and the consent of the surrogate. The surrogate in giving his consent acts in his administrative, not in his judicial capacity, nor is the consent signed by him a decree or order of the Surrogate's Court. Hence, a surrogate has no jurisdiction to revoke the abrogation of an adoption, which relief can be obtained only in a court of equity. *Matter of Ziegler* (1914), 161 App. Div. 589, 146 N. Y. Supp. 881.

An order of adoption made without the consent of the father or the fact of abandonment existing, must be abrogated. *Matter of Johnston* (1912), 76 Misc. 374, 137 N. Y. Supp. 92.

Jurisdiction.—An abrogation of an adoption can only be effected by a proceeding instituted before the court and officers provided by law; to wit: the county judge or the surrogate, and the supreme court can take no jurisdiction thereof. Where the surrogate has abrogated an order of adoption, the county judge has no power subsequently to make an order adopting the child to the same foster parents as before. *Matter of Trimm* (1900), 30 Misc. 493, 63 N. Y. Supp. 952. The surrogate's court is without jurisdiction to review adoption proceedings had before the county judge, pursuant to this chapter, either collaterally or directly. *Matter of Ward* (1908), 59 Misc. 328, 330, 112 N. Y. Supp. 282.

The powers of the county judge to abrogate the voluntary adoption of a minor are strictly statutory, but, it seems, that the Supreme Court in the exercise of its equity jurisdiction may annul an adoption which violates equitable principles, and has ample power at law and in equity to promote the welfare of a child, notwithstanding a legal adoption. *Matter of McDevitt* (1917), 176 App. Div. 418, 162 N. Y. Supp. 1032.

This section merely offers a concurrent remedy; the statute does not take from the supreme court any of its powers or jurisdiction under a writ of *habeas corpus*. *People ex rel. Stewart v. Paschal* (1893), 68 Hun 344, 22 N. Y. Supp. 881.

A surrogate may, under section 2481 (6) of the Code of Civil Procedure, vacate and set aside an order of adoption made by him without jurisdiction. *Matter of Johnston* (1912), 76 Misc. 374, 137 N. Y. Supp. 92.

Jurisdiction of the surrogate to make an order confirming an agreement by grandparents for the adoption of their deceased daughter's infant child, made without the consent of the father, who had no notice of the application for said order, and on proof that he had abandoned the infant, may properly be raised on the father's application for the abrogation of such adoption upon allegations that he had made proper provision for the maintenance of the child and upon his denial of the charge of abandonment. *Matter of Johnston* (1912), 76 Misc. 374, 137 N. Y. Supp. 92.

Consent of foster parent.—The voluntary adoption of an infant to which the parent consented and which fully complied with all the statutory requirements, cannot be abrogated by a county judge without the consent of the foster parent, for the abrogation is controlled entirely by the statute, which requires the consent of all parties concerned. *Matter of McDevitt* (1917), 176 App. Div. 418, 162 N. Y. Supp. 1032.

The consent of a mother who has been divorced for her adultery is not necessary

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The adoption of children.

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in an abrogation proceeding. *Matter of Ziegler* (1913), 82 Misc. 346, 143 N. Y. Supp. 562.

A second adoption is not required to be consented to by the natural parents even though the foster parents be both dead. *Matter of MacRae* (1907), 189 N. Y. 142, 81 N. E. 956, 12 Ann. Cas. 505.

§ 117. Application in behalf of child for the abrogation of an adoption from a charitable institution.—A minor who shall have been adopted in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, or any corporation which shall have been a party to the agreement by which such child was adopted, or any person on the behalf of such child, may make an application to the county judge or the surrogate's court of the county in which the foster parent then resides, for the abrogation of such adoption, on the ground of cruelty, misusage, refusal of necessary provisions or clothing, or inability to support, maintain or educate such child, or of any violation of duty on the part of such foster parent toward such child; which application shall be by a petition setting forth the grounds thereof, and verified by the person or by some officer of the corporation making the same. A citation shall thereon be issued by such judge or surrogate, in or out of such court, requiring such foster parent to show cause why the application should not be granted. The provisions of the code of civil procedure relating to the issuing, contents, time and manner of service of citations issued out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogate's courts, not inconsistent with this chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made before him, on the hearing on such citation, the judge or surrogate shall determine that either of the grounds for such application exists, and that the interests of such child will be promoted by granting the application, and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereof.

After one such petition against a foster parent has been denied, a citation on a subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 67; originally revised from L. 1884, ch. 438, § 12.

§ 118. Application by foster parent for the abrogation of such an adoption.—A foster parent who shall have adopted a minor in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, may apply to the county judge or surrogate's court of the county in which such foster parent resides, for the abrogation of such

adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill-behavior of such child, which application shall be by petition, stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the corporation which was a party to such adoption, or, if such corporation does not then exist, to the superintendent of the poor of such county, requiring them to show cause why such petition should not be granted. Unless such corporation shall appear on the return of such citation, before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceeding, and the foster parent shall pay to such special guardian such sum as the court shall direct for the purpose of paying the fees and the necessary disbursements in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has violated his duty toward such foster parent, and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child which any court or officer shall then be authorized to make of vagrant, truant or disorderly children. If such judge or surrogate shall otherwise determine, an order shall be made and entered denying the petition.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 68; originally revised from L. 1884, ch. 438, § 13.

ARTICLE VIII.

APPRENTICES AND SERVANTS.

Section 120. Definitions; effect of article.

121. Contents of indenture.

122. Indenture by minor; by whom signed.

123. Indenture by poor officers; by whom signed.

124. Binding out children by charitable corporation; indenture; by whom signed.

125. Penalty for failure of master or employer to perform provisions of indenture.

126. Assignment of indenture on death of master or employer.

127. Contract with apprentice in restraint of trade void.

§ 120. Definitions; effect of article.—The instrument whereby a minor is bound out to serve as a clerk or servant in any trade, profession or employment, or is apprenticed to learn the art or mystery of any trade or craft, is an indenture.

Every indenture made in pursuance of the laws repealed by this chapter shall be valid hereunder, but hereafter a minor shall not be bound out or apprenticed except in pursuance of this article.

§ 121.

Apprentices and servants.

L. 1909, ch. 19.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 70.

References.—Proceedings respecting masters and apprentices, Code Criminal Procedure, §§ 927-938. Taking apprentice without consent of guardian, Penal Law, § 493.

Application of article.—*Aborn v. Janis* (1907), 62 Misc. 95, 113 N. Y. Supp. 309.

§ 121. Contents of indenture.—Every indenture must contain:

1. The names of the parties;
2. The age of the minor as nearly as can be ascertained, which age on the filing of the indenture shall be taken prima facie to be the true age;
3. A statement of the nature of the service or employment to which the minor is bound or apprenticed;
4. The term of service or apprenticeship, stating the beginning and end thereof;
5. An agreement that the minor will not leave his master or employer during the term for which he is indentured;
6. An agreement that suitable and proper board, lodging and medical attendance for the minor during the continuance of the term shall be provided, either by the master or employer, or by the parent or guardian of the apprentice;
7. A statement of every sum of money paid or agreed to be paid in relation to the service;
8. If such minor is bound as an apprentice to learn the art or mystery of any trade or craft, an agreement on the part of the employer to teach, or cause to be carefully and skilfully taught, to such apprentice, every branch of the business to which such apprentice is indentured, and that at the expiration of such apprenticeship he will give to such apprentice a certificate, in writing, that such apprentice has served at such trade or craft a full term of apprenticeship specified in such indenture;
9. If a minor is indentured by the poor officers of a county, city or town, or by the authorities of an orphan asylum, penal or charitable institution, an agreement that the master or employer will cause such child to be instructed in reading, writing and the general rules of arithmetic, and that at the expiration of the term of service he will give to such minor a new bible.

Every such indenture shall be filed in the office of the county clerk of the county where the master or employer resides.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 71, as amended by L. 1899, ch. 448; originally revised from R. S., pt. 2, ch. 8, tit. 4, §§ 8-11; L. 1871, ch. 934, § 1, as amended by L. 1893, ch. 284; L. 1884, ch. 438, § 5.

An indenture must be effected in the manner provided by law or the minor may recover for services. *Manuel v. Beck* (1911), 70 Misc. 357, 127 N. Y. Supp. 266.

The statute relative to apprentices is not merely directory but is peremptory and must be substantially complied with or the indenture will be void. *People ex rel. Barbour v. Gates* (1869), 57 Barb. 291, 39 How. Pr. 74, revd. on other grounds 43 N. Y. 40.

Contents of indenture.—Articles of apprenticeship which do not contain the provision to the effect that the apprentice shall not leave during the term and may

be compelled to return if he does are invalid. *Burton v. Ford* (1885), 35 Hun 32. The statute is not designed to estop an infant from proving the truth in regard to his age; the burden of disapproving the age inserted in the indenture is thrown upon him but he is not concluded by its insertion. *Matter of Brennan* (1848), 1 Sandf. 711. As to sufficiency of the articles of apprenticeship under the old revised statutes, see *Fowler v. Hollenbeck* (1850), 9 Barb. 309; *People v. First Judge of Livingston* (1842), 2 Hill 596.

Evidence.—Where the statement of the length of a term of apprenticeship in counterparts vary, parol evidence may be introduced to prove which was the correct one. *McNulty v. Prentice* (1857), 25 Barb. 204.

Recital of the age of an apprentice in the indenture is only *prima facie* evidence and may be rebutted. *Drew v. Peckwell* (1852), 1 E. D. Smith 408.

To authorize an asylum to apprentice a child there must have been an absolute surrender of the child to the asylum in such a manner as to give it jurisdiction; a mere leaving of the child in its custody is not sufficient. *People ex rel. Stewart v. Paschal* (1893), 68 Hun 344, 22 N. Y. Supp. 881.

§ 122. Indenture by minor; by whom signed.—Any minor may, by the execution of the indenture provided by this article, bind himself or herself:

1. As an apprentice to learn the art or mystery of any trade or craft for a term of not less than three nor more than five years;

2. As a servant or clerk in any profession, trade or employment for a term of service not longer than the minority of such minor, unless such indenture be made by a minor coming from a foreign country, for the purpose of paying his passage, when such indenture may be made for a term of one year although such term may extend beyond the time when such person will be of full age.

An indenture made in pursuance of this section must be signed,

1. By the minor;

2. By the father of the minor unless he is legally incapable of giving consent or has abandoned his family;

3. By the mother of the minor unless she is legally incapable of giving consent;

4. By the guardian of the person of the minor, if any;

5. If there be neither parents nor guardians of the minor legally capable of giving consent, by the county judge of the county, or a justice of the supreme court of the district, in which the minor resides; whose consent shall be necessary to the binding out or apprenticing in pursuance of this section of a minor coming from a foreign country or of the child of an Indian woman, in addition to the other consents herein provided;

6. By the master or employer.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 72; originally revised from R. S., pt. 2, ch. 8, tit. 4, §§ 1-4, 7, 12, 13; L. 1871, ch. 934, §§ 1, 2.

Who may bind themselves as apprentices.—The capacity to bind himself or herself with the consent of the proper guardian is conferred upon every male infant and every unmarried female infant under the age of 18 years; the disability of infancy is removed to this extent. *People ex rel. Barbour v. Gates* (1870), 43 N. Y. 40.

Signatures.—Failure of the minor to sign cannot be availed of by the parent

where he has given his consent. *People ex rel. Wehle v. Weissenback* (1875), 60 N. Y. 385. Signing by the mother is not essential as she is not a party to the contract; but the omission of the master to sign is fatal. *People ex rel. Heilbronner v. Hoster* (1873), 14 Abb. Pr. (N. S.) 414; see also *Fitzgerald v. Fitzgerald* (1881), 24 Hun 370, 61 How. Pr. 59.

The authority of the mother to give the required consent existed prior to the statute in a case where the father was dead. *People ex rel. Barbour v. Gates* (1870), 43 N. Y. 40.

Infant only can avoid.—Where the infant is not a party to the contract the indenture is voidable by him only. It cannot be attacked at the instance of the father, though he has signed it and is bound thereby. *Matter of McDowles* (1811), 8 Johns. 328.

Assignment of services by master.—The services of an indented apprentice may be assigned by the master by parol agreement which will be considered valid as between the parties thereto; and the validity of such an assignment can be extended only by a proceeding in behalf of the apprentice. *Nickerson v. Howard* (1821), 19 Johns. 113.

Liability of master.—Where it is discretionary with the master before the termination of the apprenticeship that the indenture be avoided by reason of its not having been executed by the minor's father, the master is not liable either to the apprentice or to his father on any implied promise to make compensation for the services so rendered. *Maltby v. Harwood* (1852), 12 Barb. 473; *Potter v. Greene* (1886), 39 Hun 72.

Liability of stranger.—To enable a master to recover from a stranger for work performed for him by an alleged apprentice a valid contract of apprenticeship must be established by the plaintiff. *Barton v. Ford* (1885), 35 Hun 32. The master is entitled to the earnings of an apprentice employed by strangers to whom the apprentice has gone. *James v. LeRoy* (1810), 6 Johns. 274.

Liability of father for son leaving master.—Where it is so expressly stated by signing the father renders himself a party to the contract and becomes bound for his son and is responsible for the latter's leaving his master before the expiration of the term. *Mead v. Billings* (1813), 10 Johns. 99; so of a guardian. *Bull v. Follett* (1825), 5 Cowen 170; *Van Dorn v. Young* (1852), 13 Barb. 286; *Fowler v. Hollenbeck* (1850), 9 Barb. 309; but see, *Ackley v. Hoskins* (1817), 14 Johns. 374.

§ 123. Indenture by poor officers; by whom signed.—The poor officers of a municipal corporation may, by an execution of the indenture provided by this article, bind out or apprentice any minor whose support shall become chargeable to such municipal corporation.

In such case the indenture shall be signed,

1. By the officer or officers binding out or apprenticing the minor;
2. By the master or employer;
3. By the county judge of the county, if the support of such child was chargeable to the county, by two justices of the peace, if chargeable to the town, or by the mayor and aldermen or any two of them, if chargeable to the city.

The poor officers by whom a child is indentured and their successors in office shall be guardians of every such child and shall inquire into the treatment thereof, and redress any grievance as provided by law.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 73; originally revised from R. S., pt. 2, ch. 8, tit. 4, §§ 5, 6, 27.

When support chargeable on municipality.—The statute being in restraint of the rights of personal liberty is to be strictly construed; before the superintendents of the poor acquire the right to dispose of the liberty of a child during its minority, something more is necessary than that the child be "sent to the county poorhouse," where it is not shown that he was given any permanent relief and support or had made every application for necessities. *People ex rel. Bentley v. Hanna* (1847), 3 How. Pr. 39.

Who may sign.—The board of commissioners of public charity and correction in the city of New York has such power. *People ex rel. Wehle v. Weissenback* (1875), 60 N. Y. 385.

The authority to bind minors as apprentices may be executed by a majority of the superintendents of the poor of a county without the meeting of or notice to all. *Johnson v. Dodd* (1874), 56 N. Y. 76. In an indenture binding an infant pauper executed by only one overseer of the poor of a town is defective but is not void but voidable only. *Hamilton v. Eaton* (1827), 6 Cow. 658.

Where the child was a charge upon the city an indenture signed by two justices of the peace is void, the assent of such justices being binding in towns only. *People ex rel. Hellbronner v. Hooster* (1873), 14 Abb. Pr. (N. S.) 414.

Power of poor officers to bind out poor children.—*People ex rel Bentley v. Hanna* (1847), 3 How. Pr. 39.

§ 124. Binding out children by charitable corporation; indenture; by whom signed.—An orphan asylum or charitable institution, incorporated for the care of orphans, friendless or destitute children, may bind out as an apprentice, clerk or servant, an indigent or poor child by an indenture in writing. Such child must have been absolutely surrendered to the care and custody of such asylum or institution in pursuance of this chapter, or have been placed therein as a poor person, as provided in section fifty-six of the poor law, or have been left to the care of such asylum or institution with no provision by the parent, relative or legal guardian of such child, for its support, for a period of one year then next preceding. Such indenture shall bind such child, if a male, for a period which shall not extend beyond his twenty-first year, and if a female, for a period which shall not extend beyond her eighteenth year. Every such child shall, when practicable, be bound out or apprenticed to persons of the same religious faith as the parents of such child. The indenture shall in such case be signed:

1. In the corporate name of such institution by the officer or officers thereof authorized by the directors to sign the corporate name to such instrument, and shall be sealed with the corporate seal;

2. By the master or employer.

Such indenture may also be signed by the child, if over twelve years of age.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 74; L. 1884, ch. 438, § 5; originally revised from L. 1884, ch. 438, §§ 5, 10.

Adoption must be effected in the manner provided by law or the minor may recover for services. *Manuel v. Beck* (1911), 70 Misc. 357, 127 N. Y. Supp. 266.

When asylum has not jurisdiction to bind out child.—When the mother of a child, placed in an orphan asylum but not committed to its care by any instrument in writing, or by any mayor, county judge, or superintendent or overseer of the poor, has paid for its support while in the asylum, there has not been an absolute

surrender of the child to the asylum in such a manner as to give the jurisdiction, under this section, to bind out the child. *People ex rel. Stewart v. Paschal* (1893), 68 Hun 344, 22 N. Y. Supp. 881.

§ 125. **Penalty for failure of master or employer to perform provisions of indenture.**—If a master or employer to whom a minor has been indentured shall fail, during the term of service, to perform any provision of such indenture on his part, such minor or any person in his behalf may bring an action against the master or employer to recover damages for such failure; and if satisfied that there is sufficient cause, the court shall direct such indenture to be canceled, and may render judgment against such master or employer for not to exceed one thousand nor less than one hundred dollars, to be collected and paid over for the use and benefit of such minor to the corporation or officers indenturing such minor, if so indentured, and otherwise, to the parents or guardian of the child.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 75; originally revised from L. 1871, ch. 934, § 5; L. 1884, ch. 438, § 6.

The voluntary continuance of an apprentice in the service of the assignee of the indentures of apprenticeship will be deemed a continuance of his apprenticeship, and the law will not imply a promise by the assignee to pay the apprentice for his services. *Williams v. Finch* (1848), 2 Barb. 208.

§ 126. **Assignment of indenture on death of master or employer.**—On the death of a master or employer to whom a person is indentured by the poor officers of a municipal corporation, the personal representatives of the master or employer may, with the written and acknowledged consent of such person, assign such indenture and the assignee shall become vested with all the rights and subject to all the liabilities of his assignor, or if such consent be refused, the assignment may be made with like effect by the county judge of the county, on proof that fourteen days' notice of the application therefor has been given to the person indentured, to the officers by whom indentured, and to his parent or guardian, if in the country.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 76; originally revised from Code Crim. Pro. §§ 939, 940.

§ 127. **Contract with apprentice in restraint of trade void.**—No person shall accept from any apprentice any agreement or cause him to be bound by oath, that after his term of service expires he will not exercise his trade, profession or employment in any particular place; nor shall any person exact from any apprentice, after his term of service expires, any money or other thing, for exercising his trade, profession or employment in any place. Any security given in violation of this section shall be void; and any money paid, or valuable thing delivered, for the consideration, in whole or in part, of any such agreement or exaction, may be recovered by the person paying the same with interest; and every person accepting such agreement, causing such obligation to be entered into, or exacting money or other thing, is also liable to the apprentice in the penalty of one hundred dollars, which may be recovered in a civil suit.

L. 1909, ch. 19.	Laws repealed.	§§ 140, 141.
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Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 77; originally revised from R. S., pt. 2, ch. 8, tit. 4, §§ 39, 40.

Common law doctrine re-enacted.—Bingham v. Maigne (1885), 52 Super (20 J. & S.) 90.

ARTICLE IX.

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 140. Laws repealed.

141. When to take effect.

§ 140. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 90.

§ 141. When to take effect.—This chapter shall take effect immediately.

Source.—Former Domestic Relations L. (L. 1896, ch. 272) § 91.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....Part 2, chapter 1, title 1, sections 5-7
Revised Statutes.....Part 2, chapter 8.....All

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1788	15	1-8	1879	164	All
1796	20	All	1879	248	All
1801	11	1-5,	1879	321	All
7, 8, 14			1880	472	All
1815	221	All	1881	442	939, 940
1816	75	All	1884	381	All
1818	47	2	1884	438	All,
1822	206	All	except § 2 and first sentence of § 4.		
1826	254	All	1886	340	All
1828	20	18,	1887	24	All
(2d Meet.)			1887	77	All
1828	21	1,	1887	537	All
¶¶ 43, 201, 208, 231, 247, 353, 481 (2d Meet.)			1887	703	All
1830	320	24-29	1888	78	All
1840	80	All	1888	437	All
1845	11	All	1888	454	All
1848	200	All	1888	485	All
1849	375	All	1889	58	All
1850	266	All	1889	415	All
1851	321	All	1890	51	All
1853	576	All	1892	594	All
1855	159	All	1893	175	All
1858	187	All	1893	242	All
1860	90	All	1893	284	All
1862	70	All	1893	601	All
1862	172	All	1894	54	All
1866	656	All	1895	531	All
1870	277	All	1896	272	All
1870	431	All	1897	408	All
1871	32	All	1897	417	9,
1871	934	All	pt. relating to guardians.		
1873	25	All	1897	452	All
1873	821	All	1899	159	All
1873	830	All	1899	448	All
1875	522	All	1899	498	All
1877	430	All	1899	725	All
1878	112	1, 2	1901	339	All
1878	300	All	1902	289	All
			1902	295	1,

			Consolidators' notes.		L. 1909, ch.
LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SEC
pt. amending L. 1897, ch. 417, § 9, as to guardians.			pt. amending L. 1897, ch. 417, as to guardians.		
1902	522	All	1907	742	
1903	369	All	1908	73	
1905	495	All	Code Civil Procedure		
1905	499	All	from words "and all sums" to		
1907	480	All	the wife"; 1206; 1273, last senten		
1907	669	1,	1761.		

CONSOLIDATORS' NOTES TO SCHEDULE.

Statutes repealed where are temporary or obsolete or have been consolidated the "Consolidated Laws" are given with an explanatory note as follows:—

L. 1788, ch. 15, §§ 1-8; L. 1796, ch. 20.—Relating to apprentices and servants. 1801, ch. 193, repeals all acts "which come within the purview or operation of of the acts passed during the present session of the legislature, commonly ca the revised acts." Statutes cited are within the purview of L. 1801, ch. 11, and thus repealed by L. 1801, ch. 193.

L. 1828, ch. 20, § 18 (2d meeting). Statute cited relating to the binding out the children of Indian women as apprentices, was incorporated in R. S., pt. 2, 8, tit. 4, § 7, which was repealed by L. 1896, ch. 272, § 90.

As statutes covered by express repeals have been repealed by the Consolidated Laws, the repealing statutes have been recommended for repeal.

L. 1884, ch. 438.—All, except § 2 and § 4 from beginning to the first period. Section 1 consolidated in Domestic Relations Law, § 86. Section 4, pt., consolidated in Domestic Relations Law, § 88. Section 5, pt., consolidated in Domestic Relations Law, § 124. Section 7, pt., consolidated in Domestic Relations Law, § 114.

L. 1894, ch. 54.—Consolidated in Domestic Relations Law, § 99.

L. 1896, ch. 272.—This statute, which is the former Domestic Relations Law, recommended for repeal because its live provisions have been incorporated Domestic Relations Law.

L. 1897, ch. 408.—Consolidated in Domestic Relations Law, § 114.

L. 1897, ch. 452.—Consolidated in Domestic Relations Law, § 8.

L. 1899, ch. 159.—Consolidated in Domestic Relations Law, § 81.

L. 1899, ch. 448.—Consolidated in Domestic Relations Law, § 121, subd. 6.

L. 1899, ch. 498.—Consolidated in Domestic Relations Law, § 112.

L. 1902, ch. 295, § 1, pt. amending L. 1897, ch. 417, § 1, as to guardians. Consolidated in Domestic Relations Law, § 85.

L. 1903, ch. 369.—Consolidated in Domestic Relations Law, § 83.

L. 1905, ch. 495.—Consolidated in Domestic Relations Law, § 60.

L. 1907, ch. 480.—This statute amended Domestic Relations Law, § 11, subds. 2 and 3, and also § 17. Section 11, subds. 2 and 3 were also amended by L. 1907, ch. 742, § 1. Section 17, as amended, was repealed by L. 1907, ch. 742, § 6. Chapter 480 was enacted to provide for a condition which had arisen in one of the cities of the state, but the necessity for the act was obviated by the passage of the Marriage License Law (L. 1907, ch. 742). The legislature intended by the passage of chapter 742 to repeal the provisions of chapter 480 upon the taking effect of chapter 742, January 1, 1908.

L. 1907, ch. 742.—Consolidated in Domestic Relations Law, §§ 1, 10-25.

Code Civil Procedure, § 450, from words "and all sums" to "of the wife." Consolidated in Domestic Relations Law, § 51. Code § 1206 in § 51. Code § 1273, last sentence, in § 51. Code § 1761 in § 8.

DOWER.

Right of; Real Property Law, §§ 190-207. Action for; Code Civ. Pro. §§ 1596-1600.

DRAINAGE.

See Conservation L., §§ 480-491.

DRAINAGE LAW.

L. 1909, ch. 20.—"An act relating to drainage, constituting chapter fifteen of the consolidated laws."

CHAPTER XV OF THE CONSOLIDATED LAWS.

[In effect February 17, 1909.]

DRAINAGE LAW.

Article 1. Short title (§ 1).

2. Drainage for protection of public health and the reclaiming of low and wet lands (§§ 2-19).
3. Assessments to pay cost of drainage (§§ 30-47).
4. Maintenance and enlargement of ditches (§§ 60-74).
5. Miscellaneous provisions (§§ 80-84).
6. Drainage of agricultural lands (§§ 90-94).
7. Laws repealed; when to take effect (§§ 100, 101).

ARTICLE I.**SHORT TITLE.**

Section 1. Short title.

§ 1. Short title.—This chapter shall be known as the "Drainage Law."

Source.—New.

Consolidators' note.—The Drainage Law is the result of an examination of all general statutes relating to the subject of drainage, all live provisions of which have been consolidated without material change of substance.

Articles 1-5, which relate to drainage by commission, are made up from Revised Statutes, pt. 3, ch. 8, tit. 16, as amended, and, in fact, superseded by L. 1869, ch. 388, and the following statutes amendatory of the latter: L. 1880, ch. 388; L. 1886, ch. 636; L. 1890, ch. 557; L. 1892, ch. 321; L. 1896, ch. 819; L. 1899, ch. 111; L. 1901, ch. 523; L. 1904, ch. 75; L. 1904, ch. 433; L. 1905, ch. 325; and L. 1906, ch. 115.

Article 6, which provides for drainage of agricultural lands by agreement of property owners, consists of L. 1891, ch. 310.

These statutes have been consolidated with such changes only as were necessitated by the consolidation of independent statutes into a general law and the consequent arrangement into articles.

Following the ruling of the court of appeals in the Matter of Tuthill, 163 N. Y. 133, L. 1895, ch. 384; L. 1896, ch. 502, and L. 1897, ch. 168, have been omitted as unconstitutional.

The schedule of repeals annexed to the law covers all general statutes relating to the subject, including the session of 1908.

Note.—The R. S. of 1828 contained provisions regulating the drainage of swamp lands (R. S., pt. 3, ch. 8, tit. 16). These provisions were held unconstitutional upon the ground that they permitted the taking of private property for a private use, which was not a use for a private way. *White v. White* (1849), 5 Barb. 474. *In re Drainage* (1875), 5 Hun 116. This led to the introduction of many special

§ 2. Drainage for protection of public health, etc. L. 1909, ch. 20.

acts. In 1869 (L. 1869, ch. 888), the title of the R. S. was amended throughout, and an attempt was made to eliminate its unconstitutional features. The act of 1869 was upheld as constitutional solely on the ground that it authorized the taking of private property for the protection of the public health. *Matter of Ryers* (1878), 72 N. Y. 1; *Burk v. Ayers* (1879), 19 Hun 17; *Averell v. Day* (1882), 26 Hun 319; *Catlin v. Munn* (1885), 37 Hun 23; *People ex rel. Pullman v. Henion* (1892), 64 Hun 471, 19 N. Y. Supp. 488. The Constitution of 1894 authorized the legislature to enact general laws for the drainage of agricultural lands by the construction of drains, ditches and dykes on the lands of others (Const., Article 1, § 7); L. 1895, ch. 384, was passed to carry the constitutional provision into effect. The act authorizes an assessment of benefits upon the lands affected, and as to this feature, at least, was held unconstitutional in *Matter of Tuthill* (1900), 163 N. Y. 133, affirming 36 App. Div. 492, 55 N. Y. Supp. 657. Judge Gray, who writes the prevailing opinion in the court of appeals, argues that the provision of the Constitution authorizing the drainage of agricultural land is itself unconstitutional under the federal constitution, in providing for the taking of private property for a private use. However, the decision of the court is finally based upon the unconstitutionality of the assessment of benefits, on which point a majority of the judges concur.

ARTICLE II.

DRAINAGE FOR PROTECTION OF PUBLIC HEALTH AND THE RECLAIMING OF LOW AND WET LANDS.

(Title amended by L. 1910, ch. 624.)

- Section 2. Petition for drainage; who may make, and to what court.
3. Consolidation of applications for drainage.
 4. Proceedings on presentation of petition; appointment of commissioners.
 5. Vacancies, how filled.
 6. Commissioners to take and file oath of office.
 7. Majority of commissioners to constitute quorum.
 8. Organization of commission; chairman and treasurer.
 9. Duties and bond of treasurer.
 10. Commissioners to determine whether drainage necessary; to file their determination, and give notice thereof.
 11. Appeal from determination of commissioners; witnesses.
 12. Survey to be made and map prepared in case drainage found necessary.
 13. Map or duplicate thereof to be filed.
 14. Compensation and expenses of commissioners.
 15. Commissioners authorized to borrow funds.
 16. Bonds to be issued and sold to repay moneys so borrowed.
 17. Compensation for land taken or damages inflicted.
 18. Condemnation of land.
 19. Provisions of this article to apply to proceedings for deepening outlets of ponds.

§ 2. Petition for drainage; who may make, and to what court.—Any person owning or possessing any swamp, bog, meadow, or other low or wet lands within this state, who shall be desirous to drain the same in the interest of public health or for their improvement for agricultural purposes

L. 1909, ch. 20. Drainage for protection of public health, etc. § 3.

and who shall deem it necessary in order thereto that a ditch or ditches or other channels for the free passage of water should be opened through lands belonging to another person, or any person whomsoever who shall deem it necessary for the public health that any such swamp, bog or meadow or low or wet land should be drained, or that the outlet of any pond should be deepened or cleaned out so as to permit the free passage of water of such pond to such outlet, may present a petition duly verified, to the county court of the county in which such lands lie, or in case the same are situated in more than one county, to the supreme court, setting forth the facts in the names of the owners of all lands to be affected by the proceedings, so far as the same can with reasonable diligence be ascertained, and praying for the appointment of three commissioners for the purposes and with the powers hereafter set forth. The application provided for by this section may be made by the supervisor of any town on behalf of the town, or by the president of the board of trustees of any incorporated village on behalf of said village. (*Amended by L. 1910, ch. 624.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 1, as amended by L. 1869, ch. 888; L. 1886, ch. 636; L. 1906, ch. 115, in part. For remainder of section 1, see §§ 3 and 19.

References.—General laws may be passed permitting owners of agricultural lands to construct and maintain necessary drains on lands of others, Constitution, Art. 1, § 7. Local board of health may order drainage of lands for protection of public health, Public Health Law, § 30.

Constitutionality.—This act is not violative of any constitutional provision. It does not authorize the taking of private property for a private use, or infringe the constitutional provision prohibiting the taking of property without due process of law. *Matter of Ryers* (1878), 72 N. Y. 1. *People ex rel. Dunphy v. Wiggins* (1911), 143 App. Div. 760, 128 N. Y. Supp. 344.

The act of 1895 (L. 1895, ch. 384) providing for an apportionment of the damages and expenses incurred in the drainage of agricultural lands over the lands of others, between the petitioners thereunder and the owners of the lands taken, in proportion to the benefits received, exceeded the authority conferred upon the legislature by the provisions of the State Constitution as amended in 1894 (Art. 1, § 7), that general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches and dykes upon the lands of others. *Matter of Tuthill* (1900), 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781, 79 Am. St. Rep. 574. See also *Matter of Town of Penfield* (1896), 3 App. Div. 30, 37 N. Y. Supp. 1056, *affd.* 155 N. Y. 703, 50 N. E. 1116.

As to the constitutionality of various special acts, see *People ex rel. Pulman v. Henion* (1892), 64 Hun 471, 19 N. Y. Supp. 488; *People ex rel. Cook v. Nearing* (1863), 27 N. Y. 306; *Matter of Lent* (1900), 47 App. Div. 349, 62 N. Y. Supp. 227.

Specifications in petition.—Not necessary to state termini of drain, or the number and kind of drains contemplated. *Matter of Beehler*, 42 Hun 651, 3 N. Y. St. Rep. 486 (Gen. T., 1886).

Notice need not be given to other landowners. *Matter of Beehler* (1886), 42 Hun 651, 3 N. Y. St. Rep. 486.

Section cited.—*Olmsted v. Dennis* (1879), 77 N. Y. 378.

§ 3. Consolidation of applications for drainage.—Two or more applica-

tions under this section respecting different lands or parcels within the same town or incorporated village, may be made by one proceeding or petition, or two or more such proceedings or petitions may, in the discretion of the court, upon the application of any party in interest, be consolidated, and one commission be appointed for all, and in such case the proceedings shall continue thenceforth as if but one petition had been presented, or one proceeding commenced.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 1, as amended by L. 1869, ch. 888, § 1; L. 1886, ch. 636, § 1, and L. 1906, ch. 115, § 1, in part. For remainder of § 1 see §§ 2 and 19 hereof.

§ 4. **Proceedings on presentation of petition; appointment of commissioners.**—The court to which such application is made, if satisfied that such drainage is necessary, shall upon such notice as the court shall direct thereupon appoint and commission three persons, who shall be freeholders or householders in the county or counties wherein the lands are situated, and who shall not be interested in said lands, nor in any of them, and one of whom shall be a civil engineer or surveyor, if there be one within the county, to hear and determine, first, whether it is necessary in order to drain such lands, that a ditch or ditches or other channels for the free passage of water should be opened through lands belonging to others; second, whether it is necessary for the public health or for the improvement for agricultural purposes, or for both, that such lands should be drained; third, the probable cost of such drainage and the results that such drainage would produce, and to take such other and further steps with reference thereto as are hereinafter provided for. (*Amended by L. 1910, ch. 624, and L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 2, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 2.

Determination of necessity.—In a proceeding to effect the drainage of a swamp, bog, meadow, etc., it is neither necessary nor proper for the court to take evidence and determine in advance of the appointment of commissioners whether it is necessary for the public health that the lands in question should be drained. *Matter of Spring Valley Swamp* (1910), 66 Misc. 206, 123 N. Y. Supp. 269, *affd.* (1911) 145 App. Div. 636, 129 N. Y. Supp. 918.

Commissioners are officers included in the class whose election or appointment is by Const., Article 10, § 2, left to the control of the legislature. *Matter of Ryers* (1878), 72 N. Y. 1, 28 Am. Rep. 88. If not a freeholder, the appointment may be set aside on notice. *Matter of Beehler*, 42 Hun 651, 3 N. Y. St. Rep. 486 (Gen. T., 1886), 3, 4.

Resignation of commissioner.—A commissioner has a right to resign; his resignation is complete when it is received by the county judge; no formal acceptance by the latter is needed to give it effect; and after such resignation the person resigning cannot legally act as commissioner. *Olmsted v. Dennis* (1879), 77 N. Y. 378.

§ 5. **Vacancies, how filled.**—In all cases where, either by death, resignation or otherwise, a vacancy shall occur in the office of commissioners appointed under the provisions of this chapter, such vacancy shall on the

application of the commissioners then in office, or of any other person interested, be supplied and filled by the court in which such commissioners were originally appointed, and such application shall be upon such notice as the court to which the application is made shall prescribe. The commissioner thus appointed shall possess all the powers and be subject to all the liabilities of the commissioner whose office he is appointed to supply, provided that until such vacancy in the office of the commissioners shall be supplied and filled, the remaining or surviving commissioners shall possess and exercise all the powers conferred by the provisions of this chapter as fully to all intents and purposes as if no such vacancy had occurred or existed.

Source.—Section 19, as added by L. 1870, ch. 88, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 11.

§ 6. Commissioners to take and file oath of office.—The said commissioners shall, before they enter upon the duties of their office, make and file an oath with the county clerk of the county in which they are appointed, or in case they shall have been appointed by the supreme court, then in the county where a part of such lands are situated, in which the court shall direct the same to be filed, that they will faithfully discharge the duties of their office according to the best of their knowledge and ability.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 3, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 3, in part. For remainder of § 3 see §§ 7, 8, 9 hereof.

Section cited.—*Olmsted v. Dennis* (1879), 77 N. Y. 378.

§ 7. Majority of commissioners to constitute quorum.—A majority of the commissioners present at any meeting, of which all have notice, may exercise the powers of the commission.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 3, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 3, in part. For remainder of § 3 see §§ 6, 8, 9 hereof.

§ 8. Organization of commission; chairman and treasurer.—The commissioners shall, with all convenient speed, after qualifying as provided in section six of this article, meet and organize by appointing one of the members chairman and another treasurer of the commission.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 3, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 3, in part. For remainder of § 3 see §§ 6, 7, 9 hereof.

§ 9. Duties and bond of treasurer.—The treasurer shall collect and be custodian of all moneys to be collected or received by the commissioners under the provisions of this chapter, and shall pay out the same only upon the orders of the commissioners, signed by at least two of said commissioners. The treasurer shall, in all cases where the amount to be collected or received by him exceeds five hundred dollars, give a bond with sufficient sureties to the people of the state of New York, to be approved by the county judge of the county in which such lands or a part thereof are situated, or by a justice of the supreme court, conditioned for the faithful performance of the duties of his office, such bond to be filed in the office of the clerk of the county in which the oath of said commissioners is filed.

§§ 10, 11. Drainage for protection of public health, etc. L. 1909, ch. 20.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 3, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 3, in part. For remainder of § 3 see §§ 6, 7, 8 hereof.

§ 10. Commissioners to determine whether drainage necessary; to file their determinations, and give notice thereof.—The said commissioners shall, after notice to the petitioner and the parties named in the petition, in such manner as they shall order, proceed by personal view of lands and otherwise to determine whether it is reasonably necessary or practicable, in order to drain such lands, that a ditch or ditches or other channels for the free passage of water shall be opened through lands belonging to others than the petitioner, and also whether it is necessary either for the public health or for the improvement, for agricultural purposes of such lands, or for either or both of such purposes, that the same shall be drained. The said commissioners shall file in the office of the county clerk for said county their determinations signed by them, or by a majority of them, if they do not all concur; and in case the lands are situated in more than one county, then the said commissioners shall cause a duplicate of their determinations so made and filed as aforesaid to be made and filed in each of the other counties to which a part of such lands are situated, which duplicate shall be signed by them as aforesaid, and give notice of such filing to all whom it may concern, by publishing such notice at least twice in some newspaper published in the town in which such lands or a part thereof are situated; or if there be no such newspaper, then in a newspaper published at a place nearest to said lands respectively, and by mailing a copy of such notice directed to each person interested in such lands or any part thereof at his last known post-office address, who has not been personally served with such notice. (*Amended by L. 1910, ch. 624.*)

Source.—¶ 1, R. S., pt. 3, ch. 8, tit. 16, § 4, as amended by L. 1869, ch. 888, § 1; ¶ 2, R. S., pt. 3, ch. 8, tit. 16, § 5, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 4, in part. For remainder of § 5 see § 11 hereof.

Public health was the only ground on which drain could be constructed prior to the amendment of 1910. *Matter of Ryers* (1878), 72 N. Y. 1, 28 Am. Rep. 88; *Burk v. Ayers* (1879), 19 Hun 17; *Averell v. Day* (1882), 26 Hun 319, *affd.* (1885) 98 N. Y. 624; *Catlin v. Munn* (1885), 37 Hun 23; *People ex rel. Pulman v. Henlon* (1892), 64 Hun 471, 19 N. Y. Supp. 488; *Matter of Town of Penfield* (1896), 3 App. Div. 30, 37 N. Y. Supp. 1056, *affd.* (1898) in 155 N. Y. 703, 50 N. E. 1116.

Duties of commissioners generally. *Matter of Beehler*, 42 Hun 651, 3 N. Y. St. Rep. 486 (Gen. T. 1886).

Hearing.—This section contemplates that a property owner whose lands are affected by the proposed improvement shall have an opportunity to be heard and to submit his proof. *Matter of Spring Valley Swamp* (1910), 66 Misc. 206, 123 N. Y. Supp. 269, *affd.* (1911) 145 App. Div. 636, 129 N. Y. Supp. 918.

Section cited.—*Olmsted v. Dennis* (1879), 77 N. Y. 378.

§ 11. Appeal from determination of commissioners; witnesses.—Any party feeling aggrieved by such determination may appeal therefrom to the county court, or to the supreme court in the event the proceedings were instituted or are pending in that court, by giving written notice of such

L. 1909, ch. 20. Drainage for protection of public health, etc. §§ 12, 13.

appeal to said commissioners within ten days after the last publication of such notice. The said court to which such appeal is taken shall thereupon on motion of either party and on at least ten days' notice proceed to hear said appeal and to determine the same. The attendance of witnesses in any proceeding taken pursuant to the provisions of this chapter may be compelled as in civil actions in such court with like fees.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 5, as amended by L. 1869, ch. 888, § 1, and by L. 1886, ch. 636, § 4, in part. For remainder of § 5 see § 10 hereof.

Notice of appeal need not contain a specification of errors, and need only be served on commissioners. *Burk v. Ayers* (1879), 19 Hun 17.

§ 12. Survey to be made and maps prepared in case drainage found necessary.—If it shall be adjudged and determined either by the said commissioners or by the court on appeal that for the benefit of the public health such ditches, drains or channels should be opened, or that such lands should be drained, it shall be their duty, unless the same shall be done by the petitioner or owners of such lands to their satisfaction, or unless such petitioner and owners shall agree that such survey and map are not necessary, to cause an accurate survey of all the said lands to be made and a map thereof to be made on a scale of three hundred and thirty feet to one inch, showing all the lands that are proposed to be drained, the number of acres in each separate tract, the names of the owners or occupants thereof so far as can with due diligence be ascertained, and the general relative levels of each tract, and the width, depth, slope of slides, shape and course of such ditch or ditches or channels for the passage of water as they shall determine to be necessary for the drainage of such lands, and for the purposes of this chapter such commissioners are empowered to employ a competent civil engineer or surveyor, or to authorize such commissioner as may be a civil engineer or surveyor to act as such, and to enter upon any and all lands named in the petition or deemed necessary by such commissioners and survey the same and take levels thereof, and by themselves, their servants and agents to do all things necessary to the preparation for construction and necessary for the construction and completion of all such ditches and channels for the passage of water, as they shall deem necessary for the complete drainage of the said swamps, bog, meadow or other low lands. (*Amended by L. 1910, ch. 624, L. 1913, ch. 613, and L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 6, as amended by L. 1869, ch. 888, § 1; L. 1871, ch. 303, and L. 1886, ch. 636, § 5.

Public health only ground for constructing drain. See notes to § 10, ante.

Channel in highway.—Town authorities may by action compel commissioners to bridge it. *Town of Conewango v. Shaw* (1898), 31 App. Div. 354, 52 N. Y. Supp. 327.

Section cited.—*Olmsted v. Dennis* (1879), 77 N. Y. 378.

§ 13. Map or duplicate thereof to be filed.—The said commissioners shall, in the completion of the work, cause such map, or a duplicate thereof, certi-

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fied by them, to be filed in the office of each county clerk in which their determination is by section ten of this chapter required to be filed, which, or a duly authenticated copy of which, may be used in evidence in any suit or proceeding in this state.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 7, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 6.

Amendment of map may be ordered by court where map filed called for open ditches, and a portion were made of tile and covered. *Matter of Underhill* (1889), 53 Hun 633; 2 Silv. 541, 6 N. Y. Supp. 716, *affd.* (1889) 117 N. Y. 471, 22 N. E. 1120.

§ 14. Compensation and expenses of commissioners.—The said commissioners shall be paid for their services five dollars each, for each full day actually employed in their said duties. They shall keep an account of all their expenses and of all the costs and expenses incurred in draining said lands, including all the costs and expenses incurred in any proceedings under this chapter and preliminary or incident thereto, and any land damages as hereinafter provided, all of which shall be a lien upon the property benefited.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 8, as amended by L. 1869, ch. 888, § 1; L. 1886, ch. 636, § 7; L. 1901, ch. 523, § 1, and L. 1904, ch. 75, § 1, in part. For remainder of § 8 see §§ 15, 16 hereof.

Services as engineer.—In the absence of bad faith, a commissioner who, independent of his duty as such, renders services as an engineer in the construction of a drain, is entitled to compensation for such services. *Matter of Lent* (1900), 47 App. Div. 349, 350, 62 N. Y. Supp. 227.

Section cited.—*Olmsted v. Dennis* (1879), 77 N. Y. 378.

§ 15. Commissioners authorized to borrow funds.—In case it shall be necessary to raise funds for construction of said ditches or channels, or land damages, before the assessment hereinafter provided for can be made and collected, the said commissioners are hereby empowered from time to time, with the approval of the court in which the proceeding was initiated or is pending, to borrow so much money as may be necessary therefor, upon such evidences of indebtedness as they may deem proper, bearing interest at the rate of six per centum per annum, payable upon the completion of such assessment and collection; and the interest accruing thereon shall be assessed as other expenses for the said construction. Such evidences of indebtedness shall not be issued for less than par, and shall be receivable in payment of such assessments.

Said commissioners shall thereafter certify such amount to be borrowed to the supervisor or supervisors of the town or towns in which the lands to be assessed are located.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 8, as amended by L. 1869, ch. 888, § 1; L. 1886, ch. 636, § 7; L. 1901, ch. 523, § 1, and L. 1904, ch. 75, § 1, in part. For remainder of § 8 see §§ 14, 16 hereof.

Compelling issuance of bonds.—The provisions of section 36 of this act regarding mandamus does not give the County Court jurisdiction to grant a peremptory

writ of mandamus to compel a supervisor to issue and sell bonds under this and the following section. *People ex rel. Dunphy v. Chaney* (1916), 171 App. Div. 303, 305, 156 N. Y. Supp. 1035.

Inclusion of compensation and expenses.—Bonds for the payment of money borrowed by drainage commissioners for the construction of ditches, or for land damages will not be issued where the commissioners include in their account items for their compensation and personal expenses. *People ex rel. Dunphy v. Wiggins* (1911), 143 App. Div. 760, 123 N. Y. Supp. 344.

§ 16. Bonds to be issued and sold to repay moneys so borrowed.—The supervisor or supervisors of such town or towns shall thereupon immediately issue bonds of the town or towns to the total amount named in said statement prepared by said commissioners, and so certified by them to him or them, such bonds to be made payable on or before such time or times, not to exceed five years from the date thereof, as the said commissioners shall determine. In case the lands to be drained are located in more than one town, the total amount to be so raised, as certified by the commissioners, shall be apportioned by the court in which the proceedings is pending among the several towns in which the lands to be drained are located, upon application of said commissioners to said court, written notice of said application having been first served on the supervisors, or town clerks, of such several towns, not less than eight days before such application, unless, upon order to show cause, a shorter notice is permitted to be so served. Such apportionment shall not be construed as indicating the amount of the final assessment of the cost and expense of said drain.

Upon service of notice of such apportionment, specifying the amount to be raised by each town, the supervisor of each town shall thereupon immediately issue bonds of the town to the total amount so apportioned to his town, payable in manner, time and form as herein otherwise provided. All such bonds shall bear interest at a rate not exceeding six per centum per annum, and shall be negotiated for not less than their par value. They shall be sold on sealed proposals or at public auction upon notice published in the official paper, if any, and also in each other newspaper actually printed in the town, and in such other newspapers as the supervisor of each town may determine, and posted in three public places in the town, at least ten days before the sale, to the person who will take them at the lowest rate of interest. They shall be consecutively numbered from one to the highest number issued, and the clerk shall keep a record of the number of each bond or obligation, its date, amount, rate of interest, when and where payable, and the purchaser thereof, or the person to whom they are issued.

The proceeds from the sale of said bonds shall immediately be delivered by the said supervisor to the treasurer of said commission. The said commissioners shall, from the proceeds derived from the sale of said bonds, pay all obligations incurred by them for draining said lands, authorized

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by this chapter, including such evidences of indebtedness as they have theretofore issued in pursuance of authority contained in this chapter. (*Amended by L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 8, as amended by L. 1869, ch. 888, § 1; L. ch. 636, § 7; L. 1901, ch. 523, § 1, and L. 1904, ch. 75, § 1, in part. For remainder of § 8, see §§ 14, 15 hereof.

Compelling issuance of bonds.—See note under section 15 ante.

Mandamus by holder of bonds to compel assessment. People ex rel. Molle Marsh (1897), 21 App. Div. 88, 47 N. Y. Supp. 395.

§ 17. **Compensation for land taken or damages inflicted.**—Any person whose land is taken in the construction of any such ditch or channel shall be paid by said commissioners on or before the commencement of the work the value of the land so taken, and such other injuries as the person may sustain.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 9, as amended by L. 1869, ch. 888, § 1, L. 1908, ch. 439, § 1, in part. For remainder of § 9 see § 18 hereof.

Waiver.—The provisions of this section requiring that lands taken in the construction of a drain shall be paid for before the commencement of the work for the benefit of the owners and they can waive it. *Olmsted v. Dennis* (1879) N. Y. 587.

18. **Condemnation of land.**—If the commissioners cannot agree with any person upon the compensation and damages for making and maintaining forever such ditches or channels, the said commissioners shall proceed to acquire title to the said easement upon and across the land of such person in the manner, so far as the same is applicable, prescribed by the condemnation law. The easements, over and upon all lands included in or affected by the work determined upon by the commissioners may be obtained by one proceeding under this section. In case the said commissioners become satisfied before the easements and rights for the maintaining forever of any or all of the ditches or drains previously determined by them to be necessary for the drainage of the lands, as hereafter provided, have been fully acquired, that part of such drains so no longer necessary for the public health or for any other purposes hereafter provided for, they may, with the consent in writing of the owners of the land whereon the same are located, abandon the said drains so determined by them to be unnecessary for the public health or for such other purposes, and they shall thereupon make a certificate in writing setting forth and describing the ditches and drains so to be abandoned, and file the same in the county clerk's office wherein their determinations of the necessity of the draining such lands has been filed, and thereupon the said drain set forth and described in said last named certificate and any and all easements and rights to construct and maintain the same, shall be deemed to be forthwith abandoned and extinguished, but any costs and expenses previously incurred in connection with such drains so abandoned shall be assessed and collected as in this chapter provided. (*Amended by L. 1904, ch. 624.*)

L. 1909, ch. 20.	Assessments to pay costs of drainage.	§§ 19, 30.
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Source.—R. S., pt. 3, ch. 8, tit. 16, § 9, as amended by L. 1869, ch. 888, § 1, and L. 1908, ch. 439, § 1, in part. For remainder of § 9 see § 17 hereof.

References.—As to procedure for condemnation of land, see Code Civil Procedure, §§ 3357–3384.

Petition should state not only that commissioners cannot agree “upon the compensation and damages,” but also the reason. *Matter of Marsh* (1877), 71 N. Y. 315.

Proceeding should be begun in supreme court since passage of Condemnation Law. *Matter of Hodge* (1899), 28 Misc. 104, 59 N. Y. Supp. 775.

Commissioners of appraisal may be appointed by court, when drainage commissioners cannot agree upon compensation to be made to owner. *Rutherford v. Co. Ct. of Orleans* (1882), 28 Hun 14.

§ 19. Application of the provisions of this article.—The provisions of this article shall apply, so far as practicable, to proceedings for deepening and clearing out the outlet of any pond so as to permit the free passage of waters therefrom, and to perform the work required therefor, and to the assessment and payment of the cost of such work. The proceedings provided for in this article shall not be invoked to drain, reclaim or secure for tillage or other farming purposes only, any low, marshy or wet lands while a valid contract is in force relating to the same premises pursuant to the provisions of article six of this chapter. (*Amended by L. 1910, ch. 624.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 1, as amended by L. 1869, ch. 888, § 1; L. 1886, ch. 636, § 1, and L. 1906, ch. 115, § 1, in part. For remainder of § 1 see §§ 2, 3 hereof.

ARTICLE III.

ASSESSMENTS TO PAY COST OF DRAINAGE.

Section 30. Commissioners to make statement of cost of work and assess same according to benefits received.

31. Statement and assessment to be filed.
32. Notice to be given to owners and officers of towns or villages assessed.
33. Appeal from assessment.
34. Levying assessments.
35. Towns or villages authorized to borrow money to pay assessments.
36. Method of payment in case of annual assessments.
37. Commissioners to file and present to court for audit statement of moneys received and disbursed.
38. Proceedings thereupon.
39. Appeals on questions of law; how taken.
40. Land to be sold for non-payment of assessment.
41. Rights of purchaser on such sale.
42. Redemption of lands so sold; correction of errors in proceedings.
43. Additional assessments to cover deficiencies.
44. Statement of amount and cause of deficiency to be filed.
45. Notice thereof to be given.
46. Appeals and proceedings thereupon.
47. Enforcement of such assessments.

§ 30. Commissioners to make statement of cost of work and assess same according to benefits received.—The said commissioners shall, as soon as

the said costs, expenses, land damages and compensation, hereinbefore provided for, can be determined and ascertained, make a complete and detailed statement thereof, including all the claims of said commissioners, which statement shall be duly verified by said commissioners or by a majority of them. They shall also, in case they have decided that the public health requires that such lands shall be drained, determine whether any, and if so, how much of the said sum shall be assessed to and paid by the incorporated village, town or county in which the said lands are situated, and whether the same shall be paid in one assessment or in annual instalments, not exceeding thirty in all; the remainder, or in case they shall determine that no portion of said sum shall be paid by said village, town or county, then all of said sum shall be apportioned among the several owners or occupants of such of the lands included in the said map or adjacent thereto, as they shall deem to be directly benefited by said drainage, in proportion to the amount of benefit which each receives therefrom, and they shall in like manner determine, whether said sum so apportioned shall be paid in one assessment, or in annual instalments, as above provided, in reference to assessments to be paid by a village, town or county; provided, however, that the board of supervisors of any such county, the town board of any such town, the board of trustees of any such village, or any such owner or occupant of lands upon which, or to whom said sum or any part thereof is apportioned, may elect to pay the whole of their said apportionment, or the portion thereof at any time remaining unpaid in one assessment, instead of in instalments as above provided. The several amounts so adjudged shall constitute liens upon the respective tracts until paid or otherwise removed with interest from the service of notice of such decision of said commissioners as hereinafter provided, that no portion of the costs, expenses, land damages and compensation provided for in and by this chapter shall be assessed to or paid by any incorporated village, town or county in which the lands so to be drained are situated, unless a majority of the board of trustees in case of a village; a majority of the town board in case of a town; and a majority of the board of supervisors in case of a county, shall have joined in the petition required by the second section of this chapter, except, however, that the said commissioners shall, in case they have decided that the public health requires the drainage of the land, upon the consent of a majority of the town board of such town, manifested by the adoption of a resolution to that effect, in such case determine whether any, and if so, how much of said sum so ascertained for costs, land damages and compensation shall be assessed to and paid by such town, and thereupon the amount so determined to be paid by such town shall be assessed upon and paid by such town in one assessment or in annual instalments as such commissioners shall determine. (*Amended by L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 10, as amended by L. 1869, ch. 888, § 1; L. 1871, ch. 303, § 2; L. 1886, ch. 636, § 8; L. 1892, ch. 321, § 1; L. 1901, ch. 523, § 2.

L. 1909, ch. 20.	Assessments to pay costs of drainage.	§§ 31, 32.
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and L. 1908, ch. 439, § 2, in part. For remainder of § 10 see §§ 31, 32, 33 hereof.

Lien on land.—This provision is constitutional, the power to correct the assessment by appeal being preserved. *Matter of Lent* (1900), 47 App. Div. 349, 359, 62 N. Y. Supp. 227.

Damages need not be actually paid before levy of assessment. *Matter of Swan* (1885), 35 Hun 625.

Section cited in construing section 33 *post*. *Matter of Turrell* (1909), 63 Misc. 502, 117 N. Y. Supp. 764.

§ 31. Statement and assessment to be filed.—The said commissioners shall file in each clerk's office in which their determination of the necessity of draining such lands or duplicate thereof, as provided by section ten of this chapter, is required to be filed, a copy of the said statement, and of the said determination, as to the village or town or county, in case there be any such, and of the said apportionment, and of the time and manner of payment thereof, certified by them, which, or a duly authenticated copy of which, may be received in evidence in any suit or proceedings in this state.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 10, as amended by L. 1869, ch. 888, § 1; L. 1871, ch. 303, § 2; L. 1886, ch. 636, § 8; L. 1892, ch. 321, § 1; L. 1901, ch. 523, § 2, and L. 1908, ch. 439, § 2, in part. For remainder of § 10 see §§ 30, 32, 33 hereof.

§ 32. Notice to be given to owners and officers of towns or villages assessed.—They shall also cause notice, written or printed, to be given to each person whose lands are assessed by them, to pay any part of said sum, and also to the supervisor of any town or the president of any village, or the chairman of any board of supervisors of any county that may be assessed by them, which notice shall state the time and place of filing such statement and determination. The said notice shall be served personally upon such supervisor, president or chairman, and also upon each person whose lands are so assessed, when he can be found with due diligence in a county in which such lands or a part thereof are situated, and when not so found, then by delivering such notice to some person of reasonable age and discretion, residing upon said premises, directed to the owner or occupant thereof, or if no such person be found residing upon said premises and such owner or occupant be not found, then by depositing such notice in the post-office duly enveloped and directed to such owner or occupant at his last known place of residence with the postage prepaid. A copy of such notice with the affidavit of the person who served the same, that he delivered the original to the person to whom it was addressed, shall be evidence of such service.

If the owner or occupant of any land to be affected by proceedings taken pursuant to the provisions of this chapter, be unknown and can not, with due and reasonable diligence, be ascertained, or if a place or places where such owner or occupant would probably receive matter transmitted through the post-office can not with reasonable diligence be ascertained, service of any notice required by this chapter may be made upon such owner or occu-

pant by delivery thereof to the clerk of the county in which said land such owner or occupant or a part thereof is situated.

Source.—§ 1 from R. S., pt. 3, ch. 8, tit. 16, § 10, as amended by L. 1869, ch. 8, § 1; L. 1871, ch. 303, § 2; L. 1886, ch. 636, § 8; L. 1892, ch. 321, § 1; L. 1901, ch. 523, § 2, and L. 1908, ch. 439, § 2, in part. For remainder of § 10 see §§ 30, 31, hereof. § 2 from § 22, as added by L. 1886, ch. 636, § 13, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 883, § 1.

Actual notice.—Objections that persons were not served with notice of the proceedings is not available where it appears that they had actual notice of what took place, and that the objection was not specified as one of the grounds of appeal. *Matter of Lent* (1900), 47 App. Div. 349, 62 N. Y. Supp. 227.

Section cited in construing section 33 post. *Matter of Turrell* (1909), 63 Misc. 2d 502, 117 N. Y. Supp. 764.

§ 33. Appeal from assessment.—Any person deeming himself aggrieved thereby, or any officer on whom a notice was served as required by section thirty-two of this article, who deems his village or town or county aggrieved, may appeal from the decision of the said commissioners to the court in which such proceedings were instituted or are pending, for the correction of such assessment, provided he serves upon said commissioners notice of said appeal within ten days after the service upon him of the notice of filing such statement, and the party making the appeal shall, within ten days from the service of notice thereof on the commissioners, make a full statement of the grounds of his appeal setting forth the point on which he feels aggrieved by the determination of said commissioners, and file a certified copy thereof in the office of the clerk of the county in which such lands or a portion thereof affected by said proceedings are situated, and present the said statement to the court, and the court shall thereupon proceed, without further delay than such as is necessary to give proper notice to the parties interested, to hear and finally determine the appeal. The court may award costs to the successful party on such appeal not exceeding fifteen dollars besides his necessary disbursements to be taxed by the clerk of the court.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 10, as amended by L. 1869, ch. 883, § 1; L. 1871, ch. 303, § 2; L. 1886, ch. 636, § 8; L. 1892, ch. 321, § 1; L. 1901, ch. 523, § 2, and L. 1908, ch. 439, § 2, in part. For remainder of § 10 see §§ 30, 31, 32 hereof.

Notice of appeal.—This section relates to appeals from assessments, and the specification of errors required by it need not be contained in the notice of appeal under section 11 (formerly 5). *Burk v. Ayers* (1879), 19 Hun 17.

Matters omitted from notice of appeal are presumed lawful. *Matter of Underhill* (1889), 53 Hun 633, 25 N. Y. St. Rep. 701, 6 N. Y. Supp. 716.

Scope of review.—The court upon the hearing of an appeal is confined to the consideration of questions relating to the making of the assessment itself, and cannot go back of them for the purpose of determining whether the prior proceedings are regular and valid. The appeal is for the correction of the assessment, not for the purpose of vacating the assessment, or obtaining a decision that the commissioners had no jurisdiction. Such questions should be reviewed in some other manner. The determination of the total amount to be raised by assessment is properly the subject of review; and the court can determine that the commissioners have included in the total amount of the assessment items which are not legitimate.

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expenses of the proceeding. The court can also review the determination of the commissioners as to the portion, if any, to be borne by any town, village or county, and also the question of the fairness and justice of an assessment against a given parcel of land as to whether it has been benefited at all, or the extent of such benefit. The court will pay proper respect to the judgment of the commissioners in those matters, and will not be disposed to disturb their determination unless it should be made to appear that the commissioners were radically wrong and had proceeded upon erroneous principles. The practice upon such appeals is to take testimony and thereby review the determination of the commissioners. *Matter of Turrell* (1909), 63 Misc. 502, 117 N. Y. Supp. 764.

Court not concluded by return or by testimony of one commissioner as to what rule of apportionment was adopted, but the question is open to be determined by the evidence. *People ex rel. Parker v. Jefferson Co. Ct.* (1874), 55 N. Y. 604.

Where, on an application to a county court to review an assessment by the commissioners, there is testimony of numerous witnesses offered to show that the petitioners were in no way benefited by the drainage, while the only evidence offered against the application is the mere statement or report of the commissioners, it is the duty of the county court to act upon what appears to be the clear preponderance of evidence. *In re New York Cent. & H. R. R. Co.* (1889), 28 N. Y. St. Rep. 642, 8 N. Y. Supp. 247.

Correction of assessment.—On appeal the court may correct any act which the commissioners were required to perform in levying the assessment, if such act was specified by the appellant as a ground for appeal. *Matter of Lent* (1900), 47 App. Div. 349, 62 N. Y. 227.

Setting aside report.—Entertainment of commissioners, held not sufficient ground. *Matter of Drainage in Town of Penfield* (1893), 69 Hun 601, 23 N. Y. Supp. 944, *revd.* on other grounds, 3 App. Div. 30, 37 N. Y. Supp. 1056, *affd.* 155 N. Y. 703, 50 N. E. 1116. Nor that attorney for petitioner advised commissioners as to legal steps to be taken, *Id.*

Certiorari may be taken where appeal is not taken, but court will only interfere where commissioners acted on an erroneous principle or violated some legal right. *People ex rel. Flanders v. Haines* (1874), 3 T. & C. 224.

The unqualified character of the right of appeal is not affected by the provision that the court, upon the determination of the appeal, may award costs not exceeding fifteen dollars and disbursements. *Matter of Lent* (1900), 47 App. Div. 349, 62 N. Y. Supp. 227.

Review by supreme court.—Under the statute all proceedings under the commissioners are reviewed by an appeal to the county court. Where no such appeal has been taken, the proceedings under the commissioners will not be reviewed by the supreme court, on an appeal from an order of the county court denying a motion to set aside and vacate the order appointing the commissioners. *Matter of Beehler* (1886), 42 Hun 651, 3 N. Y. St. Rep. 846.

§ 34. Levying assessments.—The said commissioners shall within thirty days after filing said statement, in case the same is not appealed from, and within thirty days after notice of the final determination of the appellate court thereon, in case the same is appealed from, levy the assessments herein provided for in one sum or annually thereafter until said sum is paid. (*Amended by L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 11, as amended by L. 1869, ch. 888, § 1; L. 1892, ch. 321, § 2; L. 1897, ch. 249, § 1, and L. 1901, ch. 523, § 3, in part. For remainder of § 11 see §§ 35, 36 hereof.

Damages awarded need not have been paid to owners at time assessment is made. *Matter of Swan* (1885), 35 Hun 625.

Only lands benefited can be assessed for damages awarded. *Matter of Town of Gates* (1889), 55 Cilv. 390, 8 N. Y. Supp. 247.

Mandamus to compel levy.—A holder of bonds issued in compliance with this law is entitled to a writ of alternative mandamus, compelling the commissioners to levy an assessment in order to pay the holder from the proceeds, as such assessment is the only source of payment. *People ex rel. Moller v. Marsh* (1897), 21 App. Div. 88, 47 N. Y. Supp. 395. Such a mandamus proceeding must be commenced within ten years after the cause of action accrues. *People ex rel. Nelson v. Marsh* (1903), 82 App. Div. 571, 81 N. Y. Supp. 579, *affd.* 178 N. Y. 618, 70 N. E. 1107.

§ 35. Towns or villages authorized to borrow money to pay assessments.—In case it is determined that any town or village shall pay any part of such sum, the supervisor of such town, or the board of trustees of such village, is authorized to borrow money on the credit of the town or village, as the case may be, to pay the same, or any instalment thereof, and the board of supervisors shall at their next ensuing annual meeting include the amount assessed on any town in the next tax levy on said town, together with any sum to be paid by said county, which shall be included in the sum to be raised for such county. Money so borrowed shall be upon obligation of the village or town issued at not less than par, bearing interest at six per centum, payable out of the moneys raised by tax levy as aforesaid, and receivable in payment of such taxes.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 11, as amended by L. 1869, ch. 888, § 1; L. 1892, ch. 321, § 2; L. 1897, ch. 249, § 1, and L. 1901, ch. 523, § 3, in part. For remainder of § 11 see §§ 34, 36 hereof.

§ 36. Method of payment in case of annual assessments.—In case it is determined that said assessment shall be levied annually, the said commissioners shall also determine the number of assessments not to exceed thirty into which the total assessment shall be divided, and the amount of each annual assessment, and shall certify such amounts to the supervisor of the town in which the lands to be assessed are located. The supervisor of such town shall thereupon immediately issue bonds of the town to the total amount named in said statement filed by said commissioners, and so certified by them to him, such bonds to bear interest at a rate not exceeding six per centum per annum, and to be negotiated for not less than their par value. They shall be sold on sealed proposals or at public auction upon notice published in the official paper, if any, and also in each other newspaper actually printed in the town, and in such other newspaper as the supervisor may determine, and posted in three public places in the town, at least ten days before the sale, to the person who will take them at the lowest rate of interest. They shall be consecutively numbered from one to the highest number issued, and the clerk shall keep a record of the number of each bond or obligation, its date, amount, rate of

interest, when and where payable, and the purchaser thereof or the person to whom they are issued.

The amounts of the assessments against said lands as determined by said commissioners and included in their said statement filed as aforesaid, shall be collected annually from the property assessed, in such instalments as determined by said commissioners, together with the interest accrued on such town bonds for such amounts in the same manner as other town taxes are collected, and the proceeds thereof shall be used to pay said bonds.

Such bonds shall be issued in several series, each series made payable at such time and equal to such amount, as shall correspond with the annual instalments as certified to said supervisor by said commissioners. The proceeds from the sale of said bonds shall immediately be delivered by said supervisor to the treasurer of said commission, and said commissioners shall thereupon be discharged of all duty respecting the collection of said annual instalments and shall thereupon immediately, from the proceeds derived from the sale of said bonds at not less than par, pay all obligations incurred by them for draining said lands, authorized by this chapter, included in the statement filed by them, including such evidences of indebtedness or bonds of the town as may have been theretofore issued in pursuance of the authority contained in section fifteen of this chapter. The court in which the proceeding is pending shall have jurisdiction, by mandamus, upon the petition of any party aggrieved to enforce the prompt compliance of any of the provisions of this section on the part of any official charged therewith.

If in any year the amount collected from said assessments is not sufficient to pay the principal and interest of the town bonds falling due in that year there shall be levied in the next annual tax levy against all the taxable property in said town in the same manner as other town taxes are levied and collected, an amount equivalent to said deficit in the amount collected from said assessments. Said sum so collected shall be used to pay the balance of said bonds and interest then remaining unpaid. Thereafter all sums collected from such unpaid assessments, on account of the non-payment of which an amount has been levied and collected against all the taxable property of the town, shall be used to defray any expense or cost for which the town may be liable. (*Amended by L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 11, as amended by L. 1869, ch. 888, § 1; L. 1892, ch. 321, § 2; L. 1897, ch. 249, § 1, and L. 1901, ch. 523, § 3, in part. For remainder of § 11 see §§ 34, 35 hereof.

Validity of bonds; liability of town on bonds.—The fact that the plaintiff has under the command of a writ of mandamus offered bonds for sale under this section, presupposes that the bonds are legally issued, for it is the primary object of the writ of mandamus to compel action. The writ neither creates nor confers powers to act, but only commands the exercise of powers already existing, when it is the duty of the person or body proceeded against to act without its agency. The bonds in so far as they relate to third persons, are as much the obligation of the town as though they were issued for any other town purpose, and they con-

stitute a lien upon all taxable property in such town. The language of the statute to this effect is clear. *Millard v. Adams* (1910), 136 App. Div. 669, 121 N. Y. Supp. 504.

Mandamus.—Where on an application for a writ of mandamus an allegation by the petitioners that they have been duly appointed drainage commissioners is put in issue by a positive denial, the County Court has no authority to issue a peremptory writ. *People ex rel. Dunphy v. Chaney* (1916), 171 App. Div. 303, 156 N. Y. Supp. 1035.

The provisions of this section that "the court in which the proceeding is pending shall have jurisdiction, by mandamus, upon the petition of any party aggrieved to enforce the prompt compliance of any of the provisions of this section on the part of any officials charged therewith," is limited by said section to the enforcement of the rights established thereby, and, hence, does not give the County Court jurisdiction to grant a peremptory writ of mandamus to compel a supervisor to issue and sell bonds under sections 15 and 16. *People ex rel. Dunphy v. Chaney* (1916), 171 App. Div. 303, 156 N. Y. Supp. 1035.

Right of supervisor to contest issuance of bonds.—Where, in a proceeding for a writ of mandamus to compel the supervisor of a town to issue bonds under this section, it appears that in the original proceeding for the drainage of the land the town was not a party, and that the bonds, while in form the obligations of the town, are to be paid by the property benefited by the improvement, and that the only interest of the town in the matter is to collect the assessment made upon the land benefited, the supervisor has no standing to litigate the question of the performance of the work, for it affects only those who are assessed. *People ex rel. Mount Vernon Trust Co. v. Millard* (1909), 133 App. Div. 139, 117 N. Y. Supp. 474.

§ 37. Commissioners to file and present to court for audit statement of moneys received and disbursed.—The said commissioners shall as soon as practicable, or whenever thereto ordered by the court, make and file in the office of each clerk in which their determination is required to be filed as above provided, a full, true and detailed statement of all the moneys collected or received by them, and of whom collected and received; and also a like statement of all sums expended or disbursed by them, including all claims for service or personal expenses; which statement shall be verified as to each item by the said commissioners, or by some one of them having personal knowledge thereof. They shall present a copy of such statement so filed with the certificate of filing to the court before which such proceedings shall have been initiated; which shall thereupon by an order in writing, which shall be served personally or as provided in section ten of this chapter, appoint a time and place for the examination and auditing of such statement.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 12, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 9, in part. For remainder of § 12 see §§ 38, 39 hereof.

Bonds for commissions and expenses.—The court will not compel the issuance of bonds covering the commissions and personal expenses of drainage commissioners until their accounts have been audited and allowed under this section. *People ex rel. Dunphy v. Wiggins* (1911), 143 App. Div. 760, 128 N. Y. Supp. 344.

§ 38. Proceedings thereupon.—At the time and place appointed the court shall hear the proofs and allegations of such commissioners in respect to such statement and the proofs and allegations of any person interested,

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who shall appear by counsel in opposition. After hearing the proofs and allegations of the respective parties the said court shall make such order in the premises as shall be just to all parties, which order shall be filed and entered in the office of the clerk of each county in which such lands or a part thereof are situated and the same shall be final. The said court may dissolve said commission on such hearing or may give any directions that the rights of parties and the public interest shall require.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 12, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 9, in part. For remainder of § 12 see §§ 37, 39 hereof.

Finality of order.—The provision making the decision of the County Court final only applies to and makes the order final upon matters of fact. *Matter of Ryers* (1878), 72 N. Y. 1, 28 Am. Rep. 88, affg. 10 Hun 93.

§ 39. Appeals on questions of law; how taken.—An appeal on questions of law arising under articles two, three, four and five of this chapter may be taken from the decision of the court to the appellate division of the supreme court at any time within thirty days after such decision shall have been made and filed; and the same shall be heard as appeals from an order are heard; costs therein to be adjudged in the discretion of the court.

Source.—R. S., pt. 3, ch. 8, tit. 16, § 12, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 9, in part. For remainder of § 12 see §§ 37, 38 hereof.

A notice of appeal need only be served on the commissioners and need not specify the errors complained of. *Burk v. Ayers* (1879), 19 Hun 17.

Who may appeal.—To authorize a party to appeal from the determination of the drainage commissioners it is not necessary that any of his land should have been actually taken; it is sufficient if he be the owner or possessor of land in any way affected by the proceedings. *Burk v. Ayers* (1879), 19 Hun 17.

Order is final on questions of fact only.—*Matter of Ryers* (1878), 72 N. Y. 1, 28 Am. Rep. 88.

Necessity for drainage.—The reversal by the county judge of the determination of the commissioners, upon the ground that it is not necessary for the public health that the lands described in the petition should be drained is conclusive on that question. *Matter of Draining Certain Swamp Lands in Town of Chili, Monroe County* (1875), 5 Hun 116.

Weight of evidence.—The appellate division has no jurisdiction to pass upon the question as to whether the decision of commissioners appointed pursuant to section 4 and the order of the County Court affirming the same are contrary to the weight of evidence. *Matter of Spring Valley Swamp* (1911), 145 App. Div. 636, 129 N. Y. Supp. 918.

Appealable orders.—An order determining that a new or second assessment is necessary and directing the same, is final upon matters of fact, but is appealable upon any question of law arising upon the whole act, or upon any proceeding necessarily affecting such order. *Matter of Swan* (1894), 97 N. Y. 492.

An order of the County Court auditing and confirming the accounts of commissioners is appealable upon questions of law. *Matter of Ryers* (1878), 72 N. Y. 1, 28 Am. Rep. 88.

An order of the County Court, modifying and affirming the determination of the drainage commissioners as to the necessity for constructing a drain across lands owned by others than the appellant is appealable. *Burk v. Ayers* (1879), 19 Hun 17.

§ 40. Land to be sold for non-payment of assessment.—In case any of said assessments, made and perfected as provided for in this chapter, shall not be paid within thirty days after the same shall have been made and demanded of the owner of the land so assessed, or of the occupant or person in charge, if any, or, if the owner shall be a non-resident of the county, and there shall be no occupant or person in charge, and the owner's residence shall not be known, the county treasurer shall proceed to make a proper description of the land on which such unpaid assessment is made, and shall cause the assessment and description to be published for six successive weeks in a paper published in the town, or if there is no paper published in the town, then in a paper published in the nearest town to said land, together with a notice that if the said assessment is not paid, with the expenses of advertising, on or before a certain day, to be therein designated, and which shall not be less than six weeks from the first publication thereof, the lands so described will be sold at public auction to the highest bidder. On the day designated, or on such other day as the sale may be duly adjourned to, the said premises shall be so sold and the county treasurer on receiving the money bid therefor shall give to the purchaser a certificate of such sale, which certificate shall be presumptive evidence of all the facts stated, and such certificate shall be recorded in the office of the county clerk, as evidence of mortgage sales under the statute is recorded. (*Amended by L. 1909, ch. 240, § 18, and L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 13, as amended by L. 1869, ch. 888, § 1, in part. For remainder of § 13 see § 41 hereof.

§ 41. Rights of purchaser on such sale.—The said certificate shall authorize and empower the purchaser therein named, or his assignee, such assignment to be in writing, duly acknowledged, and in like manner recorded, on the first day of April, July, October or January then next, to enter into and take possession of the said land so sold, and to use, occupy and enjoy the same unless the same shall be redeemed as hereinafter provided. (*Amended by L. 1917, ch. 556, in effect May 18, 1917.*)

Source.—R. S., pt. 3, ch. 8, tit. 16, § 13, as amended by L. 1869, ch. 888, § 1, in part. For remainder of § 13 see § 40 hereof.

§ 42. Redemption of lands so sold; correction of errors in proceedings.—The owner, mortgagee, occupant, or other person interested, and entitled to redeem lands sold on execution, may at any time within fifteen months from the date of said sale redeem the lands by paying to the purchaser, or to the county clerk for his use, the said purchase-money with fifteen per centum per annum in addition thereto, together with any other tax or assessment which the said purchaser may have paid, chargeable to such land, and a certificate of the clerk stating the payment, and showing what land the payment is intended to redeem, shall be evidence of such redemption, and shall entitle the person so redeeming to a return of such lands. In-

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fants whose lands shall be sold, may redeem at any time within fifteen months after they shall become of full age, on repaying the purchase-money, with six per centum per annum interest thereon to the purchaser; but the purchaser shall in all cases of redemption have a right to all growing crops which he shall have sown after taking possession under such certificate; and he shall have a right to remove all property, or structures which he shall have put upon the land after such purchase, provided the same can be removed without serious injury to the reversion. The court may, at any time, correct any manifest error in any of the proceedings under this chapter, when such correction shall be in furtherance of justice, and the said court may allow such amendments and make such orders and impose such terms as shall promote the objects of this chapter and be equitable to all parties

Source.—R. S., pt. 3, ch. 8, tit. 16, § 14, as amended by L. 1869, ch. 888, § 1, and L. 1886, ch. 636, § 10.

Removal of commissioners.—Court has full power under this section to remove for cause. *Matter of Underhill* (1884), 32 Hun 449.

Amendment of map may be made by court under this section. *Matter of Underhill* (1889), 53 Hun 633, 25 N. Y. St. Rep. 701, 6 N. Y. Supp. 716.

Powers of court under this section, considered. *Matter of Lent* (1900), 47 App. Div. 349, 359, 62 N. Y. Supp. 227.

§ 43. **Additional assessments to cover deficiencies.**—In any case where proceedings have heretofore been taken, pursuant to the provisions of any statute in force at the time of the taking effect of this chapter, or shall hereafter be taken pursuant to the provisions hereof for the drainage of any lands, if the commissioners in the discharge of their duties shall have heretofore incurred, or shall hereafter incur any expenses or obligations in excess of the amount contemplated and provided for by them in the assessment made pursuant to sections thirty to thirty-two inclusive of this chapter, or the amount collected upon such assessment, after due diligence, shall be found insufficient to meet all lawful and necessary expenditures and obligations contemplated by said statutes in force at the time of the taking effect of this chapter or pursuant to the provisions hereof, the commissioners in such case shall have power to make a further assessment to provide for such deficiency.

Source.—Section 21, as added by L. 1881, ch. 608, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1886, ch. 636, § 12, in part. For remainder of § 21 see §§ 44, 45, 46, 47 hereof.

Damages need not be actually paid before levy of assessment. *Matter of Swan* (1885), 35 Hun 625.

§ 44. **Statement of amount and cause of deficiency to be filed.**—For the purpose of making such further assessment, the commissioners shall make and file in the office of the clerk of each county in which this chapter requires the original assessment, or a duplicate thereof, to be filed, a statement duly verified and signed by at least two of them, setting forth the items of such deficiency, and the occasion or cause thereof, and the name of each

person to be affected thereby, so far as the same can with reasonable diligence be ascertained, and shall attach thereto an order, signed by two or more of them, that the amount thereof be assessed and levied upon the property originally assessed in such proceeding.

Source.—Section 21, as added by L. 1881, ch. 608, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1886, ch. 636, § 12, in part. For remainder of § 21 see §§ 43, 45, 46, 47 hereof.

§ 45. Notice thereof to be given.—Said commissioners shall thereupon cause notice, written or printed, to be given to the several owners or occupants of the lands to be affected by such assessment, stating the time and place of the filing of such statement and order, which notice shall be served personally upon such owners or occupants, when they can be found, after due diligence, in a county in which such lands or a part thereof are situated, and when not so found, then by delivering such notice to some person of reasonable age and discretion, residing upon said premises, directed to the owner or occupant thereof, or if no such person be found residing upon said premises, and such owner or occupant be not found, then by depositing such notice in the post-office, duly enveloped and directed to such owner or occupant, at his last known place of residence, with postage prepaid.

Source.—Section 21, as added by L. 1881, ch. 608, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1886, ch. 636, § 12, in part. For remainder of § 21 see §§ 43, 44, 46, 47 hereof.

§ 46. Appeals and proceedings thereupon.—Within ten days after service of such notice, any person feeling aggrieved thereby may appeal to the court, in which said proceedings shall have been instituted, or are pending, from such order and statement, by serving a notice of appeal upon one of said commissioners, stating distinctly and specifically the error complained of in respect to said order or statement. If the proceedings are taken or are pending in the county court, said court shall be deemed always open for the hearing of such appeal, and the same may be brought to hearing on eight days' notice by either party, or his attorney, if any shall have appeared for him. The court to which such appeal is taken shall have power to hear the proofs of parties and determine whether, or to what extent such new assessment is necessary for the payment of all obligations actually incurred by said commissioners, in the discharge of their duties, provided the said court shall not consider any question not distinctly and specifically raised by said notice of appeal. Said court may, if it seems just, direct that said statement be amended to conform to its determination in respect thereto, and shall award costs, to be paid by such appellant, to such commissioners, if such appeal be unsuccessful, which costs shall be the same as those given by law for like services in cases of appeal from justices' courts where a new trial is had in the appellate court. In case such appeal be in any part successful, costs shall not be allowed unless such commissioners be guilty

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of fraud or intentional wrong in respect to the matters so reviewed, and in that case the court may, in its discretion, allow costs to the appellant, to be paid by such commissioners personally. Costs when allowed shall be adjusted and collected in the same way as an action in the court. Such determination in said court shall be final and conclusive.

Source.—Section 21, as added by L. 1881, ch. 608, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1886, ch. 636, § 12, in part. For remainder of § 21 see §§ 43, 44, 45, 47 hereof.

§ 47. **Enforcement of such assessments.**—After the time for appeal has expired, if no appeal is taken, or if such appeal is taken, then, when such appeal has been finally determined, said commissioners shall apportion the amount so to be assessed upon the real estate included in the original assessments in the same proportion or ratio as such original assessment was made and levied, and they shall thereupon make and file in each clerk's office, and wherever else such statement first herein provided for was filed, a statement showing each piece of land so assessed, and the name of the owner or occupant thereof, at such time, and the amount assessed against each, duly verified by at least two of said commissioners. Such assessment shall become a lien upon the lands so assessed, from the time of such filing, and shall be enforced, collected and applied in the same manner as such original assessment might have been enforced, collected and applied under this chapter. The necessary expenses of such commissioners upon such appeal shall be ascertained by said court, and added to the amount provided by such statement as a part thereof.

Source.—Section 21, as added by L. 1881, ch. 608, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1886, ch. 636, § 12, in part. For remainder of § 21 see §§ 43, 44, 45, 46 hereof.

ARTICLE IV.

MAINTENANCE AND ENLARGEMENT OF DITCHES.

- Section 60. Surveyor to be water commissioner.
61. Petition for repair or enlargement of ditches.
 62. Proceedings thereupon.
 63. Determination as to necessity for repairs or enlargement.
 64. Survey and report of engineer.
 65. Proposals and contracts for work.
 66. Statement of expense to be made and filed.
 67. Notice of assessments.
 68. Appeals from assessments.
 69. Collection of assessments.
 70. Proceedings of collector; enforcement of payment.
 71. Compensation of commissioners and collector.
 72. Condemnation of lands; presumption from twenty years' use.
 73. Modification of easements for maintenance of ditches.
 74. Kings county excepted from provisions of this article.

§ 60. **Supervisor to be water commissioner.**—The supervisor of each

town in the state shall be the water commissioner of his town, and as such shall have charge and supervision of all the ditches and channels for the passage of water which have been, or shall hereafter be constructed or improved for the purpose of draining any swamp, bog, meadow or other low and wet land in said town, pursuant to this chapter or any special act of the legislature therefor.

Source.—Section 25, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 3, tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 61. **Petition for repair or enlargement of ditches.**—Whenever any such ditch or channel shall become wholly or in part filled up, and the passage of water therein impeded, or whenever such ditch or channel is not large enough for the purpose for which it was made, any three or more persons liable to be assessed for the repair or enlargement thereof, may present to the water commissioner, or if such ditch or channel be partly in more than one town, then to the water commissioner of each town in which the same is located, a petition, verified by at least one such petitioner in the manner provided for verifying a pleading under the code of civil procedure, setting forth the nature and locality of such needed repairs, or of the enlargement which may be necessary, and asking that the same be made.

Source.—Section 26, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 3, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, ch. 321, § 3, in part. For remainder of § 26 see § 62 hereof.

§ 62. **Proceedings thereupon.**—Upon receipt of the petition, the water commissioner to whom the petition is presented shall forthwith give notice to all persons liable to be assessed, as hereinafter provided, that at a time and place therein stated he will examine said ditch or channel and hear all persons interested therein in respect to the necessity for its repair or enlargement. Such notice shall be signed by said water commissioner and served by publishing the same in two newspapers published in said county, or if the ditch be in more than one county, then in one newspaper published in each county in which said ditch is located, once a week in two successive weeks, the first publication to be at least fifteen days before such hearing. Said commissioner upon such day shall hear all parties interested, desiring to be heard, and may take proof, and any one of them shall have power to administer the proper oath to witnesses, and may adjourn for the purpose of continuing such hearing or making a determination.

Upon the receipt by any water commissioner of the town of the petition mentioned in section sixty-one of this article, and within ten days thereafter, it shall be the duty of the said water commissioner to make a personal examination of the ditch or ditches mentioned in the said petition, and if upon such examination he shall be of the opinion that the whole amount required to repair or enlarge such ditch or ditches shall not exceed the sum of five hundred dollars, he in lieu of all other proceedings required by this article, may proceed to make the said repairs or enlargement of the

said ditch or ditches, and for that purpose may let the same by contract as required by this article, or may have the said work done by days' work under his supervision, or under the supervision of some person to be designated and appointed by him. When the said repairs or enlargement shall be finished, it shall be the duty of the said water commissioner to make up an itemized account of his expenditures in making the said repairs or enlargement, and file the same in the town clerk's office of the town or towns in which the said ditch or ditches are situated, and also in the office of the county clerk of the county or counties embracing the said town or towns. At the next meeting of the town board of the town for the audit of claims against the said town, it shall be the duty of the said board to audit and allow the said expenditures so made by the said water commissioner not exceeding the sum of five hundred dollars in any one year; and the same shall be certified with the other town audits of the said town to the board of supervisors of the county or counties in which the said town or towns are situated, and the expenses thereof shall be apportioned among the owners of any premises which were originally assessed, for the construction of the said ditch or ditches, according to the valuations thereof on the last assessment-roll, and the said tax shall be placed in the annual tax roll in a separate column opposite the name of the person assessed, which column shall be headed "Ditch Tax," and shall be collected by the collector with the annual state and county taxes against the said person or his property, in the same manner and at the same time that other taxes are levied and collected. And in case any town has contributed to the construction of the said ditch or ditches, the said town shall be liable for the said repairs or enlargement of the said ditch or ditches, in the same proportion that they were originally assessed for the construction of the same, which shall also be levied and collected out of the taxable inhabitants of said town, in the same manner that other town taxes are levied and collected. When the said ditch tax shall be so collected, it shall be paid over by the collector to the said water commissioner, who shall use the same in the payment of the liabilities for repairing or enlarging the said ditch or ditches, and upon such payment he shall take vouchers therefor, and the same shall be filed by him in the town clerk's office of the town or towns in which the said ditch or ditches are situated.

Source.—§ 1 from § 26, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 838, § 1, and as so added amended by L. 1892, ch. 321, § 3, in part. For remainder of § 26 see § 61 hereof. § 2 from Id. § 36, as added by L. 1899, ch. 111, § 1.

Doubtful constitutionality.—This section seems to be of doubtful constitutionality in providing for an assessment by the board upon lands in proportion to valuations in assessment roll, without an opportunity of hearing. See *Matter of Lent* (1900), 47 App. Div. 349, 62 N. Y. Supp. 227.

§ 63. Determination as to necessity for repairs or enlargement.—If it shall appear that such ditch or channel is filled up in whole or in part or the passage of water therein to any considerable extent is impeded, or that

said ditch or channel is not large enough to carry off the waters prop which it was intended to carry off, the water commissioner shall and sign an order directing that the said ditch or channel be repaired enlarged or both as the case may be and file the same in the office of county clerk of each county wherein said ditch or channel is located, w order shall be final and no appeal therefrom or review thereof of any shall be allowed.

Source.—Section 27, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, 321, § 4, in part. For remainder of § 27 see § 64 hereof.

§ 64. Survey and report of engineer.—Thereupon said water commissioner shall cause a survey to be made, by a competent civil engineer shall be employed by him, of such ditch or channel and such measurements as shall show the work and excavations required to restore such ditch or channel to its depth or width as originally surveyed and designed for construction as shown by the maps, surveys, plans and specifications made such original work. When the order is for the enlargement of such ditch or channel the survey shall show the extent of the enlargement that be necessary. When sufficient data can not be found the measurements and surveys shall be such as will show the proper depth and width required to drain the lands originally sought to be drained, conforming, however, to the original design and work so far as the same can be ascertained except that the measurement and surveys shall not be limited to the original design when an enlargement of such ditch or channel has been ordered. A report shall be made by the engineer to the water commissioner showing plans and specifications of the needed repairs or enlargement giving data sufficient to designate the place where repair or enlargement required, the grade and width at such point, and all the data of excavation or any work required and the amount and nature thereof on each tract or lot of land traversed by said ditch separate from the others and numbered as a section. The report shall be verified by the engineer to the effect that it contains all the data required by this chapter, and no other estimates are included therein and shall be filed in the county clerk's office of the county in which proceedings were instituted. Thereupon the work for such repairs or enlargement shall be let by the water commissioner to the lowest bidder therefor.

Source.—Section 27, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, 321, § 4, in part. For remainder of § 27 see § 63 hereof.

§ 65. Proposals and contracts for work.—The work of such repairs or enlargement required to be done upon each such lot or parcel of land traversed by said ditch or channel and designated by number of section on engineer's report shall be offered separately from the others, and let to the lowest bidder for such part or section of said work; said water commissioner

sioner shall advertise for bids or proposals for said work, to be made in writing, in two newspapers published in said county, or if the ditch be in more than one county, then in each such county, for not less than once in each of two successive weeks, stating the time and place for receiving the bids and where the plans and specifications can be examined. Upon receipt of the proposals, said water commissioner may enter into contract with the lowest bidder for the work to be done on any of said sections, or may reject any or all bids, and again advertise for further bids. He may require of any contractor security for the proper performance of any contract. Such contract shall provide for the payment of the contract price, when the work is done according to the specifications, by an issue of said commissioner of certificates of indebtedness made payable by the collector of taxes of the town in which the work is done, or, if any such tract or lot of land is situated in more than one town, then of the town wherein said lot is taxed for state and county taxes.

Any contractor for such repairs or enlargement shall have the right to enter upon the premises and have free access thereto with all necessary tools and teams, and may deposit the earth or material excavated along the bank of the ditch or channel within a reasonable distance, provided he shall leave the surface thereof as nearly smooth as is practicable, and shall do the work without causing damage to crops further than is necessary.

Source.—Sections 28, 31, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, ch. 321, §§ 5, 7.

§ 66. **Statement of expense to be made and filed.**—When the total cost and expense of such repairs or enlargement is ascertained the water commissioner shall make and file in said county clerk's office a detailed statement, giving each item of expense and the date thereof, including the day of the month on which each water commissioner was employed, and the nature of his employment, which statement shall be verified to the effect that it is just and true.

Source.—Section 29, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, ch. 321, § 6, L. 1896, ch. 819, § 1, and L. 1905, ch. 325, § 1, in part. For remainder of § 29 see §§ 67, 68, 69 hereof.

§ 67. **Notice of assessments.**—Immediately after filing the statement required by section sixty-six of this article the water commissioner shall, unless he shall deem a new assessment desirable, levy and assess the total cost and expenses of such repairs or enlargement upon the lands originally assessed for the construction of such ditch or channel, and upon the same basis or ratio, and shall make a roll or statement thereof containing a description of each tract or parcel of land assessed, so far as may be required to identify the same, the number of acres assessed in each tract, the name of the owner thereof and his post-office address, or where the person is not known, or his post-office address can not be ascertained, then the name

and post-office address of the occupant thereof and also the amount assessed on each tract or lot. In case the situation, condition or ownership, of lands and premises affected or benefited as originally assessed for the construction of said ditch or channel shall have become changed, so as to make a new assessment desirable, the water commissioner may assess the cost and expenses of such repairs or enlargement upon the lands benefited by the drain repaired according to the situation of the same and the benefit which shall be derived thereto from the repair or enlargement of said ditch or channel. When any assessment shall exceed twenty-five dollars the water commissioner, in his discretion, may make it payable in two instalments by indicating the same upon such roll, the last instalment to be due one year after the first. The roll or assessment shall be verified by the oath of the water commissioner by whom the same is made to the effect that the same is in all respects just and true, and shall be filed in the office of the clerk of the county in which said ditch or channel or any part thereof is located.

The said water commissioner shall give notice of such assessment of the filing thereof to each person whose lands are assessed by him to pay any part of said sum, and also to the president of any village or the chairman of the board of supervisors in the county that may be assessed by him. Such notice shall be given in the manner prescribed for giving notice of assessment provided in section thirty-two of this chapter.

In case any repairs, alterations or enlargement has been made, or proceedings have been taken for the making of any such repairs, alterations or enlargement of any ditch or ditches or other channels for the free passage of water or for the making or collecting of any assessment to defray the expense thereof prior to the passage of this chapter, such assessment or collection thereof shall not be affected hereby; but the water commissioner having jurisdiction of such proceedings shall cause notice of such assessment, written or printed, to be given to the person whose lands are assessed by him to pay any part of said sum, and also to the president of the town or the president of any village or chairman of the board of supervisors of any county that may be assessed by him, of such assessment which notice shall state the time and place of filing of the detailed assessment of such assessment which notice shall be served in the manner prescribed for giving notices of assessment provided for in section thirty-two of this chapter. If any proceedings have been heretofore taken for repairing, altering or enlarging of any such ditches or drains, and no assessment has been made or levied to defray the expenses thereof, the water commissioner of his town or his successor in office, shall proceed to make and levy such assessment and give notice thereof in the manner and in the manner provided for levying assessments and giving notice thereof provided in sections thirty to thirty-two inclusive of this chapter. If any water commissioner shall have heretofore levied an assessment for repairs, alterations or enlargement of any such ditches or drains and such assessment

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for any reason be, or be adjudged void by a court of competent jurisdiction the water commissioner having jurisdiction or authority over such ditches or drains shall have power to make a new assessment for the purpose of paying the expenses of said proceedings, which assessments shall be made and notice given thereof as provided in sections thirty to thirty-two inclusive of this chapter, and if any new assessment shall be made in any case as provided in this section the sums that have been paid by any person in respect of any land assessable under this chapter for or toward paying such void assessments upon such lands shall be credited upon the amounts chargeable upon said lands in any new assessment. (*Thus amended by L. 1909, ch. 240, § 19, in effect April 22, 1909.*)

Source.—¶¶ 1, 2 from section 29 as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, ch. 321, § 6, L. 1896, ch. 819, § 1, and L. 1905, ch. 325, § 1, in part. For remainder of § 29 see §§ 66, 68, 69 hereof. ¶ 3 from Id. § 33, as so added and as amended by L. 1892, ch. 321, § 8, and L. 1896, ch. 819, § 2.

Consolidators' note.—Provision relating to appeal omitted because provided for in section 68.

§ 68. Appeals from assessments.—Appeals from any such assessment may be made by any person deeming himself aggrieved thereby, or by any officer on whom a notice was served as provided in section sixty-seven of this article, who deems his village or town or county aggrieved, in the same manner as is provided for appeals under similar assessments in section thirty-three of this chapter, and the provision of said section thirty-three in regard to appeals from assessments and the procedure thereof shall govern and control the parties and proceedings in all appeals that may be taken from assessments made under this article.

Source.—Section 29, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, ch. 321, § 6; L. 1896, ch. 819, § 1, and L. 1905, ch. 325, § 1, in part. For remainder of § 29 see §§ 66, 67, 69 hereof.

§ 69. Collection of assessments.—The assessment made thereby, or such modification thereof as shall be made upon any appeal taken therefrom shall become a lien upon the several lots or tracts of land on which the same shall be assessed as of the date of such filing, and shall be forthwith collected by the collector of the town or towns in which the same shall be situated. Provided that in case where any such ditch or channel has been kept open and cleaned to its full width and depth as originally laid out, by the owners of the land through or across which it was constructed, at their own expense, such lands shall be exempt from such proportion of the tax or assessment for any repairs or enlargement of such ditch or channel as shall be equal to the cost or expense of so having kept the same open and cleaned, to be fixed and determined by said water commissioner and the tax or assessment on any such lands shall be lessened accordingly.

Source.—Section 29, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16,

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as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, ch. 321, § 6; L. 1896, ch. 819, § 1, and L. 1905, ch. 325, § 1, in part. For remainder of § 29 see §§ 66, 67, 68 hereof.

§ 70. **Proceedings of collector; enforcement of payment.**—On receipt of the roll or statement the collector shall mail forthwith to each person named therein as owner or occupant of any tract or parcel of land assessed within his town at his post-office address stated therein, postage prepaid, a notice stating the amount of the assessment upon the tract or parcel of land owned or occupied by him and the date within which the same must be paid, which shall be thirty days from the mailing of such notice. If such assessment is not paid within that time the collector shall, within thirty days thereafter, proceed to enforce payment thereof and of the interest thereon from the time it became payable as aforesaid, in the manner provided for collecting assessments by section forty of this chapter, and sections forty-one and forty-two of said chapter shall be applicable to any case where an assessment has been so enforced. All moneys collected on said roll as the same shall be received by the collector, shall be paid by him upon the certificates of indebtedness issued by the water commissioner as in this chapter provided. At the expiration of the term of office of any such collector he shall turn over to his successors any such roll which has not been fully collected, together with all money in his hands which has been collected thereon and not paid on any certificate of indebtedness, together with a memorandum of all the payments made by him and all moneys collected upon said roll; provided, however, that when any collector shall have commenced to enforce collection of any assessment his powers in respect thereto shall continue until those proceedings are finished. When the assessments on the roll have been fully paid the roll shall be filed in the office of the clerk of said county.

Source.—Section 30, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 71. **Compensation of commissioners and collector.**—Each water commissioner shall be entitled to have and receive in full for compensation for his services under this chapter, three dollars a day for the time actually employed in such business for not exceeding ten days in any one case, except that the county judge of the county upon his ex parte application shall certify that a larger allowance is proper and fix the limit thereof. The compensation of the collector shall be two per centum upon the amount collected and disbursed, and twelve cents for each notice mailed by him. The compensation of the commissioners and collector shall be added to and form part of the costs and expenses assessed by the commissioner. When proceedings are taken to compel collection of an assessment, costs and expenses thereupon may be allowed and taxed by the county judge, not exceeding those allowed to be taxed in any special proceeding, and shall be added to the amount of such assessment and collected therewith.

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§§ 72, 73.

All expense certificates or obligations shall be certified by the water commissioner and paid out of the fund or moneys so provided for when collected, and shall bear interest for the time interest is to be allowed to be collected upon the assessment out of which the same is paid as hereinbefore provided. In case the petition for such repairs shall be denied, the expense incurred shall be paid to the commissioner by the petitioners, and payment thereof may be enforced by him in the same manner as a debt or obligation on contract.

Source.—Section 32, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 72. **Condemnation of lands; presumption from twenty years' use.**—If it shall be found in any case where repair or enlargement is necessary that a right of way for the construction or maintenance of such ditch or channel, over or upon any tract of land traversed by it, has not been acquired, title therefor may be acquired by said commissioner by agreement with the owner or, if such agreement can not be had, then he may take proceedings to acquire such title in the manner provided by section eighteen of this chapter. Compensation required to be made for such title with the costs and expenses of any proceedings taken therefor, which said costs and expenses shall be allowed to such commissioner, and taxed as in a special proceeding, shall be deemed as expense of such repair or enlargement and collected as part thereof. Whenever any such ditch or channel has been constructed and in use for twenty years and upwards, such use and operation shall be conclusive evidence that a right of way therefor, and all rights in the premises through which it passes which are necessary and incident to the perpetual maintenance thereof as herein provided for, were duly obtained.

Source.—Section 34, as added by L. 1890, ch. 557, § 1, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1, and as so added amended by L. 1892, ch. 321, § 9.

§ 73. **Modification of easements for maintenance of ditches.**—The owner of any lands lying wholly or partly within an incorporated village and which are subjects to easements for the public use for the maintenance of drains, ditches or channels which have been or shall be hereafter constructed under this chapter or any special act, who shall desire to improve such lands by laying out streets and lots for building purposes may present to the water commissioner having the charge and supervision of such drains, ditches or channels a verified petition for the amendment of the plan according to which said drains, ditches and channels shall have been constructed and a modification of said easements. The said petition shall contain a description of the lands of the petitioner over and upon which easements for the maintenance of ditches and drains have been acquired and shall be accompanied by a map showing the existing drains, ditches and channels upon the petitioner's lands and a second map or plan (here-

inafter called the new map) which shall fully show and describe all ditches, drains and channels which are to be maintained through said lands when the proposed changes shall have been made and shall describe and show the form and manner of construction thereof and the nature and character of materials to be used in any new construction; and all streets or highways existing or to be opened over and upon such lands and the new map shall conform in all particulars to the requirements contained in section twelve of this chapter. The said maps shall be prepared by a competent civil engineer upon such data as may be obtained from the maps and plans according to which said existing drains, ditches and channels were or shall have been constructed and such additional surveys and levelling to be made or taken by said engineer as may be required and the engineer shall certify that the proposed changes will not according to the best knowledge and belief impair the existing drainage for the public use. The changes hereby authorized may include the change of the form and manner of construction of any ditch or drain, the substitution of an open or closed drain for an open ditch or drain, the change of the line or course of any ditch or drain and the abandonment of lateral or sub-lateral pipes, ditches or drains the necessity for which is to be obviated by filling the lands to a proper depth. Any drains or ditches intended to be discontinued shall not be shown on said new map. If the water commissioner to whom such petition is presented shall be satisfied that the drainage for the public use will not be impaired by the proposed changes he may approve of such proposed new plan or map and shall in such case certify his approval in writing and file said petition, maps and certificate in the office of the clerk of the county wherein the lands described in the petition are situated; provided, however, that the said water commissioner shall not approve said new map or plan unless the same shall have been previously approved by a majority of the board of trustees of the village in which all or any portion of the said drains, ditches and channels to be affected by the proposed change are located. The petitioner may thereupon after proceed to construct at his own cost and expense the new drains, ditches and to fill in the lands in accordance with the new map so approved by the water commissioner and upon the completion of the work and in case the drains and ditches upon the lands of the petitioner and which are shown upon said new map or plan shall then prove to be sufficient for the proper use and necessity for which the easements were originally acquired without the continuance of the ditches, drains and pipes intended to be superseded and discontinued by such plan and not shown thereon the petitioner, his heirs and assigns shall be entitled to and the water commissioner shall issue to him or to them a certificate to the following effect and such certificate shall thereupon be filed in the said clerk's office with said petition, maps and certificate of approval. Upon such filing the easements for the public use in all drains, ditches and channels upon the petitioner's said lands now shown upon said new map shall

extinguished and corresponding easements of the same nature, quality and duration shall be acquired for the public use for the maintenance of the new ditches, drains and channels constructed by the petitioner and shown and described on said new map. The petitioner shall be responsible for all damages he may cause by carelessness or negligence in making the changes authorized as above provided and the water commissioner may require reasonable security for the payment of such damages as a condition of his approval of the proposed changes.

Source.—Section 38, as added by L. 1908, ch. 439, § 3, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 74. **Kings county excepted from provisions of this article.**—This article shall not apply to the county of Kings.

Source.—L. 1890, ch. 557, § 2.

ARTICLE V.

MISCELLANEOUS PROVISIONS.

Section 80. Penalties.

81. Notice of court proceedings.
82. Notice to superintendent of public works.
83. Persons injured through failure to keep ditch open may apply to fence viewers; proceedings thereupon.
84. Town of Newcastle exempted from the foregoing provisions of this chapter.

§ 80. **Penalties.**—Any person who shall do any act to hinder or obstruct the flow of water in a ditch made or repaired under the provisions of this and the preceding articles of this chapter, or who by his negligence or carelessness shall suffer or permit the flow of water in said ditch to be hindered or obstructed, shall be guilty of a misdemeanor.

Source.—Section 35, as added by L. 1892, ch. 321, § 10, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 81. **Notice of court proceedings.**—Any appeal or other proceeding before the court, taken pursuant to the provisions of articles two, three and four of this chapter, in a proceeding initiated or pending in the supreme court, except in a proceeding for the condemnation of real property, may be noticed for hearing at any special term of said court at which a motion on notice may be made in an action pending in a county in which such lands or a part thereof are situated.

Source.—Section 23, as added by L. 1886, ch. 636, § 13, to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 82. **Notice to superintendent of public works.**—In any case where the lands sought to be drained lie in two or more counties, no order of court shall be entered for the drainage thereof, under the provisions of this chapter until the certificates of the superintendent of public works

§§ 83, 84.

Miscellaneous provisions.

L. 1909, ch.

and state engineer and surveyor shall have been first obtained, that such drainage would not affect injuriously, the navigation of any of the canals of this state.

Source.—Section 24, as added by L. 1886, ch. 636, § 13, to R. S., pt. 3, ch. tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 83. Persons injured through failure to keep ditch open may apply to fence viewers; proceedings thereupon.—If any person through whose lands regularly constructed ditches now exist and run, fails to keep the same opened through his said lands, after a request in writing has been served on him at least for a period of ten days, then, and in that case, any person whose lands are damaged by said failures shall apply to the fence viewers of the town in which such ditch or ditches run, that are not properly opened, to open such ditch or ditches, and then on such failure said fence viewers shall notify the person complained of requesting him to open said ditches or appoint a fence viewer to represent him, and such person complaining shall appoint a fence viewer to represent him. In the event of the person complained of not opening the ditch or appointing a fence viewer, after a lapse of the said ten days, it shall be lawful for the person complaining to appoint another fence viewer, and those two shall examine the ditches and assess the damages thereof for cleaning the same. In the event of the two not agreeing they shall appoint a third fence viewer and the decision of two shall be binding on all parties concerned, and the expense of said fence viewers and the charges for cleaning said ditches shall be a charge and lien against the premises through which said ditch or ditches run, or such proportion thereof as runs through said land. In the event of fence viewers finding against the complainant, the fees of fence viewers and expenses of proceedings shall be a charge against the complainant. The fence viewers in these proceedings shall receive the same compensation as in their other official duties.

Source.—Section 37, as added by L. 1904, ch. 433, § 1, to R. S., pt. 3, ch. tit. 16, as amended by L. 1869, ch. 888, § 1.

§ 84. Town of Newcastle exempted from the foregoing provisions of this chapter.—The town of Newcastle in the county of Westchester is hereby exempted from the provisions of articles two, three, four and five of this chapter, and all proceedings for the drainage of swampy marshes and other low lands in such town shall be conducted in conformity with the provisions of the revised statutes, part three, chapter eight, titles sixteen, as they existed prior to the amendment of chapter eight hundred and eighty-eight of the laws of eighteen hundred and sixty-nine.

Source.—L. 1871, ch. 43, repealed by L. 1879, ch. 282, § 1, and revived in part by L. 1880, ch. 388, § 1.

Consolidators' note.—New matter required to continue in force, as a part of the Drainage Law, the exception contained in L. 1880, ch. 388, § 1.

ARTICLE VI.

DRAINAGE OF AGRICULTURAL LANDS.

tion 90. Use of ditches along or across highways.

91. Fence viewers to determine differences between owners who have entered into agreement for drainage.

92. Proceedings of fence viewers; disqualification.

93. Findings of fence viewers and their compensation.

94. Water directed into natural channel not to be deemed diversion thereof from lands drained.

§ 90. Use of ditches along or across highways.—Whenever any owner of agricultural lands desires to drain the same, or to reclaim and secure the same for tillage or other farming purposes, any low, marshy or wet lands, by laying out the same, the said owner or as many owners of such lands as may be named for said purpose under any agreement, contract or writing entered into by them, may, with the consent and under the supervision of the commissioners of highways of any town wherein the said lands are located, lay out and construct the necessary drains or ditches for draining such lands, so as to connect with and flow into the drains, ditches or other water courses along or across any public road or highway, or through or under any sluice, or under any bridge upon any public road, or highway, provided that the draining of any land in such manner shall not endanger any such road or highway, or impede travel thereon on account of overflow. In case any additional quantity of water thus emptied into the highway ditches or other courses for carrying off water be in excess of their usual capacity, the commissioners of highways are hereby authorized to so enlarge or cause to be enlarged, the said highway ditches or other courses that they can receive the waters thus drained into them, without damage, and without danger of damage or obstruction to the highway.

Source.—L. 1891, ch. 310, § 1.

Constitutional provision.—General laws may be passed permitting the owners of agricultural lands to construct and maintain necessary drains on the lands of others, under proper restrictions and with just compensation, Constitution, Art.

§ 7.

§ 91. Fence viewers to determine differences between owners who have entered into agreement for drainage.—In case of any difference or disagreement arising over the laying out and construction of drains or ditches by the owners of adjoining lands, who have previously entered into an agreement for the drainage of any such lands possessed by them, as in section ninety of this chapter mentioned, which agreement shall be in writing, the said owners may make in writing, in which all said owners interested shall unite, an application to the fence viewers of the town wherein the land to be drained is situated, to hear and determine the matters of difference between said owners, upon submission to said fence viewers, in the same manner as they would a matter touching any divisions

of lands or farm lines for the building and maintaining of line fences, or any other matter which may now be by law submitted to said fence viewers. And the said fence viewers shall, before making their report, view the premises or lands included within the area of the proposed drainage, and give opportunity to any party interested to be heard. And any agreement made by any of said owners for said submission to the said fence viewers, shall be held and construed to be as legal and binding upon the parties thereto, as any contract or agreement made for any lawful purpose.

Source.—L. 1891, ch. 310, § 2.

Reference.—Town assessors and town superintendent of highways to act as fence viewers, Town Law, § 121.

§ 92. **Proceedings of fence viewers; disqualification.**—It shall be the duty of the fence viewers to act when called upon, in the manner and for the purpose hereinbefore provided, and they shall meet and proceed upon any application made as provided, within ten days after receiving the same; and said application shall contain a particular statement of all the matters and things upon which their action is requested, within the meaning of this article, by the parties to said application, but no fence viewer who is an owner of any land or has any personal interest in any matter involved in the proceeding, shall be competent to act; and in case of such disqualification of any said officer, his place may be filled by any justice of the peace of the town who may not be for the same reason disqualified, and whom the persons uniting in the application for such proceeding as provided, may agree upon.

Source.—L. 1891, ch. 310, § 5.

§ 93. **Findings of fence viewers and their compensation.**—The conclusions and findings of said fence viewers shall be in writing, one copy of which shall be delivered to the applicants in every such proceeding, and one copy shall be filed in the office of the clerk of the town wherein the land proposed to be drained is located. The compensation or fees of said fence viewers in such proceeding, shall be the same as now allowed by law, in the case of establishing and maintaining line fences and shall be paid by the parties making the application hereinbefore mentioned.

Source.—L. 1891, ch. 310, § 3.

§ 94. **Water directed into natural channel not to be deemed diversion thereof from lands drained.**—Where any water or drainage has been carried or directed by owners of lands as in this chapter provided; across, through or under said land to a point of intersection with the natural flow, drainage or outlet of water, upon the surface, along or by the side of any lands adjoining, but not embraced within the portion or district of land so drained as by this chapter provided, the same shall not be deemed as a diversion of any drainage or flow of water from the lands included within the area so drained.

Source.—L. 1891, ch. 301, § 4.

ARTICLE VII.

(Article added by L. 1914, ch. 519.)

CORPORATE SANITARY OR DRAINAGE DISTRICTS.

- Section 100. Commissioners to establish.
101. Maps to be prepared and filed.
 102. Notice; hearings; procedure.
 103. Powers; officers.
 104. Powers of commissioners heretofore appointed.
 105. Bonds and certificates.
 106. Apportionment of costs; assessments.
 107. Appeals; tax roll to be filed.
 108. Duty of supervisors and collector.
 109. Annual reports.
 110. Duration of corporate existence.

§ 100. **Commissioners to establish.**—At any time after it shall have been finally determined, either by the commissioners appointed under the provisions of section four of this chapter or by the court on appeal, that ditches or other channels are necessary, for the free passage of water across lands belonging to others than the petitioners, for the drainage of any swamp, bog, meadow or other low or wet lands, as provided in this chapter, wherever such lands shall be situated in two or more towns, either in the same or in different counties, the commissioners shall have full authority and may create and establish a corporate sanitary or drainage district by complying with the provisions of this article. (*Added by L. 1914, ch. 519.*)

Reference.—General laws to be passed permitting owners of agricultural lands to construct drains on lands of others, Constitution, Art. 1, § 7.

§ 101. **Maps to be prepared and filed.**—The commissioners shall cause a map to be prepared, showing, with reasonable accuracy, the proposed limits and boundaries of such proposed sanitary or drainage district, and a copy of such map shall be filed in each town clerk's office, of each town in which any of such lands are located. Upon the filing of such map, not less than ten days' notice shall be given by publication in at least one newspaper published in each county, and by posting the same in at least three public places in each town, in which any of such lands are situated, of the fact that such commissioners intend to create such sanitary or drainage district, within certain towns specified; that a map showing the proposed boundaries of the same has been filed in the town clerk's office of each town in which any of the lands of the proposed sanitary or drainage district are located, and specifying a time and place within one of the towns having lands in said district, when the commissioners will meet for the purpose of hearing the interested parties, and for the purpose of amending, fixing and determining the limits and boundaries of such corporate sanitary or drainage district. (*Added by L. 1914, ch. 519.*)

§ 102. Notice; hearing; procedure.—At the time and place specified in said notice, or at such other time and place to which the matter may be adjourned, the commissioners shall meet, hear all interested parties, and shall fix and determine the limits and boundaries of such sanitary or drainage district, by including in the same all lands which shall be directly benefited by such drainage and which shall be finally liable to assessment under the law for any portion of such benefits, together with such other lands as may not be benefited, but which may be necessary for the construction of channels, or for any other necessary purpose connected with such drainage, and by excluding all other lands. And such commissioners shall file in the town clerk's office of each town containing any portion of said lands included in said sanitary or drainage district, the certificate of said commissioners, duly executed and acknowledged before a person authorized to take the acknowledgment of deeds, a description specifying, with reasonable accuracy, and so that the same can be identified, the proposed sanitary or drainage district, with its limits and boundaries, as so determined and fixed by the commissioners, and particularly specifying the limits and boundaries of any lands which may be necessary for the construction of any channels or for any other purposes connected with such drainage, but which shall not be benefited thereby or finally subject to any lien or cost of or connected with said drainage; and a copy of said certificate, so describing and determining said drainage district, shall be published in not less than one newspaper in each county, and posted in at least three public places in each town, in which any part of said proposed sanitary or drainage district shall be located, together with a notice specifying a time and place within the judicial district, within which such proposed sanitary or drainage district is located, not less than twenty days thereafter, when an application will be made, at a special term of the supreme court for an order confirming and establishing the limits and boundaries of said sanitary or drainage district.

Any interested party feeling aggrieved, who shall desire to amend or change the limits or boundaries of such proposed sanitary or drainage district, subject to a lien for the cost of such improvement, shall, not less than three days before the return day for said application, unless the time for such service shall be extended by the court before which the application is made, and if so extended, on or before the day finally fixed by the court for such service, serve on at least one of said commissioners and on their attorney, a statement in writing of his objections to any portion of the limits or boundaries of the district, subject to a lien for the cost of such improvement, specified in said certificate of the commissioners; and specifying, with reasonable accuracy, the limits and boundaries, which, in his judgment, should be fixed and established.

Upon the return day for said application, or on any other day to which the matter may be adjourned, unless objection shall be made in writing and served as aforesaid, the court shall grant an order confirming the limits

boundaries of said sanitary or drainage district, so fixed by the certificate of the commissioners. In case objection is made and served as aforesaid by any interested party, the court shall hear, in a summary manner, such party and said commissioners, and such evidence as they may produce, and shall, on the conclusion of such hearing, make an order either confirming the limits and boundaries of such sanitary or drainage district as fixed by the certificate of the commissioners, or by amending and changing such limits and boundaries of the district which shall be subject to a lien for the cost of such improvement, in conformity to the requirements of law. Said order shall be filed and recorded in the county clerk's office of each county in which any portion of such sanitary or drainage district is located.

When the limits and boundaries of such sanitary or drainage district have been finally determined and established as aforesaid, the commissioners shall execute a certificate or certificates, describing such sanitary or drainage district, together with the limits and boundaries thereof, as finally established, including such other lands as may be necessary for the construction of channels or for other purposes connected with such drainage, which shall not be benefited, or subject to a lien for such improvement, and which lands shall be particularly described; and specifying the corporate name of such sanitary or drainage district, which shall be selected by them, and which certificate shall be acknowledged by said commissioners before a person authorized to take the acknowledgment of deeds; and one of said certificates shall be filed and recorded in the county clerk's office in each county in which any portion of the lands contained in said district is located; and thereafter all lands within said sanitary or drainage district, unless specifically excepted in said certificate as being lands necessary for drainage purposes but not subject to a lien of the cost of such improvement, shall be affected by and subject to a lien for their due proportionate part of all of the expenses and costs of such drainage, including the fees and expenses of said commissioners, and of their attorney and engineer and the necessary costs and expenses connected with the organization and management of the corporation organized for such drainage purpose, until paid and discharged.

Within sixty days after the filing of said certificate, giving the corporate name of such sanitary or drainage district and the limits and boundaries thereof, as finally determined and established, the commissioners shall cause to be prepared by a competent engineer and filed in each county clerk's office in which any portion of the lands within which such sanitary or drainage district is located, a map of suitable proportions and dimensions, which shall specify the corporate name of such sanitary or drainage district, adopted by said commissioners, and which shall show the location of said sanitary or drainage district and the limits and boundaries of the same, so that the same may be identified, with reasonable certainty, by the owners of lands affected thereby, and which shall also show the location, limits and boundaries of any lands necessary for the construction of chan-

nels or for any other purposes connected with such drainage, but which shall not be benefited thereby nor subject to any lien for the cost thereof. (*Added by L. 1914, ch. 519.*)

§ 103. **Powers; officers.**—From and after the recording of such certificate and order in the county clerk's office of each county within which any portion of the lands contained within such sanitary or drainage district is located, finally fixing and determining such district and the limits and boundaries thereof, such sanitary drainage district shall be and become a body corporate and politic, under the name given in said certificate, and by such name and style may sue, be sued, contract and be contracted with, acquire and hold real and personal property necessary for corporate purposes, have a common seal, and shall have full power and authority to construct any and all necessary ditches and other channels for the passage of water, for the drainage of any and all swamp, bog, meadow, or other low or wet lands within the limits of said district, and to do any and all other necessary acts and perform any and all other necessary work for the complete drainage of such district; and shall have full power and authority to issue and sell all necessary certificates of indebtedness and bonds of said corporation, for the purpose of paying the expenses and costs of drainage, including the land damages and compensation for any interest in land or personal property necessary to be acquired for the purpose of drainage or in connection therewith, together with the compensation and expenses of the commissioners and of their engineer and attorney, and for such other expenses as may be necessarily incurred by said commission in connection with such drainage, or in connection with said corporation established therefor.

The commissioners and their successors in office, may perform all the duties and sustain all such acts as may be necessary and proper, to enable them to execute all the powers and duties expressly conferred and imposed upon them. One of their number shall be elected president, one treasurer, and one secretary, and they shall, respectively, perform the duties ordinarily incidental to said offices. (*Added by L. 1914, ch. 519.*)

§ 104. **Powers of commissioners heretofore appointed.**—Any commissioners heretofore appointed, and now acting as such, who have determined, under the drainage law of the state, to drain any swamp, bog, meadow, or other low or wet lands, which are located in more than one town lying in the same or different counties, may create and establish a sanitary or drainage district and a corporation, with all the powers and authority provided for in this article, by complying with the requirements and provisions specified in the same, at any time before they shall have finally apportioned the costs and expenses of such drainage; and all the acts and proceedings of any such commissioners including all certificates of indebtedness issued by them down to the time of the creation and establishment of such corporation, are hereby ratified and confirmed; and such corporation, when

ated, shall issue new certificates of indebtedness or bonds for the purpose of taking up and paying any such certificates which may have been heretofore issued, and for the purpose of paying all expenses and costs of drainage, including the compensation and expenses of the commissioners, and of their engineer and attorney, and for all land damages or compensation or other necessary expenses connected with such drainage or with such corporation. (*Added by L. 1914, ch. 519.*)

§ 105. **Bonds and certificates.**—No certificates or bonds shall be issued by such commissioners except bonds issued for the purpose of retiring, or retaining funds wherewith to retire certificates of indebtedness theretofore issued except on the petition of said commissioners showing the necessity therefor, and upon the order of a special term of the supreme court, or justice thereof, granted within the judicial district within which any portion of the lands within said sanitary or drainage district shall be located, and which petition and order or a duly certified copy thereof, shall be filed in the county clerk's office in each county within which any of said bonds may be located. All cost of, or connected with the improvement shall be, and continue to be, a first lien on all the lands within such district, as finally determined as aforesaid, unless expressly excepted from such lien herein provided, until paid, to be collected out of such lands or from the owners thereof, according to the direct benefits derived from such drainage, as apportioned by the commissioners, or as finally determined by the court. No land within such drainage district shall be exempt from paying its due proportion of all the costs of such drainage or connected therewith, and of such corporations, by reason of any defect or technicality in any part of the legal proceedings, unless expressly excepted by the court in any final order and in the final certificate of the commissioners fixing the boundaries of such sanitary or drainage district. All such certificates of indebtedness and bonds of said corporation shall be issued for not less than five per centum and shall bear not to exceed six per centum interest, and shall be sold, in the same manner as town bonds are sold under the drainage law for drainage purposes, to the person who will take them at the lowest rate of interest. Such certificates shall all be taken up and paid not later than the completion of the work of drainage, and of the apportionment of the cost of the same, but the commissioners shall have the right to substitute bonds, bearing the same rate of interest, and issued as aforesaid for the same. The bonds issued under the authority of this article may be issued for not to exceed the same period of time as in the case of town bonds issued under the authority of the drainage law. (*Added by L. 1914, ch. 519.*)

§ 106. **Apportionment of cost; assessments.**—On the completion of the work of drainage, said commissioners shall apportion all of the cost of the same, and of said corporation in the manner contemplated and provided for in the drainage law; and shall prepare a tax roll on which shall be set forth a description of the several parcels of land to be affected by metes

and bounds, and so that the same can be identified with reasonable certainty, with the name where obtainable, of the owner, or the last known owner, or reputed owner, of each parcel separately assessed, which name shall be regarded as an aid to identify such parcel, and a mistake in the name of the owner, or the last known owner, or reputed owner, shall not affect the validity of the assessment against the parcel, and shall set opposite the several parcels of land so described, the grade or several grades of taxation, according to benefits, as apportioned by said commission, in compliance with the drainage law, the quantity of land within each grade and the amount of assessment per acre against each such grade, together with a statement of the total amount of tax under all of such grades assessed against each parcel separately described, and specifying the proportion of said total amount to be paid annually and the rate of interest which such assessment shall bear until paid. Upon the completion of said tax roll, said commissioners shall publish a notice in at least one newspaper to be published in each county in which any of such lands shall be situated, and which notice shall be posted in at least three public places in each town containing any part of such lands, specifying a time and place within one of the towns having a portion of its lands located within said drainage district, where said tax roll may be examined by any person having or claiming an interest in any such lands, for a period of not less than ten days after such publication and posting, and also specifying a time thereafter, at the same place, when said commissioners will meet and listen to any person feeling aggrieved, for the purpose of amending and correcting any error or improper apportionment of such taxes, if, in the judgment of such commissioners, there shall be any.

Any amendments or corrections to said tax roll shall be made on the conclusion of such hearing forthwith; and the same, when so amended and corrected, shall be redated as of the date of such final amendment and correction, and shall continue to remain on file at the same place for the inspection of any person owning or claiming to own any of such lands within said drainage district subject to the payment of taxes, for a further period of ten days after said tax roll shall be amended and corrected by said commissioners as aforesaid. They shall also serve the notice provided for by section thirty-two of the drainage law, upon the same persons and in the same manner as in sections specified. (*Added by L. 1914, ch. 519.*)

§ 107. **Appeals; tax roll to be filed.**—At any time within twenty days after said tax roll shall have been finally amended and corrected as aforesaid, and the notice last mentioned is served on him, any owner of lands within said drainage district subject to taxation may appeal to the special term of the supreme court, to be held within the judicial district within which said drainage district is located, for a further hearing, amendment and correction of said tax roll, by serving on one of said commissioners and their attorney, a notice of appeal, and naming a time and place not less than eight or more than twenty days thereafter, or as soon as the matter

be heard, for such hearing, and specifying any and all alleged errors in the improper apportionment of taxes which said appellant desires corrected, and the reasons therefor. At the time and place specified in such notice of appeal, or at such other time to which the matter may be adjourned, the commissioners shall produce before said court said tax roll or apportionment, and said court shall examine the same and hear said appellant and said commissioners together with such evidence as they may produce, in a summary manner, and shall thereupon make an order either confirming said tax roll or apportionment as fixed by said commissioners, or amending and correcting the same in a manner to be specified in said order; and said commissioners shall thereupon amend and correct said tax roll or apportionment as directed in said order and shall cause one copy of said order, together with said tax roll or apportionment, duly subscribed by said commissioners, to be filed in the county clerk's office in each county in which any of the lands within said drainage district, subject to taxation, are located; and, at the same time said commissioners shall cause a transcript of said tax roll or apportionment, relating to all the lands in each town within said drainage district affected thereby to be filed in the town clerk's office of each such town. (*Added by L. 1914, ch. 519.*)

§ 108. Duty of supervisor and collector.—It shall be the duty of the supervisor of each town, whose lands form part of the drainage district, to cause to be included in the annual tax levy of such town, and added to the tax roll such portion of the costs and expenses of drainage or in connection therewith as may be due, or as shall become due before the next succeeding annual tax roll is made out, as shown or indicated by the apportionment or tax roll made by the commissioners, and filed with the several town clerks and county clerks as hereinbefore provided, as the same shall have been apportioned or assessed against each separate parcel of land until all outstanding indebtedness for such drainage, or in connection therewith, has been paid.

And it shall be the duty of the collector of each such town to collect annually all such costs of drainage, or connected therewith, apportioned by the commissioners, and included in the town roll as aforesaid, together with the usual fees and expenses for collection, out of the lands referred to or specified in the tax roll or apportionment prepared by the commissioners, or from the owners thereof, and, in case of default in the payment or collection of such taxes, they shall be returned to the county treasurer as unpaid taxes; and such lands shall be sold by him or by the state comptroller as the case may be, for unpaid taxes, in the same manner, with the same effect, and with the same right of redemption as in the case of ordinary county or town taxes against such lands. All amounts so collected, less the legal costs and charges in connection with the collection of the same, shall be paid over by the supervisor of each town, or by the county treasurer as the case may be, to the treasurer of the commission; and commissioners

§§ 109, 110.

Corporate sanitary or drainage districts.

L. 1909, ch. 20.

shall apply the same to the payment of certificates of indebtedness, bonds and other legal costs and charges as they become due. (*Added by L. 1914, ch. 519.*)

§ 109. **Annual reports.**—The commissioners shall make an annual report, duly verified, to the supreme court, on or before February first, of each year, of all their receipts and disbursements during the preceding calendar year, together with a statement of all contracts, obligations and indebtedness outstanding, including all certificates of indebtedness and bonds issued during such year, and the total amount of the same outstanding. Said report shall also contain an estimate of the necessary expenditures for the ensuing calendar year, and the amount of certificates of indebtedness or bonds which it will be necessary to issue to meet such expenditure. Said report shall be filed in the county clerk's office of each county within which any of the lands within the drainage district are situated; and thereafter, not less than ten days' notice shall be given by publication in at least one newspaper published in each county and by posting such notice in at least three public places in each town in which any of the lands within the drainage district are situated, of the time when and the place where an application will be made for the confirmation of said report. Any party interested may appear and oppose the confirmation of said report. The court shall examine into, or cause an examination to be made of said report, and shall make an order settling and adjusting the same, and approving the same as settled and adjusted; and authorizing said commission to issue and sell from time to time, such certificates of indebtedness or bonds as may be necessary during the ensuing calendar year, not exceeding the amount specified in said order, without the further leave of the court; and no certificates of indebtedness or bonds, except bonds issued for the purpose of retiring, or obtaining funds wherewith to retire, certificates of indebtedness theretofore duly issued, shall be issued except upon the petition or report of said commissioners, showing the necessity for the same and upon the order of the court approving the same, which may be granted from time to time when necessary. Said annual report or a duplicate thereof, together with each order of the court made in connection therewith, or a duly certified copy thereof, and each order of the court authorizing the issue of certificates of indebtedness or bonds, or a duly certified copy thereof, together with the papers upon which the same was granted, shall be filed in the county clerk's office of each county having any lands within said drainage district. (*Added by L. 1914, ch. 519.*)

§ 110. **Duration of corporate existence.**—Any sanitary or drainage corporation organized under the provisions of this article shall continue in existence until all of the work of drainage within the district, which shall be determined to be necessary, has been completed, and until the cost of the same or in connection therewith, has been apportioned, and all assessments, apportionments, certificates of indebtedness and bonds outstanding, or

1909, ch. 20. Laws repealed. §§ 130, 131.

used in connection with the same shall have been paid and discharged; and new commissioners may be appointed by the supreme court from time to time, on the application of any party interested, and upon such notice the court may direct, to succeed any commissioner who may have died, who shall have removed from the state, or whom the court shall, by order, move or permit to resign. All other provisions of the drainage law, not consistent with the terms of this article, shall be applied to any corporation and the officers thereof, organized under the provisions of this article, and to all the proceedings under the same. (*Added by L. 1914, ch. 519.*)

ARTICLE VIII.

(Former Article 7, renumbered by L. 1914, ch. 519.)

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 130. Laws repealed.

131. When to take effect.

§ 130. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed. (*Renumbered by L. 1914, ch. 519.*)

§ 131. When to take effect.—This chapter shall take effect immediately. (*Renumbered by L. 1914, ch. 519.*)

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part 3, chapter 8, title 16.....	All
LAWS OF	CHAPTER	SECTION
16	143	All
28	21	1
¶ 212 (2d meet.)		
51	345	All
51	503	All
69	388	All
70	38	All
71	43	All
71	303	All
73	243	All
79	282	All
80	338	All
81	608	All
82	326	All
86	636	All
88	259	All
LAWS OF	CHAPTER	SECTION
1888	527	All
1890	557	All
1891	310	All
1892	321	All
1895	384	All
1896	502	All
1896	819	All
1897	168	All
1897	249	All
1899	111	All
1901	523	All
1904	75	All
1904	433	All
1905	325	All
1906	115	All
1908	439	All

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

R. S., pt. 3, ch. 8, tit. 16, was amended and, in fact, superseded by L. 1869, ch. 18, § 1, which act in effect substituted eighteen sections for the ten originally contained in said chapter 8, title 16. Subsequent legislation has treated these eighteen sections as both chapter 8, title 16, of R. S., and as L. 1869, ch. 18, § 1. Notwithstanding the fact that the latter in reality contained but one section, in the proposed Drainage Law these eighteen sections, with those added by subsequent enactment, and as affected by amendments, have been treated as sections of R. S., pt. 3, ch. 8, tit. 16 as amended by L. 1869, ch. 18, § 1.

L. 1851, ch. 345.—Relates to proceedings for draining low lands. Section 1 amends R. S., pt. 3, ch. 8, tit. 16, § 1. Section 2 adds to R. S., pt. 3, ch. 8, tit. 16, § 11. Section 3, saving clause, is of temporary importance. Section 4 states when act takes effect.

L. 1851, ch. 503.—Relative to draining Cayuga marshes. Recommended for repeal because temporary.

L. 1869, ch. 888.—Amends Revised Statutes, pt. 3, ch. 8, tit. 16, consisting of eighteen sections, so as to read as follows. [See note 11.] Sections 1-3, 5, 12, 14 were amended to read as follows by L. 1886, ch. 636. Sections 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18 were amended to read as follows by L. 1871, ch. 303. Section 11 was amended to read as follows by L. 1892, ch. 321. Section 15 repealed by L. 1886, ch. 636, § 1, ¶ 3 (2). Section 17 is a repeal and saving clause. Section 18 states when act takes effect. Remainder of statute consolidated in Drainage Law, as follows: Section 4 in § 10. Section 9 in §§ 17, 18. Section 13 in §§ 40, 41.

L. 1870, ch. 38.—Relates to proceedings for draining low and farm lands. Added § 19 to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1869, ch. 888, section, as so added, is amended by L. 1886, ch. 636, § 11, "to read as follows."

L. 1871, ch. 303.—Relates to proceedings for draining low lands. Section amended "so as to read as follows" by L. 1886, ch. 636, §§ 5, 8, and L. 1892, ch. 527, § 1. Section 4 obsolete and superseded by jurisdictional provisions of L. 1906, ch. 115. Section 5 states when act takes effect.

L. 1873, ch. 243.—Relates to filling vacancy in office of commissioner. Superseded by provisions of L. 1886, ch. 636, § 11.

L. 1880, ch. 388.—Amends L. 1879, ch. 282, § 1, which repealed L. 1871, ch. 303. The amendment excepts town of Newcastle, Westchester county, from the operation of the repeal. Exemption created provided for in Drainage Law, § 84.

L. 1881, ch. 608.—Relates to proceedings for draining low lands. Three sections. Section 1 added section 21 to R. S., pt. 3, ch. 8, tit. 16, as amended by L. 1886, ch. 636, which § 21, as so added, is amended by L. 1886, ch. 636, § 12, "to read as follows." Exemptions created by § 2 apply in terms only to the provisions of § 1; § 2 should therefore be repealed. Section 3 provides when act shall take effect.

L. 1882, ch. 326.—Relative to drains, ditches and water channels for draining low lands, constructed before 1872. Section 1 of the act is superseded by L. 1890, ch. 557, § 1. Section 2 obsolete, and the exemptions provided for by § 3 being no longer operative, that section should fall with the other sections of the act.

L. 1886, ch. 636.—Consists of fourteen sections. Section 1 amended to read as follows by L. 1906, ch. 115; § 7 by L. 1901, ch. 523; § 8 by L. 1892, ch. 321. Sections when act shall take effect. Remainder consolidated in Drainage Law, as follows: Section 2, in § 4; section 3, in §§ 6-9; section 4, in §§ 10-11; section 5, in § 12; section 6, in § 13; section 9, in §§ 37-39; section 10, in § 42; section 11, in § 5; section 12, in §§ 43-47; section 13, in §§ 32, 81, 82.

L. 1888, ch. 259.—Legalizing proceedings in county court and extending jurisdiction of said court in the drainage of low lands. Temporary and obsolete.

L. 1888, ch. 527.—Relates to proceedings for draining low lands. Repealed by L. 1890, ch. 557, § 3, because inconsistent with § 1 of last mentioned act.

L. 1890, ch. 557.—Amends L. 1869, ch. 888, by adding §§ 25-34. Of these sections §§ 25, 30, 32 are consolidated in Drainage Law, §§ 60, 70, 71. Sections 26-29, 31, 33, 34 were amended to read as follows by L. 1892, ch. 321. §§ 3-9. Section 2 of L. 1890, ch. 557, is consolidated in Drainage Law, § 3 is a repeal and § 4 states when act takes effect.

L. 1891, ch. 310.—Consolidated in Drainage Law, as follows: Section 1, in § 90; section 2, in § 91; section 3, in § 93; section 4, in § 94; section 5, in § 95.

L. 1892, ch. 321.—Sections 3-5, 7, 9, 10 consolidated in Drainage Law, as follows: Section 3, in §§ 61-62; section 4, in §§ 63-64; section 5, in § 65; section 7, in § 65; section 9, in § 72; section 10, in § 80. Section 11 provides when act shall take effect. Remainder of statute amended "so as to read as follows."

L. 1895, ch. 384.—Relates to drainage of agricultural lands. Declared unconstitutional. See Matter of Tuthill, 163 N. Y. 133.

L. 1896, ch. 502.—Relates to drainage of agricultural lands. Declared unconstitutional. See Matter of Tuthill, 163 N. Y. 133.

L. 1896, ch. 819.—Consolidated in Drainage Law, as follows: Section 1, in § 67; section 2, was amended by L. 1905, ch. 325, § 1, to read as follows; section 3 states when act takes effect.

L. 1897, ch. 168.—Relates to drainage of agricultural lands. Declared unconstitutional. See Matter of Tuthill, 163 N. Y. 133.

L. 1897, ch. 249.—Section 1 amended "so as to read as follows" by L. 1904, ch. 523, § 3; section 2 applies remainder of statute. Recommended for repeal.

L. 1899, ch. 111.—Consolidated in Drainage Law, as § 62, ¶ 2.

L. 1901, ch. 523.—Consolidated in Drainage Law, as follows: Section 1, in §§ 30-33; section 3, in §§ 34-36; section 1, amended by L. 1904, ch. 75, § 1.

L. 1910, ch. 177. Translation of Dutch manuscripts. § 1.

read as follows"; section 4 applies the statute; § 5 states when act takes effect.
 L. 1904, ch. 75.—Consolidated in §§ 14-16 of Drainage Law.
 L. 1904, ch. 433.—Consolidated in § 83 of Drainage Law.
 L. 1905, ch. 325.—Consolidated in §§ 66-69 of Drainage Law.
 L. 1906, ch. 115.—Consolidated in §§ 2, 3 and 19 of Drainage Law.

DRAMA.

Unlawfully producing copyrighted drama; Penal Law, § 441.

DRUG STORES.

Working hours; Public Health Law, § 236. See Public Health Law, §§ 230-240.

DRUGGISTS.

Examination and license; Public Health Law, §§ 230-234. Apprentices and employees; Public Health Law, § 238. Penalties for illegal practice; Public Health Law, § 239. Hours for; Public Health Law, § 240.

DRUGS.

Adulteration; Public Health Law, § 41. Penalty for adulterating; Public Health Law, § 235. Retailing poisons; Public Health Law, § 236. Habit forming, sale regulated; Public Health Law, §§ 245-249-d. Omitting to label, or labeling falsely; Penal Law, § 1742. Sale of poisons; Penal Law, § 1743. Sale of opium or morphine; Penal Law, § 1745. Sale of cocaine or eucaine; Penal Law, § 1746. Careless distribution of; Penal Law, § 1747. Sale of adulterated; Penal Law, § 1748. Sale in penal institutions; Penal Law, § 1691.

DUELING.

See Penal Law, §§ 730-737. When murder in second degree; Penal Law, § 1047.

DURESS.

Defined; Penal Law, § 859. Defense of, by married woman; Penal Law, § 1460.

DUTCHESS COUNTY.

Act to establish a board of child welfare, L. 1917, ch. 354.

DUTCH RECORDS.

L. 1910, ch. 177.—An act providing for the translation of the Dutch manuscript records of the colony of New Netherland from the year sixteen hundred and thirty to the year sixteen hundred and seventy-four, now in the New York state library, and making an appropriation therefor. [In effect Apr. 28, 1910.]

Section 1. The commissioner of education is hereby authorized, subject to the approval of the board of regents of the university of the State of New York, to appoint and enter into a contract with a competent person to translate into the English language, the Dutch manuscript records of the Dutch West India Company, being the official records of the government of the colony of New Netherland, from the year sixteen hundred and thirty to sixteen hundred and seventy-four, inclusive; which are owned by the State of New York, and deposited in the state library; and are more specifically described as volumes one to nineteen and twenty-three of the series of New York colonial manuscripts, and two additional volumes of land patents and deeds. The person so employed

Cross references.

to make such translation shall prepare the same for publication, perform such duties in respect thereto as shall be prescribed by director of the state library. Such translation shall be published in p from time to time, in parallel columns or pages of Dutch and Eng in the same manner and under the same conditions as the annual re of the state library.

§ 2. The sum of three thousand dollars (\$3,000) shall be appropri each year to pay the compensation of the person appointed to make a translation as above provided.

DYNAMITE.

Unlawful keeping or transportation; Penal Law, § 894.

EASTERN NEW YORK CUSTODIAN ASYLUM.

Commission to select site for; L. 1907, ch. 331, as amended by L. 1908, ch. Name changed to Letchworth Village and commission to construct, L. 1909, ch. See Letchworth Village.

EASTERN NEW YORK REFORMATORY.

See Prison Law, §§ 280-308.

EAVESDROPPING.

Definition and punishment; Penal Law, § 721.

EDUCATION.

Credit to pupils engaged during the war in agricultural, military and indus services. See Children.

Physical and disciplinary training in schools; Military Law, § 27.

EDUCATION BUILDING.

L. 1906, ch. 678.—“An act providing for the acquisition of a site and for the erect of a state education building, providing for the state library, state museum, making an appropriation therefor.”

Omitted as temporary.

EDUCATION FUND.

See State Finance Law, §§ 80-93.

EDUCATION LAW.

(L. 1909, ch. 21.)

L. 1910, ch. 140.—An act to amend the education law, generally.

[In effect April 22, 1910.]

Schedule has been amended by editors to conform to articles and sections added.)

Section 1. Chapter twenty-one of the laws of nineteen hundred and nine, entitled "An act relating to education, constituting chapter sixteen of the consolidated laws," is hereby amended to read as follows:¹

CHAPTER XVI OF THE CONSOLIDATED LAWS.**EDUCATION LAW.**

- Article 1. Short title and definitions (§§ 1, 2).
 2. Education department (§§ 20-27).
 3. University (§§ 40-77).
 4. Commissioner of education (§§ 90-99).
 5. School districts (§§ 120-154).
 6. School neighborhoods (§§ 170-172).
 6-a. Temporary school districts (§§ 175-179).
 6-b. Central rural schools (§§ 180-186).
 6-c. Central high school districts (§§ 187-189-1).
 7. District meetings (§§ 190-207).
 7-a. School elections in certain cities (§§ 208-218).
 8. School district officers; general provisions (§§ 220-236).
 9. District clerk, treasurer, collector (§§ 250-257).
 10. Trustees (§§ 270-285).
 11. Boards of education (§§ 300-328).
 11-a. Town boards of education (§§ 330-365).
 12. Town clerks (§§ 364, 365).
 13. Supervisors (§§ 370-375).
 14. District superintendents of schools; his election, powers and duties (§§ 380-398).
 15. Assessment and collection of taxes (§§ 410-440).
 16. School buildings and sites (§§ 450-467).
 17. School district bonds (§ 480).
 18. School moneys (§§ 490-502).

¹ The Education Law (L. 1909, ch. 21) has been entirely amended by this act. Many sections of the former law have been rewritten, without in most instances any material change in substance. Certain obsolete provisions have been omitted, and many inconsistent and conflicting provisions have been modified. We have included notes indicating the derivation of the sections of the present law and also the derivation of the sections of the Education Law of 1909.

19. Trusts for schools; gospel and school lots (§§ 520-528).
20. Teachers and pupils (§§ 550-567).
- 22-a. Farm schools in counties (§§ 610-619-b).
- 20-b. Children with retarded mental development (§ 578).
21. Contract system (§§ 580-586).
22. General industrial schools, trade schools, and school of culture, mechanic arts and home making (§§ 600-606).
- 22-a. Farm schools in counties (§§ 610-619b).
23. Compulsory education (§§ 620-636).
24. School census (§§ 650-654).
25. Text-books (§§ 670-673).
26. Physiology and hygiene (§§ 690, 691).
- 26-a. Discipline and physical training.
- 26-b. Instruction in the humane treatment of animals and (§ 700).
27. The flag (§§ 710-713).
28. Fire drills (§§ 730-733).
29. Arbor day (§§ 750-752).
30. Teachers' institute (§§ 770-775).
31. Training classes (§§ 790-794).
32. Normal schools; state normal college (§§ 810-833).
33. Fines; penalties; forfeitures and costs (§§ 850-862).
- 33-a. Board of education in the several cities of the state (§§ 881).
34. Appeals or petitions to commissioner of education (§§ 882).
35. Orphan schools (§§ 900-902).
36. Schools for colored children (§§ 920-922).
37. Indian schools (§§ 940-954).
38. Instruction of deaf mutes and of the blind (§§ 970-980).
39. New York state school for the blind (§§ 990-1011).
- 39-a. Physically defective children (§ 1020).
40. Cornell university (§§ 1030-1039).
- 40-a. Agricultural schools (§§ 1040-1041).
41. State school of agriculture of Saint Lawrence university (§§ 1050-1052).
- 41-a. State school of agriculture and domestic science at Ithaca (§§ 1055-1060).
42. State school of agriculture at Alfred university (§§ 1070-1072).
- 42-a. State school of agriculture at Cobleskill (§§ 1075-1078).
43. State school of agriculture at Morrisville (§§ 1090-1094).
- 43-a. Retirement fund for teachers in state institutions (§§ 1099-a).

- 43-b. State teachers retirement fund for public school teachers (§§ 1100-1109-a).
- 44. Libraries (§§ 1110-1141).
- 45. Court libraries (§§ 1160-1179).
- 45-a. State school agriculture on Long Island (§§ 1185-1188).
- 46. Division of history and public records (§§ 1190-1198).
- 46. The New York-American Veterinary college (§§ 1190-1193).
- 47. Laws repealed; saving clause; when to take effect (§§ 1200-1202).

ARTICLE I.

SHORT TITLE AND DEFINITIONS.

Section 1. Short title.

2. Definitions.

§ 1. Short title.—This chapter shall be known as the “Education Law.”

Source.—Education L. 1909, § 1.

Scope and object.—This chapter is the result of a careful examination of all statutes on the subject of education enacted during the one hundred and thirty years of legislation, beginning with the first chapter enacted in 1777 and ending with the last in 1907.

The law as presented herewith is a consolidation in the main of live provisions of the Consolidated School Law and the University Law, as amended, together with a large number of independent general statutes relating to institutions which are directly or indirectly under the supervision of the Education Department; also independent statutes relating to institutions, law libraries for instance, which while not directly of an educational character relate so closely to the subject as to readily fall within the general scheme of the chapter.

The schedule of repeals to the law contains all statutes which relate to the subjects treated in the body of the law heretofore repealed either specifically or by construction; or recommended for repeal because inoperative, superseded, or consolidated in the law.

Among the topics treated are school districts and school neighborhoods with their formation, dissolution and the duties and responsibilities of their officers; school taxes, bonds and moneys; trusts for schools, including gospel and school lots; fines, penalties and forfeitures; compulsory education, including that of Indians; teachers, their contracts and duties; text-books; contract system; training classes and schools with teachers' institutes; normal schools; the flag; fire drills; arbor day; physiology and hygiene; special instruction by graphic illustration; drawing and vocal music; industrial training; kindergartens; orphan schools; Indian schools and the compulsory education of Indian children; schools for the instruction of deaf-mutes and the blind; colored schools; school census; libraries; the University and regents; Cornell University; New York State School of Agriculture at St. Lawrence University.

Made up as it is of independent general statutes enacted during different legislative periods and under widely different conditions, this chapter, read as a general law, necessarily presents many rough places and many incongruities which could be eliminated by revision. Much might also be accomplished in the way of shortening and simplifying, but the Board is restricted in scope by the act which created it, and no attempt has been made to do more than to present the statute

law as it exists to-day with such elimination as could be made without the risk of revision. (Report of Board of Statutory Consolidation, p. 1154).

§ 2. Definitions.—As used in this chapter, the following specified terms mean as here defined.

1. Academy. The term "academy" means an incorporated institution for instruction in secondary education, and such high schools, academic departments in union schools and similar unincorporated schools as are admitted by the regents to the university as of academic grades.

2. College. The term "college" includes universities and other institutions for higher education authorized to confer degrees.

3. University. The term "university" means the university of the state of New York.

4. Regents. The term "regents" means board of regents of the university of the state of New York.

5. Commissioner. The term "commissioner" means commissioner of education.

6. School commissioner. The term "school commissioner" means the local officer provided for in article fourteen.

7. Secondary education. The term "secondary education" means instruction of academic grades, between the elementary grades and the college or university.

8. Higher education. The term "higher education" means education in advance of secondary education, and includes the work of colleges, universities, professional and technical schools, and educational work connected with libraries, museums, university and educational extension courses and similar agencies.

9. Trustee. The term "trustees," when not used in reference to a school district, includes directors, managers or other similar members of the governing board of an educational institution.

10. Parental relation. The term "persons in parental relation" to a child includes the parents, guardians or other persons, whether one or more, lawfully having the care, custody or control of such child.

11. Compulsory school ages. The term "child of compulsory school age" means any child between seven and sixteen years of age lawfully required to attend upon instruction.

12. School authorities. The term "school authorities" means the trustees, or board of education, or corresponding officers, whether one or more, and by whatever name known, of a city, or school district however created.

13. School officer. The term "school officer" means a clerk, collector, or treasurer of any school district; a trustee or member of a board of education or other body in control of the schools by whatever name known in a union free school district or in a city; a superintendent of schools; a truant officer; a school commissioner; or other elective or appointive officer in a school district or city whose duties generally relate to the administration of affairs connected with the public school system.

14. Board of education. The term "board of education" shall include by whatever name known the governing body charged with the general control, management and responsibility of the schools of a union free school district or of a city.

Source.—Education L. 1909, § 2, revised from former Univ. L. (L. 1892, ch. 378), § 2; former Con. Sch. L. (L. 1894, ch. 556), tit. 16, § 2, as added by L. 1894, ch. 671, amended by L. 1903, ch. 459; originally revised from L. 1889, ch. 529, tit. 2, § 1. The definitions of "commissioner," "school commissioner," "school authorities," "school officer," and "board of education" are new. The other definitions were formerly included in the acts above referred to and defined the terms as used in such acts. The incorporation of such definitions in this section extends them to such terms when used anywhere in this chapter.

Consolidators' note.—"Institution" substituted for "school" as being more descriptive of an academy than the latter term.

"Commissioner of education" substituted for "superintendent of public instruction" because of the abolition of the latter office and creation of the former by L. 1904, ch. 40.

The definition of "school commissioner" is introduced to prevent confusion with the term commissioner as defined in the preceding paragraph.

New matter "when not used in reference to a school district" inserted because term "trustees," as defined in this section, refers to institutions within the University of the State of New York, and since the Consolidated School Law and the University Law are consolidated it is necessary to restrict the term "trustees" under the definition given to institutions in the university.

References.—Towns and town school units created as school districts, and provision made for the administration of schools therein, Education Law, Act XIa as inserted by L. 1917, ch. 328. Office of district superintendent of schools created and office of school commissioner abolished, Id. § 380, as amended by L. 1910, ch. 607.

Parental relation.—A family caring for a child taken from an aid society stands "in parental relation to a child" within the meaning of this section. People ex rel. Brooklyn Children's Aid Society v. Hendrickson (1908), 125 App. Div. 256, 109 N. Y. Supp. 403, *affd.* (1902), 196 N. Y. 551, 90 N. E. 1163.

ARTICLE II.

EDUCATION DEPARTMENT.²

Section 20. Education department.

21. Divisions of department.
22. Assistant commissioners.
23. Other officers and employees.
24. Removals and suspensions.
25. Joint seal.
26. Reports to the Legislature.
27. State education building.

§ 20. Education department.—The education department is hereby continued and shall be under the legislative direction of the regents and the executive direction of the commissioner of education, who is made, by section ninety-four of this act, the chief executive officer of the state system of education and of the regents. The said department is charged with

² This article is new in form, but not in substance. See former § 331.

the general management and supervision of all public schools and all of the educational work of the state, including the operations of the university of the state of New York.

Source.—New in form, but see former Education L. § 331.

§ 21. Divisions of department.—By concurrent action of the regents and the commissioner of education the department may be divided into divisions. By like action new divisions may be created and existing divisions may be consolidated or abolished, and the administrative work of the department assigned to the several divisions.

Source.—New in form, but see former Education L. § 331.

§ 22. Assistant commissioners.—The commissioner of education shall appoint, subject to the approval of the regents, such assistant commissioners as he shall deem necessary for the proper organization and general classification of the work of the department, and assign to such assistant commissioners the work which shall be under their respective supervision.

Source.—New in form, but see former Education L. § 331.

§ 23. Other officers and employees.—The commissioner of education, subject to the approval of the regents, shall have power, in conformity with their rules, to appoint all other needed officers and employees and fix their titles, duties and salaries.

Source.—New in form, but see former Education L. § 331.

§ 24. Removals and suspensions.—With the approval of the regents, the commissioner of education may, at his pleasure, remove from office any assistant commissioner, or other appointive officer or employee; and, when the regents are not in session, the commissioner may, during his pleasure, suspend, without salary, any such officer or employee, but not longer than till the adjournment of the succeeding meeting of the regents.

Source.—New in form, but see former Education L. § 331.

§ 25. Joint seal.—The regents of the university and the commissioner of education shall together adopt, and may modify at any time, a seal, which shall be used in common as the seal of the education department and of the university; and copies of all records thereof and of all acts, orders, decrees and decisions made by the regents or by the commissioner of education, and of their official papers, and of the drafts or machine copies of any of the foregoing, may be authenticated under the said seal and shall then be evidence equally with and in like manner as the originals.

Source.—Education L. 1909, § 332, revised from former Con. Sch. L. (L. 1894, ch. 556), tit. 1, § 5; originally revised from L. 1864, ch. 555, tit. 1, § 6.

References.—Seal of state officers, form thereof, and how provided, Public Officers Law, § 60. How seals are impressed on written instruments, General Construction Law, § 43. Copies of records and papers in offices having official seals, presumptive evidence, Code Civil Procedure, § 933.

§ 26. Reports to the legislature.—The commissioner of education shall annually prepare a report of the education department, including the university, which shall be transmitted to the legislature over the signatures of the chancellor of the university and of the commissioner of education. At their pleasure, the regents or the commissioner of education may make other reports and communications to the legislature. Such portions of their annual or other reports or communications as the commissioner or the regents shall desire for such use shall be printed by the state printer as bulletins.

Source.—Education L. 1909, § 335, revised from former Con. Sch. L. (L. 1894, ch. 556), tit. 1, § 9; originally revised from L. 1864, ch. 555, tit. 1, § 14.

Reference.—Publication of reports of department, State Printing Law, § 5.

§ 27. State education building.—After the completion of the state education building, it shall be occupied exclusively by the education department, including the university, with the state library, the state museum, and its other departments, together with such other work with which the commissioner of education and the regents have official relations, as they may, in their discretion, provide for therein; and such building and the offices of such department shall be maintained at state expense.

Source.—New.

ARTICLE III.

UNIVERSITY OF THE STATE OF NEW YORK.

Section 40. Corporate name and objects.

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42. Officers.
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44. Quorum.
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§ 40. **Corporate name and objects.**—The corporation created in the year seventeen hundred and eighty-four under the name of the Regents of the university of the state of New York, is hereby continued under the name of the university of the state of New York. Its objects shall be to encourage and promote education, to visit and inspect its several institutions and departments, to distribute to or expend or administer for them such property and funds as the state may appropriate therefor or as the university may own or hold in trust or otherwise, and to perform such other duties as may be intrusted to it.

Source.—Education L. 1909, § 1080, revised from former Univ. L. (L. 1892, ch. 378) § 3; L. 1904, ch. 40, § 4; originally revised from L. 1889, ch. 529, tit. 1, §§ 1, 2.

Reference.—Constitutional provision as to University of State of New York, Constitution, Article 9, § 2.

Function of University of the State of New York.—See *Matter of Francis* (1907), 121 App. Div. 129, 105 N. Y. Supp. 643, *affd.* 189 N. Y. 554, 82 N. E. 1126.

Wampum belts of the Indian confederacy not shown to belong by transfer to the university of the state. *Onondaga Nation v. Thacher* (1900), 53 App. Div. 561, 65 N. Y. Supp. 1014, *affd.* (1901), 169 N. Y. 584, 62 N. E. 1098.

§ 41. **Regents.**—The university shall be governed and all its corporate powers exercised by a board of regents whose members shall at all times be three more than the then existing judicial districts of the state. The regents now in office and those hereafter elected shall hold, in the order of their election, for such times that the term of one regent will expire in each year on the first day of April, and his successor shall be chosen in the second week of the preceding February, on or before the fourteenth day of such month. A regent shall be elected by the legislature, on joint ballot of the two houses thereof.

All vacancies in such office, either for full or unexpired terms, shall be so filled that there shall always be in the membership of the board of regents at least one resident of each of the judicial districts. A vacancy in the office of regent for other cause than expiration of term of service shall be filled for the unexpired term by an election at the session of the legislature immediately following such vacancy, unless the legislature is in session when such vacancy occurs, in which case the vacancy shall be

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filled by such legislature. There shall be no "ex officio" members of the board of regents. No person shall be at the same time a regent of the university and a trustee, president, principal or any other officer of an institution belonging to the university. (*Amended by L. 1915, ch. 3.*)

Source.—Education L. 1909, § 1081, revised from former Univ. L. (L. 1892, ch. 378) § 4; L. 1904, ch. 40, §§ 1, 2, as amended by L. 1909, ch. 1; originally revised from L. 1889, ch. 529, tit. 1, §§ 4, 5.

Reference.—Number of regents not to be less than nine, Constitution, Article 9, § 2.

Paid instructors are not officers of an institution within the meaning of this section and not thereby disqualified for election as regents of the university. Rept. of Atty. Genl (1893) 270.

Acceptance of office of regent vacates, *ipso facto*, position of president, etc., of any institution belonging to the university. Rept. of Atty. Genl. (1904) 252.

§ 42. **Officers.**—The elective officers of the university shall be a chancellor and a vice-chancellor who shall serve without salary, and such other officers as are deemed necessary by the regents, all of whom shall be chosen by ballot by the regents and shall hold office during their pleasure; but no election, removal or change of salary of an elective officer shall be made by less than six votes in favor thereof. Each regent and each elective officer shall, before entering on his duties, take and file with the secretary of state the oath of office required of state officers.

The chancellor shall preside at all convocations and at all meetings of the regents, and confer all degrees which they shall authorize. In his absence or inability to act, the vice-chancellor, or if he be also absent, the senior regent present, shall perform all the duties and have all the powers of the chancellor.

Source.—Education L. 1909, § 1082, revised from former Univ. L. (L. 1892, ch. 378) § 5; originally revised from L. 1889, ch. 529, tit. 1, §§ 6-8.

§ 43. **Meetings and absences.**—The regents may provide for regular meetings, and the chancellor, or the commissioner of education, or any five regents, may at any time call a special meeting of the board of regents and fix the time and place therefor; and at least ten days' notice of every meeting shall be mailed to the usual address of each regent. If any regent shall fail to attend three consecutive meetings, without excuse accepted as satisfactory by the regents, he may be deemed to have resigned and the regents shall then report the vacancy to the legislature, which shall fill it.

Source.—Education L. 1909, § 1083, revised from former Univ. L. (L. 1892, ch. 378) § 6; originally revised from L. 1889, ch. 529, tit. 1, §§ 9, 10.

§ 44. **Quorum.**—Seven regents attending shall be a quorum for the transaction of business.

Source.—Education L. 1909, § 1084, revised from former Univ. L. (L. 1892, ch. 378) § 7, as amended by L. 1905, ch. 161; originally revised from L. 1889, ch. 529, tit. 1, § 11.

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§ 45. **Authority to take testimony.**—The regents, any committee thereof, the commissioner of education and any assistant commissioner of education may take testimony or hear proofs relating to their official duties, or in any matter which they may lawfully investigate.

Source.—Education L. 1909, § 1085, revised from former Univ. L. (L. 1892, ch. 378) § 8.

References.—Power to administer oaths, Code Civ. Pro. § 843. Compelling attendance and testimony of witnesses, Id. §§ 852-862.

§ 46. **Legislative power.**—Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and except as to the judicial functions of the commissioner of education establish rules for carrying into effect the laws and policies of the state, relating to education, and the powers, duties and trusts conferred or charged upon the university. But no enactment of the regents shall modify in any degree the freedom of the governing body of any seminary for the training of priests or clergymen to determine and regulate the entire course of religious, doctrinal or theological instruction to be given in such institution. No rule by which more than a majority vote shall be required for any specified action by the regents shall be amended, suspended or repealed by a smaller vote than that required for action thereunder.

Source.—Education L. 1909, § 1086, revised from former Univ. L. (L. 1892, ch. 378) § 9, as amended by L. 1895, ch. 577; originally revised from L. 1889, ch. 529, tit. 1, § 12.

§ 47. **General examinations, credentials and degrees.**—The regents may confer by diploma under their seal such honorary degrees as they may deem proper, and may establish examinations as to attainments in learning, and may award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Source.—Education L. 1909, § 1087, revised from former Univ. L. (L. 1892, ch. 378) § 11; originally revised from L. 1889, ch. 529, tit. 3, § 1.

False certificates of attendance.—Where the principal of an educational institution incorporated by the regents has furnished its students with false certificates of attendance and permitted them to take examinations without having regularly attended upon instruction as required by the regents' rules, and many of said students have not attended upon instruction at the times and under the conditions required for attendance at registered secondary schools and much of their instruction has been given in violation of said rules and, as a result of an investigation, the registration of the institution as a member of the university has been canceled by the regents, applications by said students for peremptory writs of mandamus to compel the university to grant them a rating upon their examination papers will be denied, though it appears that they did not participate in the fraud of the principal of the institution. *People ex rel. Ortenberg v. University of the State of New York* (1917), 99 Misc. 50.

§ 48. **Academic examinations.**—The regents shall establish in the secondary institutions of the university, examinations in studies furnishing

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a suitable standard of graduation therefrom and of admission to colleges, and certificates or diplomas shall be conferred by the regents on students who satisfactorily pass such examinations.

Source.—Education L. 1909, § 1088, revised from former Univ. L. (L. 1892, ch. 378) § 12; originally revised from L. 1889, ch. 529, tit. 3, § 2.

Discretion of regents.—Under the statute it is clear that no certificates are required to be issued until the applicant has passed an examination satisfactorily to the regents. *People ex rel. Ortenberg v. University of the State of New York* (1917), 99 Misc. 50 N. Y. Supp.

§ 49. **Admission and fees.**—Any person shall be admitted to these examinations who shall conform to the rules and pay the fees prescribed by the regents.

Source.—Education L. 1909, § 1089, revised from former Univ. L. (L. 1892, ch. 378) § 13; originally revised from L. 1889, ch. 529, tit. 3, § 3.

Reference.—Fees to be paid monthly into the state treasury, *State Finance Law*, § 37.

§ 50. **Registrations.**—The regents may register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in this state.

Source.—New.

§ 51. **Supervision of professions.**—Conformably to law the regents may supervise the entrance regulations to and the licensing under and the practicing of the professions of medicine, dentistry, veterinary medicine, pharmacy, optometry and chiropody, and also supervise the certification of nurses, public accountants, certified shorthand reporters, architects, and members of any other profession which may hereafter come under the supervision of the board of regents.

The regents may by rule or order accept evidence of preliminary and professional education for licensing a candidate to practice any such profession in lieu of that prescribed by the laws relating to such profession; provided it shall appear to the satisfaction of the regents that such candidate has substantially met the requirement of such laws.

And the regents shall have further power to indorse a license issued by a legally constituted board of examiners in any other state upon satisfactory evidence that the requirements for the issuance of such license were substantially the equivalent of the requirements in force in this state when such license was issued, and that the applicant has been in the lawful and reputable practice of his profession for a period of not less than five years prior to his making application for such indorsement. When the evidence presented is not satisfyingly sufficient to warrant the indorsement of such license, the board of regents may require that the candidate for indorsement shall pass such subjects of the licensing examination specified by

statute or regents' rule as should be required of the candidate to establish his worthiness to receive such indorsement. (*Amended by L. 1917, ch. 357, in effect May 4, 1917.*)

Source.—New.

References.—Regulation of the profession of medicine, Public Health Law, §§ 160-174; dentistry, Id. §§ 190-203; veterinary medicine and surgery, Id. 210-224; pharmacy, Id. §§ 230-239; optometry, Id. §§ 301-308; chiropody, Id. §§ 270-281; trained nursing, Id. §§ 250-253. Practice of public accountancy, General Business Law, §§ 80-82; certified shorthand reporters, Id. §§ 85-89a; architecture, Id. §§ 77-79b.

Supervision of professions.—The action of the Regents of the University in considering and denying an application for a license to practice a profession is executive, administrative or ministerial in the sense in which those terms are used by the courts in determining whether official action is reviewable by certiorari or mandamus, or whether there may be any review at all. *People ex rel. Scott v. Reid* (1909), 135 App. Div. 89, 93, 119 N. Y. Supp. 866.

§ 52. **Extension of educational facilities.**—The regents may extend to the people at large increased educational opportunities and facilities, stimulate interest therein, recommend methods, designate suitable teachers and lecturers, conduct examinations and grant credentials, and otherwise organize, aid and conduct such work. And the regents, and with their approval the commissioner of education, may buy, sell, exchange and receive by will, or other gift, or on deposit, books, pictures, statuary or other sculptured work, lantern slides, apparatus, maps, globes, and any articles or collections pertaining to or useful in and to any of the departments, divisions, schools, institutions, associations or other agencies, or work, under their supervision, or control, or encouragement, and may lend or deposit any such articles in their custody or control, when or where in their judgment compensating educational usefulness will result therefrom; and may also, from time to time, enter into contracts desirable for carrying into effect the foregoing provisions.

Source.—Education L. 1909 § 1090, revised from former Univ. L. (L. 1898, ch. 378) § 14.

§ 53. **Departments and their government.**—The state library and state museum shall be departments of the university, and the regents may establish such other departments and divisions therein as they shall deem useful in the discharge of their duties.

Source.—Education L. 1909, § 1091, revised from former Univ. L. (L. 1892, ch. 378) § 10; originally revised from L. 1889, ch. 529, tit. 1, § 16.

§ 54. **State museum; how constituted.**—All scientific specimens and collections, works of art, objects of historic interest and similar property appropriate to a general museum, if owned by the state and not placed in other custody by a specific law, shall constitute the state museum, and one of its officers shall annually inspect all such property not kept in the state museum rooms, and the annual report of the museum to the legislature shall include summaries of such property, with its location,

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and any needed recommendations as to its safety or usefulness. The state museum shall include the work of the state geologist and paleontologist, the state botanist and the state entomologist, who, with their assistants, shall be included in the scientific staff of the state museum.

Source.—Education L. 1909, § 1092, revised from former Univ. L. (L. 1892, ch. 8) § 22, as amended by L. 1893, ch. 488; L. 1896, ch. 493.

§ 55. Collections made by the staff.—Any scientific collection made by a member of the museum staff during his term of office shall, unless otherwise authorized by resolution of the regents, belong to the state and form part of the state museum.

Source.—Education L. 1909, § 1093, revised from former Univ. L. (L. 1892, ch. 8) § 23.

§ 56. Indian collection.—There shall be made, as the Indian section of the state museum, as complete a collection as practicable of the historical, ethnographic and other records and relics of the Indians of the state of New York, including implements or other articles pertaining to their domestic life, agriculture, the chase, war, religion, burial and other rites and customs, or otherwise connected with the Indians of New York.

Source.—Education L. 1909, § 1095, revised from former Univ. L. (L. 1892, ch. 8) § 24; originally revised from L. 1889, ch. 529, tit. 1, § 3.

§ 57. Institutions in the university.—The institutions of the university shall include all secondary and higher educational institutions which are now or may hereafter be incorporated in this state, and such other libraries, museums, institutions, schools, organizations and agencies for education as may be admitted to or incorporated by the university. The regents may exclude from such membership any institution failing to comply with law or with any rule of the university.

Source.—Education L. 1909, § 1094, revised from L. 1896, ch. 586, §§ 1, 2.

Reference.—Term "higher education" defined, Education Law, § 2.

Libraries recognized as educational institutions.—Matter of Francis (1907), 121 App. Div. 129, 105 N. Y. Supp. 643 (1907), *affd.* (1907) 189 N. Y. 554, 82 N. E. 1126.

§ 58. Visitation and reports.—The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.

Source.—Education L. 1909, § 1096, revised from former Univ. L. (L. 1892, ch. 8) § 25; originally revised from L. 1889, ch. 529, tit. 1, § 14.

§ 59. Charters.—Under such name, with such number of trustees or

other managers, and with such powers, privileges and duties, and subject to such limitations and restrictions in all respects as the regents may prescribe in conformity to law, they may, by an instrument under their seal and recorded in their office, incorporate any university, college, academy, library, museum, or other institution or association for the promotion of science, literature, art, history or other department of knowledge, or of education in any way, associations of teachers, students, graduates of educational institutions, and other associations whose approved purposes are, in whole or in part, of educational or cultural value deemed worthy of recognition and encouragement by the university. No institution or association which might be incorporated by the regents under this chapter shall, without their consent, be incorporated under any other general law.

Source.—Education L. 1909, § 1097, revised from former Univ. L. (L. 1892, ch. 378) § 27, as amended by L. 1895, ch. 859; originally revised from L. 1875, ch. 176; L. 1880, ch. 529, tit. 2, § 2; L. 1890, ch. 352.

References.—Educational institution not to be incorporated under business corporation law, Business Corporation Law, § 2; nor under membership corporation law, Membership Corporation Law, § 40. Incorporation of alumni corporations, *Id.* §§ 220–227. Powers of trustees, Education Law, § 68.

Authority to grant charters.—This is the only statute designed for the incorporation of institutions for the promotion of higher education. *Matter of Lampson* (1898), 33 App. Div. 49, 57, 53 N. Y. Supp. 531, *affd.* 161 N. Y. 511, 56 N. E. 2.

The board of regents has no authority to grant a charter for educational purposes to a hospital or dispensary already existing as a corporation. *Rept. of Atty. Genl.* (1894) 377.

Educational institutions, with power to issue stock subject to the provisions of the Stock Corporation Law, may be incorporated by the Board of Regents. *Rept. of Atty. Genl.* (1908) 344.

A proposed corporation having for its objects the preservation of the German language, by procuring and permitting free tuition in said language for children, must be incorporated under this section. *Rept. of Atty. Genl.* (1911) 427.

This section was intended mainly for the incorporation of colleges, seminaries and institutions designed for the promotion of higher education, and was not intended to apply to primary schools or to homes for orphans or other charitable institutions in which some of the elementary branches of education may be taught. *Atty. Genl. Opin.* (1915), 5 State Dep. Rep. 456.

§ 60. Provisional charters.—On evidence satisfactory to the regents that the conditions for an absolute charter will be met within a prescribed time, they may grant a provisional charter which shall be replaced by an absolute charter when the conditions have been fully met; otherwise, after the specified time, on notice from the regents to this effect, the provisional charter shall terminate and become void and shall be surrendered to the regents. No such provisional charter shall give power to confer degrees.

Source.—Education L. 1909, § 1098, revised from former Univ. L. (L. 1892, ch. 378) § 28; originally revised from L. 1889, ch. 529, tit. 2, § 3.

§ 61. Conditions of incorporation.—No institution shall be given power

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confer degrees in this state unless it shall have resources of at least one hundred thousand dollars; and no institution for higher education shall be incorporated without suitable provision, approved by the regents, for educational equipment and proper maintenance. No institution shall constitute or have any faculty or department of education in any place where it is not given power to confer any degree not specifically authorized by its charter; and no corporation shall, under authority of any general act, pretend its business to include establishing or carrying on any educational institution or work, without the consent of the board of regents.

Source.—Education L. 1909, § 1099, revised from former Univ. L. (L. 1892, ch. 8) § 32; originally revised from L. 1889, ch. 529, tit. 2, § 2; L. 1890, ch. 352.

§ 62. Change of name or charter.—1. The regents may, at any time, for sufficient cause by an instrument under their seal and recorded in their office, change the name, or alter, suspend or revoke the charter or incorporation of any institution which they might incorporate under section twenty-nine, if subject to their visitation or chartered or incorporated by the regents or under a general law; provided that, unless on unanimous request of the trustees of the institution, no name shall be changed and no charter shall be altered, nor shall any rights or privileges thereunder be suspended or repealed by the regents, till they have mailed to the usual address of every trustee of the institution concerned at least thirty days' notice of a hearing when any objections to the proposed change shall be considered, and till ordered by a vote at a meeting of the regents at which the notices have specified that action is to be taken on the proposed change.

2. Any notice to a trustee whose address is not readily ascertainable, may be mailed to him in care of the institution.

Source.—Education L. 1909, § 1100, revised from former Univ. L. (L. 1892, ch. 8) § 29, as amended by L. 1895, ch. 859; originally revised from L. 1889, ch. 529, tit. 2, § 4.

Reference.—Provisions for change of name of corporation, General Corporation Law, §§ 60-65.

Power of regents to change number of trustees or alter the charter of a library.—Rept. of Atty. Genl. (1905) 278.

The unanimous request may be given by the trustees in writing without their holding a meeting. Rept. of Atty. Genl. (1892) 253. This ruling does not conform to the practice before the regents on applications for amendment of charter, which requires the action of the board of trustees by vote of all its members at a meeting.

§ 63. Liquidation of affairs of educational institutions.—Whenever any educational corporation subject to the visitation of the regents, chartered or incorporated by the regents or under a general law, shall cease to act in its corporate capacity, or shall have its charter revoked by the regents, it shall be lawful for the supreme court of this state, upon the application of the majority of the trustees thereof, in case said court shall deem it proper so to do, to order and decree a dissolution of such educational corporation, and for that purpose to order and direct a sale and conveyance

of any and all property belonging to such corporation, and after providing for the ascertaining and payment of the debts of such corporation, and the necessary costs and expenses of such sale and proceedings for dissolution, so far as the proceeds of such sale shall be sufficient to pay same, such court may order and direct any surplus of such proceeds remaining after payment of such debts, costs and expenses, to be devoted and applied to any such educational, religious, benevolent, charitable or other objects or purposes as the said trustees may indicate by their petition and the said court may approve.

Such application to said court shall be made by petition, duly verified by said trustees, which petition shall state the particular reason or cause why such sale and dissolution are sought; the situation, condition and estimated value of the property of said corporation, and the particular object or purposes to which it is proposed to devote any surplus of proceeds of such property; and such petition shall, in all cases, be accompanied with proof that notice of the time and place of such intended application to said court has been duly published once in each week for at least four weeks successively, next preceding such application, in a newspaper published in the county where such corporation is located.

In case there shall be no trustees of such educational corporation residing in the county in which such corporation is located, such application may be made and such proceedings taken by the board of regents of the university of the state of New York. This section shall not apply to the dissolution of an academy incorporated under the laws of this state and having a capital stock. (*Former § 63, repealed; new § 63 added by L. 1911, ch. 860.*)

Source.—Education L. 1909, § 1101, revised from former Univ. L. (L. 1892, ch. 378) § 30, as amended by L. 1903, ch. 289; originally revised from L. 1853, ch. 2.

Reference.—Provisions of General Corporation Law, relative to dissolution of corporations, not applicable to certain educational institutions, General Corporation Law, § 195.

§ 64. Dissolution of incorporated academy by stockholders.—1. Meeting to consider application for dissolution, when to be called. The trustees of any academy incorporated under the laws of this state and having a capital stock, may, and upon the written application of any person owning or lawfully holding one-third of the said capital stock, must call a general meeting of the stockholders of the said academy, as herein provided, for the purpose of determining whether or not such incorporated academy shall surrender its charter and be dissolved and its property distributed among the stockholders thereof.

2. Notice thereof, how published. The notice for such general meeting must state the object thereof and be subscribed by the chairman or other acting presiding officer and the secretary or acting secretary of the said corporation or board of trustees; it shall be published once

week for three successive weeks prior to such meeting in a daily or weekly newspaper published in the place where the said academy is located; or if there be no such paper, then in a daily or weekly paper published within the county, if there be one, or, if not, in an adjoining county to that in which such academy is located.

3. Vote requisite for surrender of charter and dissolution. Whenever, at a meeting of the stockholders called as hereinbefore provided, any person or persons holding or qualified to vote upon a majority of the capital stock of such incorporated academy shall vote to surrender the charter thereof and to dissolve the corporation, the trustees of such academy, or a majority of them, must make and sign a certificate of such action, cause the same to be properly attested by the officers of the corporation and file the same, together with a copy of the published notice for the meeting at which such action was taken, and due proof of the publication thereof, in the office of the board of regents of the university of the state of New York and thereupon, if the said proceedings shall have been regularly conducted as above prescribed, the charter of said corporation shall be deemed to be surrendered and the said corporation dissolved.

4. Powers of trustees of academies upon dissolution. Upon the dissolution of such incorporated academy, as herein provided, the trustees thereof shall forthwith become and be trustees of the creditors and stockholders of the corporation dissolved. They shall have full power to settle the affairs of the said corporation; to collect and pay the outstanding debts; to sue for and recover debts and property thereof by the name of the trustees of such corporation; to sell and dispose of the property thereof, at public or private sale, and to divide among the stockholders the moneys or other property that shall remain after the payment of debts and necessary expenses.

5. Notice to creditors to present claims, how published. The said trustees may, after the dissolution of the said corporation, insert in a newspaper published in the place where the said academy is located, or if there be none such then in a newspaper published within the county, if there be one, or, if not, in an adjoining county, a notice once in each week for three successive months, requiring all persons having claims against the said corporation dissolved to present the same with proof thereof to the said trustees, at the place designated in such notice, on or before a day therein named which shall be not less than three months from the first publication thereof. In case any action shall be brought upon any claim which shall not have been presented to the said trustees within three months from the first publication of such notice, the said trustees shall not be chargeable for any assets, moneys or proceeds of the said corporation dissolved, which they may have paid in satisfaction of other claims against the said corporation, or in making distribution to the stockholders thereof, before the commencement of such action.

6. Surrender of stock scrip, upon distribution to shareholders. Upon

the distribution by the said trustees of assets or property, or the proceeds thereof, of the dissolved corporation among its stockholders the trustees may require the certificates of ownership of capital stock, if there have been issued, standing in the name of any stockholder claiming a distributive share, or under whom such share is claimed, to be surrendered for cancellation by such stockholder or person claiming the said share in the event of the non-production of any such certificate, the trustees may require satisfactory proof of the loss thereof, or of any other cause for such non-production, together with such security as they may prescribe, before payment of the distributive share to which the person claiming upon such share of stock may appear to be entitled.

7. Notice of distribution, to absent and unknown shareholders. In case the said trustees upon such distribution by them of assets or property, or the proceeds thereof, of the dissolved corporation among its stockholders, shall be unable to find any of the said stockholders or the persons lawfully owning or entitled to any portion of the said capital stock, they shall give notice in the manner hereinabove provided for calling a general meeting of stockholders, of such distribution, to the persons whose names such stock shall stand upon the books of the said corporation, requiring them to appear at a time and place designated, to receive the portion of such assets or property to which they may be entitled. In case of the failure of any such persons to so appear, it shall be lawful for the said trustees to pay over and deliver to the county treasurer of the county wherein such academy was located, or to any trust company or other corporation located within such county and authorized to receive moneys on deposit under order or judgment of a court of record, a proportion of the assets, property or proceeds aforesaid which such appearing stock bears to the whole stock; the said trustees shall deliver therewith a list of the persons entitled to receive the same, together with the separate amounts to which they shall be severally entitled.

8. Liability of trustees, when to cease. Upon the payment and discharge of the debts and obligations of the corporation dissolved, as hereinbefore provided, and the distribution of its assets, property and proceeds among the stockholders thereof, and due provision made, hereinabove prescribed, for the interests of non-appearing stockholders such as can not be found, the said trustees shall become and be released and discharged from further duty, liability and responsibility by reason of their relation to the said corporation, or towards the stockholders thereof.

9. Duties and liabilities of custodians. Any county treasurer, trust company or other corporation to whom assets, property or proceeds shall be delivered as herein provided, shall hold the same in trust for the persons designated and entitled to receive it; and upon receiving satisfactory proof of the right and title thereto, or upon the order of a court of record competent to adjudicate thereupon, shall pay over

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deliver to any persons entitled to receive the same the portion of such proceeds, property or assets to which they shall be entitled.

Source.—Education L. 1909, § 1102, revised from L. 1889, ch. 25, §§ 1-9.

§ 65. **Suspension of operations.**—If any institution in the university shall discontinue its educational operations without cause satisfactory to the regents, it shall surrender its charter to them, subject, however, to restoration whenever arrangements satisfactory to the regents are made for resuming its work.

Source.—Education L. 1909, § 1103, revised from former Univ. L. (L. 1892, ch. 378) § 31.

§ 66. **Prohibitions.**—1. No individual, association or corporation not holding university or college degree-conferring powers by special charter from the legislature of this state or from the regents, shall confer any degrees, or transact business under or in any way assume the name university or college, till written permission to use such name shall have been granted by the regents under their seal.

2. No person shall buy, sell or fraudulently or illegally make or alter, give, issue or obtain any diploma, certificate or other instrument purporting to confer any literary, scientific, professional or other degree, or to constitute any license, or to certify to the completion in whole or in part of any course of study in any university, college, academy or other educational institution.

3. No diploma or degree shall be conferred in this state except by a regularly organized institution of learning meeting all requirements of law and of the university, nor shall any person with intent to deceive, falsely represent himself to have received any such degree or credential, nor shall any person append to his name any letters in the same form registered by the regents as entitled to the protection accorded to university degrees, unless he shall have received from a duly authorized institution the degree or certificate for which the letters are registered. Counterfeiting or falsely or without authority making or altering in a material respect any such credential issued under seal shall be a felony; any other violation of this section shall be a misdemeanor; and any person who aids or abets another, or advertises or offers himself to violate the provisions of this section, shall be liable to the same penalties.

Source.—Education L. 1909, § 1104, revised from former Univ. L. (L. 1892, ch. 378) § 33, as amended by L. 1895, ch. 859.

Application.—Section does not apply to a corporation, organized under the Business Corporations Law, which is to conduct a cafe and restaurant and is not to engage in any educational pursuits. Rept. of Atty. Genl. (1911) 297.

The unrestricted use of the word "university" or "college" as a part of the corporate name of a company created pursuant to the Business Corporation Law would be apt to lead to abuses and deceptions. It seems that the discretionary power as to the use of the word "college" is intended by the statute to be vested in the Regents of the University of the State of New York and not in the Secretary of State. Rept. of Atty. Genl. (1907) 282.

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Cited.—*People ex rel. Scott v. Reid* (1909), 135 App. Div. 89, 119 N. Y. Supp. 866.

§ 67. Unlawful acts in respect to examinations.

A person who shall

1. Personate or attempt or offer to personate another person in taking or attempting or offering to take an examination held in accordance with this chapter or with the rules of the university; or

2. Take, or attempt or offer to take, such an examination in the name of any other person; or

3. Procure any other person to falsely personate him or to take, or attempt or offer to take, any such examination in his name; or

4. Have in his possession question papers to be used in any such examination, when not contained in their sealed wrappers, or copies of such papers or questions, at any time prior to the date set for such examination, unless duly authorized by the agents or the commissioner of education; or

5. Sell or offer to sell question papers or any questions prepared for used in any examination held in accordance with this chapter or with the rules of the university; or

6. Use in any such examination any question papers or questions, or secure or prepare the answers to such questions prior to the time set for the examination; or

7. Transmit to the state education department answers to questions used in any such examination which are prepared or written outside of the period of examination, or alter any such answers after such period is closed; or

8. Otherwise secure or attempt to secure the record of having passed such examination in violation of the university rules; is guilty of a misdemeanor and upon conviction thereof shall be punished for a first offense by a fine of not less than fifty dollars or imprisonment for not less than thirty days, or by both such fine and imprisonment, and for a second offense by a fine of not less than two hundred and fifty dollars, or imprisonment for not less than six months or by both such fine and imprisonment.

Source.—Same as § 66 *ante*.

Cited.—*People ex rel. Scott v. Reid* (1909), 135 App. Div. 89, 119 N. Y. Supp. 866; *People ex rel. Ortenberg v. University of the State of New York* (1917), 99 Misc. 50, 52.

§ 68. Powers of trustees of institutions.—The trustees of every corporation created by the regents, unless otherwise provided by law or by its charter, may:

1. Number and quorum. Fix the term of office and number of trustees, which shall not exceed twenty-five, nor be less than five. If any institution has more than five trustees, the body that elects, by a two-thirds vote after notice of the proposed action in the call for a meeting, may reduce the number to not less than five by abolishing the office of any trustee

which is vacant and filing in the regents' office a certified copy of the action. A majority of the whole number shall be a quorum.

2. Executive committee. Elect an executive committee of not less than five, who, in intervals between meetings of the trustees, may transact such business of the corporation as the trustees may authorize, except to grant degrees or to make removals from office.

3. Meetings and seniority. Meet on their own adjournment or when required by their by-laws, and as often as they shall be summoned by their chairman, or in his absence by the senior trustee, on written request of three trustees. Seniority shall be according to the order in which the trustees are named in the charter or subsequently elected. Notice of the time and place of every meeting shall be mailed not less than five nor more than ten days before the meeting to the usual address of every trustee.

4. Vacancies and elections. Fill any vacancy occurring in the office of any trustee by electing another for the unexpired term. The office of any trustee shall become vacant on his death, resignation, refusal to act, removal from office, expiration of his term, or any other cause specified in the charter. If any trustee shall fail to attend three consecutive meetings without excuse accepted as satisfactory by the trustees, he shall be deemed to have resigned, and the vacancy shall be filled. Any vacancy in the office of trustee continuing for more than one year, or any vacancy reducing the number of trustees to less than two-thirds of the full number may be filled by the regents. No person shall be ineligible as a trustee by reason of sex.

5. Property holding. Take and hold by gift, grant, devise or bequest in their own right or in trust for any purpose comprised in the objects of the corporation, such additional real and personal property, beyond such as shall be authorized by their charter or by special or general statute, as the regents shall authorize within one year after the delivery of the instrument or probate of the will, giving, granting, devising or bequeathing such property, and such authority given by the regents shall make any such gift, grant, devise or bequest operative and valid in law. Any grant, devise or bequest shall be equally valid whether made in the corporate name or to the trustees of a corporation, and powers given to the trustees shall be powers of the corporation.

6. Control of property. Buy, sell, mortgage, let and otherwise use and dispose of its property as they shall deem for the best interests of the institution; and also to lend or deposit, or to receive as a gift, or on loan or deposit, literary, scientific or other articles, collections, or property pertaining to their work; and such gifts, loans or deposits may be made to or with the university or any of its institutions by any person, or by legal vote of any board of trustees, corporation, association or school district, and any such transfer of property, if approved by the regents, shall during its continuance, transfer responsibility therefor to the

institution receiving it, which shall also be entitled to receive any money, books or other property from the state or other sources to which said corporation, association or district would have been entitled but for such transfer.

7. Officers and employees. Appoint and fix the salaries of such officers and employees as they shall deem necessary, who, unless employed under special contract, shall hold their offices during the pleasure of the trustees; but no trustee shall receive compensation as such.

8. Removals and suspensions. Remove or suspend from office by vote of a majority of the entire board any trustee, officer or employee engaged under special contract, on examination and due proof of the truth of a written complaint by any trustee, of misconduct, incapacity or neglect of duty; provided, that at least one week's previous notice of the proposed action shall have been given to the accused and to each trustee.

9. Degrees and credentials. Grant such degrees and honors as are specifically authorized by their charter, and in testimony thereof give suitable certificates and diplomas under their seal; and every certificate and diploma so granted shall entitle the conferee to all privileges and immunities which by usage or statute are allowed for similar diplomas of corresponding grade granted by any institution of learning.

10. Rules. Make all by-laws and rules necessary and proper for the purposes of the institution and not inconsistent with law or any rule of the university; but no rule by which more than a majority vote shall be required for any specified action by the trustees shall be amended, suspended or repealed by a smaller vote than that required for action thereunder.

Source.—Education L. 1909, § 1105, revised from former Univ. L. (L. 1892, ch. 378) § 34, as amended by L. 1901, ch. 592.

Resignation of a trustee of a college takes effect from the time the same is filed with the proper officer. Rept. of Atty. Genl. (1893) 141.

Discretion of faculty in refusing to confer degrees.—The faculties of educational institutions having power to confer degrees, and the teachers of schools having the right to recommend to the regents of the university students deemed to be worthy of degrees, are necessarily vested with a broad discretion as to the persons who shall receive those honors, or be recommended for such distinctions; and when the conduct of a student has been such, between his final examination and the time of conferring degrees, that there is a fair occasion for the exercise of discretion on the part of the faculty, it should not be reversed by the court. The case must be an extraordinary one to justify judicial interference. *People ex rel. O'Sullivan v. N. Y. Law School* (1893), 68 Hun 118, 121, 22 N. Y. Supp. 663.

Section cited.—*Matter of Lampson* (1898), 33 App. Div. 49, 57, 53 N. Y. Supp. 531, *affd.* 161 N. Y. 511, 56 N. E. 9.

§ 69. Colleges may construct water-works and sewer systems.—1. Every incorporated college in this state is duly authorized and empowered to construct and maintain a system of water-works for the purpose of supplying its college buildings and premises with pure and wholesome water for domestic, sanitary and fire purposes, and for the preservation of the health

of its students, faculty and employees, and for the preservation of the public health of the town, village or city in or near which such college is located, and the construction and maintenance of such water-works is declared to be a public use. Such water-works, as often as necessary, may be enlarged or improved. Every such incorporated college owning its water-works system and having an adequate supply of water therefrom, may furnish water to persons other than students, faculty and employees of such college at and for a just and adequate compensation, providing that they reside within a sewer district now created in which the premises of the said college or any part thereof are embraced, and provided no municipal or private public service corporation operates or maintains a system of water-works therein capable of supplying water to such inhabitants. Whenever any such college shall extend its mains along any streets, avenues or highways for the purpose of supplying water to such inhabitants, it shall not lose its exemption from taxation by reason thereof, and shall not be deemed to be exercising a public or corporate franchise within the meaning of the tax law. (*Subd. amended by L. 1913, ch. 422.*)

2. Any such college shall have the right to acquire real estate, or any interest therein, necessary or proper for such water-works, and the right to lay, relay, repair and maintain conduit and water pipes, with connections and fixtures, on, through, and over the lands of others; the right to intercept and divert the flow of waters from the lands of riparian owners, and from persons owning and interested in any waters; and the right to prevent the flow or drainage of noxious, or impure, or unwholesome matter from the lands of others into its reservoirs, or sources of supply. But no such college shall ever have power to take or use water from any of the lands of this state, or any land, reservoir, or feeders, or any streams which have been taken by the state for the purpose of supplying the canals with water. The consent of an incorporated village or city must be obtained to lay any such pipes in or through its streets, and such consent may be accompanied by such reasonable conditions or restrictions as are proper.

3. Such college may cause such examinations and surveys for its proposed water-works to be made as may be necessary to determine the proper location thereof, and for such purpose, by its officers, agents and servants, may enter upon any lands or waters in the vicinity for the purpose of making such examinations and surveys, subject to liability for all damage done. When surveys or examinations are made or concluded, a map shall be made of the lands or interests to be taken or entered upon, and on which the land or interest of each owner or occupant shall be designated, and all streets and roads in which it is proposed to lay conduit pipes, with the proposed line thereof, which map shall be dated and signed by the engineer making the same; and said map shall be filed and kept in the college library for examination and reference, and a duplicate thereof shall be filed in the clerk's office in each county wherein

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any of such lands or interests proposed to be taken are located. Such examinations and surveys may be ordered and directed by the president or board of trustees of such college. A majority of the trustees shall determine upon the construction of such water-works and the plans thereof, and order contracts therefor to be made by such officers of the college as may be designated.

4. If any such college shall be unable to agree upon such terms of purchase of any such property, right or easements, before or after plans shall be determined upon, it may, after such plans have been adopted, acquire the same by condemnation, according to the provisions of the condemnation law.

5. When any such college has constructed and completed water-works, as above provided, it may, by a majority of its trustees, determine upon and construct a sewer system; it may connect the same with the sewer system of the village or city in or near which said college is situated, if such connection is practicable. Examination, surveys and a map may be made as above provided. Lands and easements may be acquired by purchase, as above provided, and in case such acquisition can not be made by purchase then they may be acquired by condemnation, according to the provisions of the condemnation law.

Source.—Education L. 1909, § 1106, revised from L. 1895, ch. 630.

§ 70. State scholarships established.—1. State scholarships are hereby established in the several counties of the state, to be maintained by the state and awarded as provided by this act.

2. Five such scholarships shall be awarded each county annually for each assembly district therein.

3. Each such scholarship shall entitle the holder thereof to the sum of one hundred dollars for each year which he is in attendance upon an approved college in this state during a period of four years, to be paid to or for the benefit of such holder as hereinafter provided, and out of a fund which is hereinafter created. (*Added by L. 1913, ch. 292.*)

§ 71. Scholarship fund of the University of the State of New York.—1. The scholarship fund of the University of the State of New York is hereby created. Such fund shall consist:

a. Of all money appropriated therefor by the legislature;

b. Of all money and property hereafter received by the state, the regents of the university or the commissioner of education by gift, grant, devise or bequest for the purpose of providing funds for the payment of such scholarships and of all income or revenue derived from any trust created for such purpose.

2. Such fund shall be kept separate and distinct from the other state funds by the state treasurer, and payment shall be made therefrom to the persons entitled thereto in the same manner as from other state funds, except as otherwise provided by this act.

3. Whenever any such gift, grant, devise or bequest shall have been made or any trust shall have been created for the purpose of providing funds for such scholarships, the incomes or revenues derived therefrom shall be applied in maintaining scholarships in addition to those to be maintained by appropriations made by the state legislature, as provided herein, and no part of such income or revenue shall be applied for the maintenance of state scholarships hereinbefore established for each county. Such additional scholarships shall be equitably apportioned by the commissioner of education among the several counties, unless it be provided in the will, deed or other instrument making such gift, grant, devise or bequest, or creating such trust, that the incomes or revenues derived therefrom be applied to the establishment and maintenance of additional scholarships in a specified county. (*Added by L. 1913, ch. 292.*)

§ 72. **Regents to make rules.**—The regents shall make rules governing the award of such scholarships, the issuance and cancellation of certificates entitling persons to the benefits thereof, the use of such scholarships, by the persons entitled thereto, and the rights and duties of such state scholars, and the colleges which they attend, in respect to such scholarships, and providing generally for carrying into effect the provisions of this act. Such rules shall be in conformity with this act and shall have the force and effect of a statute. (*Added by L. 1913, ch. 292.*)

Rules of regents.—Section 339-f of the rules of the regents of the university made May 18, 1916, pursuant to section providing that they "will be given only to pupils of the registered secondary schools of this state who make written application for such diplomas by the fifteenth of the month of July, next succeeding the completion * * * of at least four full school years of time" who have earned under regents' examinations the average standing required by the rule, has the force of a statute. The courts will not examine into the wisdom or reasonableness of a rule of the regents of the university relating to college entrance diplomas adopted pursuant to statutory authority and not in conflict therewith. *Matter of Carnes v. Finley* (1917), 98 Misc. 390, 164 N. Y. Supp. 305.

§ 73. **List of candidates, award of scholarships.**—1. The commissioner of education shall cause to be prepared for each county of the state, annually, during the month of August, from the records of the education department, a list of the names of all pupils residing therein who become entitled to college entrance diplomas under regents' rules, during the preceding school year. Such list shall also show the average standing of the pupils in the several subjects on which each of such diplomas was issued.

2. The commissioner of education shall also cause the names of all pupils on the foregoing lists of the several counties, who are not appointed to scholarships in the county of their residence, to be arranged upon a state list in the order of their merit, as shown by their average standings on the several county lists, from which unclaimed vacant scholarships shall be filled as hereinafter provided.

3. The scholarships to which each county is entitled shall be awarded by the commissioner of education annually in the month of August to those pupils residing therein who became entitled to college entrance diplomas, under regents' rules, during the preceding school year and in the order of their merit as shown by the list prepared as provided in subdivision one of this section.

4. In case a pupil who is entitled to a scholarship shall fail to apply for such scholarship within thirty days after being notified that he is entitled thereto or shall fail to comply with the rules of the regents as to such scholarships and the same shall have been revoked or cancelled on account thereof, or, if for any other reason such scholarship shall become vacant, then the pupil standing next highest to those pupils on such list for such county who have received scholarships, shall be entitled to receive appointment to such vacant scholarship.

5. In case a scholarship belonging to a county shall not be claimed by a resident of such county or if there be no resident of the county entitled to appointment to the vacant scholarship in such county, the commissioner of education shall fill such vacancy by appointing from the state list the person entitled to such vacancy as provided in subdivision two of this section.

6. The commissioner of education shall cause such person entitled to receive appointment to a scholarship to be notified of his rights thereto and of his forfeiture of such rights by failure to make the application for such scholarship required under section seventy-four of this act. (*Added by L. 1913, ch. 292.*)

Special relief for pupils who failed to qualify.—It is provided in L. 1917, chap. 48, as follows: Any pupil who attended secondary schools at and during the required time or times and attained the required counts in regents examinations by which such pupil would have become entitled to a college entrance diploma under regents rules during the school year next preceding the month of August, in the year nineteen hundred and sixteen, if he or she had made application for such diploma on or before July fifteenth of that year, but who failed to make such application, shall nevertheless be granted such diploma on his or her written application made on or before July fifteenth, nineteen hundred and seventeen. Such pupil shall thereupon be placed on the list of pupils holding college entrance diplomas, to be prepared by the commissioner of education in the month of August, nineteen hundred and seventeen, pursuant to subdivision one of section seventy-three of the education law, and shall be eligible to a university scholarship in the same manner and subject to the same conditions as though the pupil had become entitled to such diploma during the school year then preceding.

§ 74. *Issuance of scholarship certificate.*—Upon the application of a pupil duly notified of his right to a scholarship, the commissioner of education shall issue to such pupil a scholarship certificate. Such application and such certificate shall be in the form prescribed by the commissioner of education and such certificate shall specify the college for which it is valid. Said commissioner may also require such additional

statements and information to accompany such application as he may deem necessary. (*Added by L. 1913, ch. 292.*)

§ 75. **Effect of certificate; payments thereon.**—The certificate issued as provided in the preceding section shall entitle the person named therein to receive the sum of one hundred dollars each year for a period of four years to aid such person in the completion of a college education. Such sum shall be paid by the state treasurer in two equal payments, one on October first and the other on March first out of the scholarship fund of the University of the State of New York, upon the warrant of the comptroller issued with the approval of the commissioner of education. Such approval shall be given upon vouchers or other evidence showing that the person named therein is entitled to receive the sum specified, either directly or for his or her benefit. The rules of the regents may prescribe conditions under which payments may be made direct to the college attended by the person named in such certificate, in behalf of and for the benefit of such person. (*Added by L. 1913, ch. 292, and amended by L. 1913, ch. 437.*)

Note.—The act adding this section took effect Aug. 1, 1913, whereas L. 1913, ch. 437 took effect May 1, 1913.

§ 76. **Revocation of scholarship.**—If a person holding a state scholarship shall fail to comply with the rules of the regents in respect to the use of such scholarship, or shall fail to observe the rules, regulations or conditions prescribed or imposed by such college on students therein, or shall for any reason be expelled or suspended from such college, or shall absent himself therefrom without leave, the commissioner of education may, upon evidence of such fact deemed by him sufficient, make an order under the seal of the education department revoking such scholarship and thereupon such scholarship shall become vacant and the person holding such scholarship shall not thereafter be entitled to further payment or any diploma issued by a state normal school ineffective and null as a benefits under the provisions of this act and the vacancy caused thereby shall be filled as provided in section seventy-three of this act. (*Added by L. 1913, ch. 292.*)

§ 77. **Limitation as to number of scholarships; courses of study.**—At no time shall there be more than twenty scholarships established and maintained for each assembly district and at no time shall there be more than three thousand such scholarships so established and maintained for the entire state not including scholarships maintained from the revenues or income of trust funds, or gifts, devises or bequests created or made as provided in this act for the maintenance of such scholarships. A person entitled to such scholarship shall not be restricted as to the choice of the college which he desires to attend, or the course of study which he proposes to pursue; provided that no such scholarship shall include professional instruction in

law, medicine, dentistry, veterinary medicine or theology, except so far as such instruction is within a regularly prescribe course of study leading to a degree other than in the above-named professions; and provided further, that the college selected by the person entitled to such scholarship is situated within the state of New York, and is incorporated as a college and authorized under the laws of this state and the rules of the regents of the university to confer degrees. (*Added by L. 1913, ch. 292.*)

ARTICLE IV.

COMMISSIONER OF EDUCATION.

Section 90. Commissioner of education continued.

91. How chosen.

92. Term of office.

93. Salary.

94. General powers and duties.

95. Removal of school officers; withholding public money.

96. Other powers.

97. Schools of union free school districts and cities.

98. Reports of school officers.

99. County clerk and county treasurers to forward certain reports.

§ 90. Commissioner of education continued.—The office of commissioner of education is hereby continued.

Source.—Education L. 1909, § 330, revised from former Con. Sch. L (L. 1894, ch. 556) tit. 1, § 2; L. 1904, ch. 40, § 3; originally revised from L. 1864, ch. 555, tit. 1, §§ 3, 4, as amended by L. 1883, ch. 75, L. 1888, ch. 533.

§ 91. How chosen.—1. The commissioner of education shall be elected by a majority vote of the regents.

2. Such commissioner may be elected without regard to the place of his residence whether it be within or without the state of New York.

Source.—Same as § 90, *ante*.

§ 92. Term of office.—The commissioner of education shall serve during the pleasure of the board of regents.

Source.—Same as § 90, *ante*.

§ 93. Salary.—The salary of such commissioner shall be seven thousand five hundred dollars per annum, payable monthly, and he shall also be paid one thousand five hundred dollars in lieu and in full for his traveling and other expenses which shall also be payable monthly.

Source.—Same as § 90, *ante*.

§ 94. General powers and duties.—The commissioner of education is hereby charged with the following powers and duties:

1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws

relating to the educational system of the state and execute all educational policies determined upon by the board of regents.

2. He shall have general supervision over all schools and institutions which are subject to the provisions of this act, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control.

3. He shall have general supervision of industrial schools, trade schools and schools of agriculture, mechanic arts and home making; he shall prescribe regulations governing the licensing of the teachers employed therein; and he is hereby authorized, empowered and directed to provide for the inspection of such schools, to take necessary action to make effectual the provisions therefor, and to advise and assist boards of education in the several cities and school districts in the establishment, organization and management of such schools.

4. He shall also have general supervision over the state normal schools which have been, or which may hereafter be, established as required by the provisions of this chapter.

5. He shall be ex officio a trustee of Cornell University.

6. He shall be responsible for the safe keeping and proper use of the department and university seal and of the books, records and other property in charge of the regents, and for the proper administration and discipline of the various offices and divisions of the educational department.

7. He may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare qualification to teach a common school within this state, as he may reconsider and reverse his action in any such matter.

8. He shall cause to be prepared and keep in his office records of all persons who have received, or shall receive, certificates of qualification to teach or diplomas of the state normal schools, with the dates thereof, and shall note thereon all annulments of such certificates and diplomas, and reversals thereof, with the dates and causes thereof, together with such other particulars as he may deem expedient.

9. He shall cause to be prepared suitable registers, blanks, forms and regulations for making all reports and conducting all necessary business under this chapter, and shall cause the same, with such information and instructions as he shall deem conducive to the proper organization and government of the common schools and the due execution of their duties by school officers, to be transmitted to the officers and persons intrusted with the execution of the same.

10. He may administer oaths and take affidavits concerning any matter relating to the duties of his office or pertaining in any way to the schools of the state or any part thereof.

11. He is hereby authorized to furnish, by means of pictorial or graphic

representations, additional facilities for instruction in geography, history, science and kindred subjects, to the schools, institutions and organizations under the supervision of the regents. Material collected for this purpose may, under regents' general rules, be lent for a limited time to responsible institutions and organizations for the benefit of artisans, mechanics and other citizens of the several communities of the state. He may from time to time enter into contracts necessary for carrying out this provision.

12. He shall also have and execute such further powers and duties as he shall be charged with by the regents.

Source.—Subdivisions 1-6, derived Education L. 1909, § 331, revised from L. 1904, ch. 40, § 4; former Univ. L. (L. 1892, ch. 378) § 5; former Con. Sch. L. (L. 1894, ch. 556), tit. 1, § 6, L. 1908, ch. 263, § 6; L. 1908, ch. 249, § 6; section of Univ. L. originally revised from L. 1889, ch. 529, tit. 1, §§ 6-8; section of Cons. Sch. L. from L. 1864, ch. 555, tit. 1, § 6, as amended by L. 1875, ch. 567.

Subd. 7, derived Education L. 1909, § 336, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 1, § 11; originally revised from L. 1864, ch. 555, tit. 1, § 16.

Subd. 8, derived Education L. 1909, § 337, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 1, § 12; originally revised from L. 1864, ch. 555, tit. 1, § 17.

Subd. 9, derived Education L. 1909, § 339, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 1, § 14; originally revised from L. 1864, ch. 555, tit. 1, § 19.

Subd. 10, derived Education L. 1909, § 340, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 1, § 15; originally revised from L. 1864, ch. 555, tit. 1, § 20, as added by L. 1888, ch. 331, § 2.

Subd. 11, derived Education L. 1909, §§ 780, 781, revised from L. 1899, ch. 489, §§ 1, 2.

Subd. 12, New.

References.—Revocation of teacher's certificate by school commissioner for immoral conduct, Education Law, §§ 556 and 395, subd. 10. Revocation by commissioner of education for failure of teacher to complete an agreement to teach, Id. § 562. Supervision and control of agricultural schools and colleges, Id. §§ 1040, 1041. Powers as to state normal schools, Id. §§ 810-833.

Authority of Commissioner; regulation as to use of religious garb.—The validity of the regulations of the commissioner depends upon whether they are reasonable and not inconsistent with the laws and policy of the state. A regulation prohibiting teachers from wearing a distinctly religious garb is a reasonable and valid exercise of the power conferred upon him. *O'Connor v. Hendrick* (1905), 184 N. Y. 421, 77 N. E. 612, 7 L. R. A. (N. S.) 402, 6 Ann. Cas. 432 affirming 109 App. Div. 361, 96 N. Y. Supp. 161.

Special districts; supervision.—Districts organized under special acts of the legislature are subject to supervision of the commissioner, Dec. of Supt. (1886), Jud. Dec. p. 382.

Revocation of teacher's license.—Falsification of register as ground for annulment of license, Dec. of Supt. (1889), Jud. Dec. p. 1052. Improper language used in letters to commissioner ground for revocation, Dec. of Supt. (1890), Jud. Dec. p. 1051. Intemperance and use of excessive corporal punishment ground for revocation, Dec. of Supt. (1890), Jud. Dec. p. 1053. Acts of teacher relative to corporal punishment insufficient to justify annulment of certificate. Dec. of Com'r (1915), 6 St. Dep. Rep. 609; Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.) 342; Dec. of Com'r (1909), Jud. Dec. 1940; Dec. of Com'r (1910), Jud. Dec. 1041. License annulled. Dec. of Supt. (1890), Jud. Dec. p. 1054; Dec. of Supt. (1890), Jud. Dec. p. 1055. Proceeding to annul dismissed. Dec. of Supt. (1888), Jud. Dec. 1048; Dec. of Supt. (1887), Jud. Dec. 1049; Dec. of Supt. (1887), Jud. Dec. 1050.

§ 95. **Removal of school officers; withholding public money.**—1. Whenever it shall be proved to his satisfaction that any trustee, member of a board of education, clerk, collector, treasurer, school commissioner, superintendent of schools or other school officer has been guilty of any wilful violation or neglect of duty under this chapter, or any other act pertaining to common schools or other educational institution participating in state funds, or wilfully disobeying any decision, order or regulation of the regents or of the commissioner of education, said commissioner may, by an order under his hand and seal, which order shall be recorded in his office, remove such school officer from his office.

2. Said commissioner of education may also withhold from any district or city its share of the public money of the state for wilfully disobeying any provision of law or any decision, order or regulation as aforesaid.

Source.—Education L. 1909, § 338, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 1, § 13; originally revised from L. 1864, ch. 555, tit. 1, § 18, as amended by L. 1893, ch. 500.

References.—Removal of member of board of education by commissioner of education, Education Law, § 309. Withholding public money for failure to provide water closets, *Id.* § 457. Forfeiture of moneys lost by neglect of school officer, *Id.* § 855.

Removal of school board.—To justify the removal of a board of education, the commissioner of education must find that they have been guilty of acts intentionally done with a wrongful purpose. *People ex rel. Light v. Skinner* (1899), 37 App. Div. 44, 55 N. Y. Supp. 337, *affd.* (1899), 159 N. Y. 162, 53 N. E. 806.

Removal of school commissioner.—The Commissioner of Education may base his determination not only upon the evidence at the hearing but also upon records in his office, consisting of letters sent and received, even though they were not called to the attention of the person removed upon the hearing. *People ex rel. Woodward v. Draper* (1911), 142 App. Div. 102, 127 N. Y. Supp. 14, *affd.* (1911), 202 N. Y. 612, 96 N. E. 1128.

Hearing in case of removal.—The power given by this section to the Commissioner of Education to remove a school commissioner for wilful violations or neglect of duty may be exercised without notice to the school commissioner or on opportunity to defend. *People ex rel. Woodward v. Draper* (1910), 67 Misc. 461, 124 N. Y. Supp. 758, *affd.* (1911), 142 App. Div. 102, 127 N. Y. Supp. 14, *affd.* (1911), 202 N. Y. 612, 96 N. E. 1128.

Determination as to title to office.—The power to remove school officers, given to the Commissioner of Education by this section and section 309, necessarily devolves upon him the duty to decide whether accused trustees of a union free school district were holding office at the time of the determination as to charges against them. *People ex rel. Jennings v. Finley* (1916), 175 App. Div. 205, 161 N. Y. Supp. 817.

Review by certiorari.—Section 880 of this act, exempting from review by the courts decisions of the commissioner of education, made upon appeals to him from acts or decisions of local school officers, has no application to an order made by him, in the first instance, removing school officers from office. *People ex rel. Light v. Skinner* (1899), 159 N. Y. 162, 53 N. E. 806, *affg.* (1899), 37 App. Div. 44, 55 N. Y. Supp. 337; *Matter of Light* (1899), 30 App. Div. 50, 51 N. Y. Supp. 743. These cases were determined prior to change in section 880 authorizing the institution of proceedings against school officers.

Decision is final.—Decision of the Commissioner of Education removing a trustee

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from office is final and conclusive and not reviewable by the courts. *Matter of O'Neill* (1911), 71 Misc. 469, 130 N. Y. Supp. 446.

Withholding public money.—The commissioner of education may restrain the payment of money in the custody of the supervisor to the trustee of a district which refuses to comply with his decision that it should carry out its contract with a teacher. *Mandamus* will not lie to compel supervisor to pay such public money. *People ex rel. Bowers v. Allen* (1897), 19 Misc. 464, 44 N. Y. Supp. 566.

Petition for removal of trustee.—*Morah v. Steele* (1918), 157 App. Div. 109, 141 N. Y. Supp. 868.

Removal by commissioner.—Officer will not be removed when there is no wilful intent, Dec. of Com'r (1907), Jud. Dec. 307; Dec. of Com'r (1910), Jud. Dec. 457; Dec. of Com'r (1907), Jud. Dec. 462; Dec. of Supt. (1899), Jud. Dec. 464; Dec. of Supt. (1869), Jud. Dec. 470; Dec. of Supt. (1894), Jud. Dec. 472; Dec. of Supt. (1893), Jud. Dec. 476; Dec. of Supt. (1895), Jud. Dec. 478; Dec. of Supt. (1883), Jud. Dec. 483; Dec. of Supt. (1888), Jud. Dec. 484. The word "wilful" construed, Dec. of Com'r (1905), Jud. Dec. 95, 98.

Persistent and wilful violation of law and disobedience to directions of commissioner constitute sufficient grounds for removal, Dec. of Supt. (1891), Jud. Dec. 1265; Dec. of Supt. (1890), Jud. Dec. 1270; Dec. of Supt. (1888), Jud. Dec. 1272; Dec. of Com'r (1905), Jud. Dec. 448; Dec. of Supt. (1897), Jud. Dec. 467; Dec. of Supt. (1868), Jud. Dec. 471; Dec. of Supt. (1851), Jud. Dec. 471. **Removal for failure to maintain school**, Dec. of Supt. (1895), Jud. Dec. 481. **Trustee removed for wilful violations of sections 276, 284 and 566 of the Education Law**, Dec. of Com'r (1914), 3 St. Dep. Rep. 576. **Withholding moneys ground for removal**, Dec. of Com'r (1905), Jud. Dec. 441; Dec. of Supt. (1888), Jud. Dec. 456. **Failure to comply with compulsory education law ground for removal**, Dec. of Com'r (1906), Jud. Dec. 443. **Trustee removed who accepted employment by contractor constructing school building**, Dec. of Supt. (1890), Jud. Dec. 463. **Trustees vacated office pending the determination of charges;—management of school moneys discussed**, Dec. of Supt. (1891), Jud. Dec. 1267.

Intoxication on part of one of the trustees at annual meeting does not necessarily require removal of trustee under section 95 of the Education Law, Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.) 440.

Application for removal of school officer dismissed. Dec. of Supt. (1890), Jud. Dec. 1263; Dec. of Supt. (1891), Jud. Dec. 1264; Dec. of Supt. (1889), Jud. Dec. 1268; Dec. of Supt. (1891), Jud. Dec. 1270; Dec. of Supt. (1887), Jud. Dec. 1284; Dec. of Supt. (1887), Jud. Dec. 1288; Dec. of Com'r (1907), Jud. Dec. 440; Dec. of Com'r (1905), Jud. Dec. 440.

§ 96. Other powers.—The commissioner of education shall also have power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents.

Source.—New.

§ 97. Schools of union free school districts and cities.—The schools of every union free school district and of every city in all their departments shall be subject to the visitation of the commissioner of education. He is

charged with the general supervision of their boards of education and their management and conduct of all departments of instruction.

Source.—Education L. 1909, § 341, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 28; originally revised from L. 1864, ch. 555, tit. 9, § 25, as amended by L. 1883, ch. 413; L. 1885, ch. 340; L. 1889, ch. 245.

§ 98. Reports of school officers.—The officers of the several districts and cities of the state and all other school officers shall make such reports and in such form from time to time in relation to the schools under their management and supervision as the commissioner of education shall require.

Source.—Same as § 97, *ante*.

§ 99. County clerk and county treasurers to forward certain reports.—1. The county clerk of each county shall, upon the requisition of the commissioner of education, file with such commissioner any reports of trustees of school districts and boards of education or the abstract of such reports made by school commissioners which have been filed in the office of such county clerk pursuant to the provisions of the education law, whenever it is necessary for the commissioner of education to obtain information or data contained in official reports which have been transmitted to the education department but which have been destroyed by fire or otherwise.

2. The county treasurer of each county shall, upon the requisition of the commissioner of education, forward to said commissioner any original certificates relating to the apportionment of school moneys which the commissioner of education has filed in the office of such treasurer whenever it is necessary to obtain information on the apportionment of school moneys when the data relating thereto in the office of the commissioner of education has been destroyed by fire or otherwise. After securing such information as may be necessary from such certificates, the commissioner of education shall return the same to the treasurer of such county. (*Added by L. 1911, ch. 159.*)

References.—Payment of public moneys to county treasurer, Education Law, § 494; certificates of apportionments to county clerk and county treasurer, *Id.* § 496; annual report of county treasurer, *Id.* § 495.

ARTICLE V.

SCHOOL DISTRICTS.

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§ 120. Existing districts continued.—All school districts organized either by special laws or pursuant to the provisions of a general law are hereby continued and may be altered or dissolved as herein provided.

Source.—Education L. 1909, § 20, revised from former Con. Sch. L. (L. 1894, ch. 556), tit. 6, § 1, as amended by L. 1895, ch. 223; originally revised from L. 1864, ch. 555, tit. 6, § 1. Education L. 1909, § 21, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 7; originally revised from L. 1864, ch. 555, tit. 6, § 6.

References.—Appeals to commissioner of education from action of school commissioner in altering or establishing school districts, Education Law, § 880, subd. 2. First meetings in new districts, *Id.* §§ 190, 191.

Union free school districts may be altered by school commissioner. *People ex rel. Board of Education v. Hopper* (1878), 13 Hun 639.

Transfer of territory from one district to another by special act is permissible under constitution. The legislature may alter the boundaries of a district, merge it into another district or abolish it altogether. *Board of Education, Union Free School District, No. 6, Town of Cortlandt v. Board of Education* (1902), 76 App Div. 355, 78 N. Y. Supp. 522.

§ 121. Formation of new district.—1. A district superintendent may organize a new school district out of the territory of one or more school districts which are wholly within his supervisory district, whenever the educational interests of the community require it. If there is an outstanding bonded indebtedness chargeable against the district or districts

out of the territory of which such new district is organized, the district superintendent shall apportion said indebtedness between such new district and the remaining portion of the district or districts out of which such new district is organized, according to the assessed valuation thereof, and the portion of the indebtedness so apportioned shall become a charge for principal and interest upon the respective districts as though the same had been incurred by said districts separately.

2. The district superintendents of two or more adjoining supervisory districts when public interests require it, may form a joint school district out of the adjoining portions of their respective districts. (*Amended by L. 1912, ch. 294.*)

Source.—Same as § 120, *ante*.

The district superintendent's power under this section is discretionary, Dec. of Com'r (1914), 1 St. Dep. Rep. 546. Refusal to form new district sustained in absence of convincing proof as to necessity, Dec. of Supt. (1889), Jud. Dec. 755. Order forming new district sustained, Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.) 399; Dec. of Supt. (1893), Jud. Dec. 748; Dec. of Supt. (1895), Jud. Dec. 757; Dec. of Com'r (1906), Jud. Dec. 760; Dec. of Com'r (1910), Jud. Dec. 727.

District superintendent may be directed to issue order forming new district. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.) 425; Dec. of Supt. (1891), Jud. Dec. 755.

Educational advantage to be gained.—Order dividing district and creating a new district vacated as against the educational policy of the state and the best interests of the community. Dec. of Com'r (1916), 9 St. Dep. Rep. 616. Where no educational advantage shown district should not be divided and new district established. Dec. of Com'r (1914), 2 St. Dep. Rep. 644; Dec. of Supt. (1886), Jud. Dec. 750; Dec. of Supt. (1894), Jud. Dec. 751.

Presumption of regularity.—Regularity or organization of district will be presumed where the district has been recognized as such for a number of years. Dec. of Supt. (1834), Jud. Dec. 746.

Division of assets.—There is no provision for the division of assets where new district is formed. Dec. of Supt. (1886), Jud. Dec. 872.

§ 122. Number and description of districts.—1. Each school commissioner shall renumber the school districts of each town in his commissioner district from time to time and shall also number each new district and shall describe in metes and bounds each of such school districts.

2. The order of a school commissioner forming or numbering a school district and the written description thereof together with all notices, orders, consents and proceedings relating to the formation or alteration thereof shall be filed with the town clerk of the town in which such district is located.

3. Every joint district shall bear the same number in every school commissioner district of whose territory it is in part composed.

Source.—New.

§ 123. Alteration by consent.—1. With the written consent of the trustees of all the districts to be affected thereby, the district superintendent may make an order altering the boundaries of any school district within

his jurisdiction, and fix in such order a day when the alteration shall take effect.

2. With the written consent of the board of education of a union free school district having a population of five thousand or more, and employing a superintendent of schools, and the written consent of the board of education or trustees of a district in a supervisory district adjoining such union free school district, the district superintendent having jurisdiction may make an order altering the boundaries of such districts, and fix in such order a day when the alteration shall take effect. (*Amended by L. 1914, ch. 154.*)

Source.—Education L. 1909, § 23, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 2; originally revised from L. 1864, ch. 555, tit. 6, § 2, as amended by L. 1867, ch. 406, § 5.

Alteration of boundaries of district; consent of trustees.—An attempt made by a school commissioner to alter the boundaries of a school district, without the written consent of the trustees of all the districts affected, except in those cases specified in the act, is inoperative, and a purported election of trustees therein is of no effect. *School District No. 25 Town of Mooers v. Raymond* (1904), 90 App. Div. 614, 86 N. Y. Supp. 182.

Educational interests promoted by transfer.—Order transferring property from one district to another will be sustained unless it appears to be against the educational interests of the persons affected by the order, Dec. of Com'r (1915), 6 St. Dep. Rep. 601; Dec. of Supt. (1887), Jud. Dec. 610; Dec. of Supt. (1900), Jud. Dec. 612; Dec. of Supt. (1886), Jud. Dec. 614; Dec. of Supt. (1895), Jud. Dec. 616; Dec. of Supt. (1888), Jud. Dec. 618; Dec. of Supt. (1889), Jud. Dec. 622; Dec. of Com'r (1907), Jud. Dec. 646. Policy of Department to discourage change of boundaries except where educational advantages are to be gained, Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.) 422. District Superintendent may be ordered to make change of district boundaries where educational interests require, Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.) 408; Dec. of Com'r (1914), 3 St. Dep. Rep. 513; Dec. of Supt. (1890), Jud. Dec. 619; Dec. of Supt. (1888), Jud. Dec. 620; Dec. of Supt. (1889), Jud. Dec. 621; Dec. of Com'r (1907), Jud. Dec. 648. Property should not be taken from weak district. Dec. of Supt. (1900), Jud. Dec. 601; Dec. of Supt. (1888), Jud. Dec. 603.

Equalization of taxes is not a sufficient reason for changing boundaries, Dec. of Supt. (1896), Jud. Dec. 630; Dec. of Supt. (1886), Jud. Dec. 662.

Procedure carefully outlined, see Dec. of Supt. (1900), Jud. Dec. 606.

Order.—Boundaries must be defined in the order, Dec. of Supt. (1897), Jud. Dec. 627. Order modified to conform to wishes of residents. Dec. of Com'r (1910), Jud. Dec. 643.

Consents.—Trustee is without power to consent to order which would take him and his property out of the district, Dec. of Supt. (1900), Jud. Dec. 599; Dec. of Supt. (1890), Jud. Dec. 600.

The consent of a board of education to the alteration of the boundaries of a district may only be given by a written instrument duly signed by a majority of the members of the board, or if signed by the president of the board, it must affirmatively appear that he was authorized to sign such consent by resolution of the board adopted by a majority vote thereof. *Com. of Educ. Decision* (1915), 5 State Dep. Rep. 619; Dec. of Supt. (1895), Jud. Dec. 649.

Joint districts.—Where commissioners having jurisdiction over joint district cannot agree the state superintendent will not ordinarily interfere. Dec. of Supt. (1887), Jud. Dec. 336.

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§ 124. **Alteration without consent.**—If the trustees of any district affected thereby refuse to consent, the school commissioner may make and file with the town clerk his order making the alteration, but reciting the refusal, and directing that the order shall not take effect until a day therein to be named, and not less than three months after the date of such order.

Source.—Education L. 1909, § 24, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 3; originally revised from L. 1864, ch. 555, tit. 6, § 3, as amended by L. 1867, ch. 406, § 6.

Construction.—This section is directory and not mandatory. *Rawson v. Van Riper* (1873), 1 T. & C. 370, 375. Statute must be strictly followed. Dec. of Supt. (1887), Jud. Dec. 638.

Application.—This section and section 125 do not relate to an order of a district superintendent dissolving a school district and annexing its territory to an adjoining district. They apply only when it is proposed to alter the boundaries of a district by transferring portions thereof. Com. of Educ. Decision (1915), 6 State Dep. Rep. 553. Sections 124 and 125 do not apply to dissolution of school districts. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 423.

Exercise of power.—Power is discretionary. Dec. of Com'r (1914), 1 St. Dep. Rep. 548. Where jurisdiction is reasonably exercised order will be sustained. Dec. of Com'r (1914), 3 St. Dep. Rep. 568. District Superintendents may be directed to make alteration of boundary lines. Dec. of Com'r (1914), 1 St. Dep. Rep. 552; Dec. of Com'r (1914), 1 St. Dep. Rep. 533. Refusal of district superintendent to alter boundaries sustained. Dec. of Com'r (1914), 2 St. Dep. Rep. 599.

District Superintendent may alter boundaries of union free school district. Dec. of Supt. (1886), Jud. Dec. 1335.

The burden is upon the appellant to show that the refusal of the district superintendent to alter the boundary lines of a district is not justified. Dec. of Com'r (1915), 7 St. Dep. Rep. 573.

Special district.—Legislature alone can alter districts formed under special act. Dec. of Supt. (1890), Jud. Dec. 661.

Joint district.—Where district lies in two commissioner districts, order of one commissioner is not sufficient. Both must join. Dec. of Supt. (1886), Jud. Dec. 634.

§ 125. **Hearing of objections to order for alteration without consent.**—

1. Within ten days after making and filing such order the school commissioner shall give at least a week's notice in writing to the trustees of all districts affected by the proposed alterations, that at a specified time, and at a named place within the town in which one of the districts to be affected lies, he will hear the objections to the alteration.

2. The trustees of any district to be affected by such order may request the supervisor and town clerk of each of the towns, within which such districts shall wholly or partly lie, to be associated with the school commissioner.

3. At the time and place mentioned in the notice, such commissioner, with the supervisors and town clerks, if they shall attend and act, shall hear and decide the matter, and the decision shall be final unless duly appealed from. Such decision must either affirm or vacate such order, and must be filed with and recorded by the town clerk of the town in

which the district to be affected shall lie, and a tie vote shall be regarded a decision for the purposes of an appeal on the merits. Upon such appeal the commissioner of education may affirm, modify or vacate the order of the school commissioner or the action of the local board.

Source.—Education L. 1909, § 25, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 4, as amended by L. 1895, ch. 223, L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 6, § 4, as amended by L. 1865, ch. 647, § 6.

References.—Appeals to commissioner of education and practice thereon, Education Law, §§ 880, 881.

Notice of a meeting to hear the objections of trustees must be given the trustees. People ex rel. Board of Education v. Hooper (1878), 13 Hun 639, 642.

There is a presumption that the district superintendent had a sufficient educational reason for making the order. Dec. of Com'r (1914), 3 St. Dep. Rep. 526.

Effect of unanimous vote.—Where all the officers sitting at the hearing are agreed in affirming the order, there is a strong presumption that the order was properly made. Dec. of Com'r (1917), 10 St. Dep. Rep. 457.

A tie vote is a decision for the purpose of appeal. Failure of trustee to notify town clerk waived. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.) 383. On tie vote order was directed to be confirmed. Dec. of Supt. (1889), Jud. Dec. 668.

Appeals from orders.—Order transferring territory affirmed. Appellants failed to show any injustice. Dec. of Com'r (1915), 6 St. Dep. Rep. 557. Order vacating order of superintendent affirmed. Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 406; Dec. of Supt. (1895), Jud. Dec. 656; Dec. of Supt. (1895), Jud. Dec. 658.

§ 126. Dissolution or alteration of joint district.—The majority of the school commissioners within whose districts any joint school district lies may make an order at a meeting duly called by one of such commissioners altering or dissolving such district.

Source.—New.

§ 127. Special meeting of joint district to act regarding dissolution.—

1. If a school commissioner, by notice in writing, shall require the attendance of the other school commissioners, at a joint meeting for the purpose of altering or dissolving a joint district, and a majority of all the commissioners shall refuse or neglect to attend, such commissioners attending, or any one of them, may call a special meeting of such school district for the purpose of deciding whether such district shall be dissolved.

2. If such special meeting shall vote to dissolve the district the school commissioner who called such meeting may make an order dissolving the district and shall recite in such order the refusal or neglect of the other school commissioners, his call of the special meeting and the action taken at such meeting.

Source.—Education L. 1909, § 22, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 8; originally revised from L. 1864, ch. 555, tit. 6, § 7.

§ 128. Dissolution by consent and consequent alteration of districts.—

1. A school commissioner may dissolve one or more common school districts upon the written consent of the trustees of all the districts to be affected. When one or more of such districts adjoin a union free school

district whose limits do not correspond with those of an incorporated village or city, he may annex the territory of such dissolved districts to such union free school district.

2. A school commissioner on the written consent of the boards of education of the districts affected may also dissolve a union free school district when it adjoins another union free school district and annex the territory of such dissolved district to such other union free school district.

Source.—Education L. 1909, § 26, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 30, as amended by L. 1899, ch. 540; L. 1905, ch. 258; L. 1907, ch. 609.

References.—School districts in towns not to be consolidated without consent of boards of education of towns, and vote of districts consolidated, Education Law, § 330; consolidation by vote of districts, *Id.* § 130–134.

There must be a strict compliance with the requirements of the statute where it is sought to dissolve a district with the consent of the trustees. *Com. of Educ. Decision* (1915), 5 *State Dep. Rep.* 636.

Orders affirmed.—Order issued upon consent of trustees sustained. *Dec. of Com'r* (1915), 5 *St. Dep. Rep.* 587; *Dec. of Supt.* (1889), *J. Dec.* 703; *Dec. of Supt.* (1888), *Jud. Dec.* 738. In absence of proof that consolidation will interfere with the educational welfare of the children order will be sustained. *Dec. of Com'r* (1915), 6 *St. Dep. Rep.* 587; *Dec. of Supt.* (1888), *Jud. Dec.* 738.

Order of district superintendent dissolving common school district and annexing its territory to union free school district affirmed. *Dec. of Com'r* (1913), 2 *St. Dep. Rep.* (Unof.), 416.

Consent of trustee to annexation is not consent to dissolution of district. *Dec. of Com'r* (1915), 5 *St. Dep. Rep.* 636. Order issued upon consent of trustees vacated. *Dec. of Supt.* (1890), *Jud. Dec.* 706.

§ 129. **Dissolution, re-formation and consolidation of districts.**—Any school commissioner may dissolve one or more districts, and may from such territory form a new district; he may also unite such territory or a portion thereof to any adjoining school district, except a union-free school district whose boundaries are coterminus with the boundaries of an incorporated village or city.

Source.—Education L. 1909, § 27, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 9, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 6, § 8.

References.—Consolidation of districts in towns, Education Law, § 330; consolidation by vote of districts, *Id.* §§ 130–134.

Broad powers are conferred upon the district superintendent by this section.—He may dissolve any of the school districts under his supervision and from the territory of such dissolved districts erect new districts and make such disposition of the territory as in his judgment is most desirable. History of legislation relating to consolidation. *Com. of Educ. Decision* (1915), 4 *State Dep. Rep.* 614.

Validity of order dissolving school district, from which no appeal has been taken, can not be questioned in a collateral proceeding. *Smith v. Coman* (1900), 47 *App. Div.* 116, 62 *N. Y. Supp.* 106.

There is a presumption in favor of the reasonableness and sufficiency of an order altering the boundaries of a school district, which, after due opportunity for a hearing, has been duly ratified by a board consisting of the district superintendent and the supervisor and town clerk of the town in which the districts are situated. *Com. of Educ. Decision* (1915), 6 *State Dep. Rep.* 557.

Increase of assessed valuation.—An order made for the purpose of securing additional assessed valuation for a district will be set aside. Dec. of Com'r (1913), 1 St. Dep. Rep. 511; Dec. of Com'r (1913), 1 St. Dep. Rep. 515; Dec. of Com'r (1913), 1 St. Dep. Rep. 518. Equalization of taxation is not a controlling reason for consolidation. Order vacated. Dec. of Supt. (1896), Jud. Dec. 1353; Dec. of Com'r (1905), Jud. Dec. 696.

The rule that the boundaries of a district should not be altered for the sole purpose of equalizing tax rates, does not apply where it is sought to transfer from one district to another, territory which should naturally be included within the latter district. Com. of Educ. Decision (1915), 6 State Dep. Rep. 557.

Sufficiency of order.—The order should definitely describe the district. Dec. of Supt. (1900), Jud. Dec. 732. The order must annex all the territory of the dissolved district to an adjoining district or districts. Dec. of Supt. (1898), Jud. Dec. 730; Dec. of Supt. (1900), Jud. Dec. 732. Order of consolidation vacated. Dec. of Supt. (1893), Jud. Dec. 1347; Dec. of Supt. (1891), Jud. Dec. 702; Dec. of Com'r (1905), Jud. Dec. 709; Dec. of Com'r (1907), Jud. Dec. 715; Dec. of Com'r (1908), Jud. Dec. 717; Dec. of Com'r (1906), Jud. Dec. 720; Dec. of Supt. (1890), Jud. Dec. 739; Dec. of Supt. (1891), Jud. Dec. 740; Dec. of Supt. (1889), Jud. Dec. 742.

District Superintendent should not dissolve district erected by his predecessor in office except for good cause. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 411.

Order issued by district superintendent immediately prior to the expiration of his term of office without sufficient reason vacated. Dec. of Com'r (1916), 9 St. Dep. Rep. 600.

Educational interests.—To vacate order made under this section it must be shown that it is against the best education interests of district. Dec. of Com'r (1914), 3 St. Dep. Rep. 561. Increased educational advantages and just distribution of cost of instruction authorize consolidation. Dec. of Com'r (1914), 1 St. Dep. Rep. 572; Dec. of Com'r (1907), Jud. Dec. 707. Where district has contracted for a long period of time, and permitted its school building to deteriorate there is no advantage in maintaining a separate district. Dec. of Com'r (1915), 4 St. Dep. Rep. 647. Order sustained as being for the best educational interests of district. Dec. of Com'r (1915), 5 St. Dep. Rep. 625; Dec. of Com'r (1915), 5 St. Dep. Rep. 628; Dec. of Com'r (1916), 10 St. Dep. Rep. 454; Dec. of Com'r (1915), 4 St. Dep. Rep. 610; Dec. of Com'r (1915), 5 St. Dep. Rep. 612; Dec. of Com'r (1915), 5 St. Dep. Rep. 646.

Order sustained where it is shown that the advantages to be gained outweigh the inconveniences. The consolidation district should furnish transportation. Dec. of Com'r (1915), 6 St. Dep. Rep. 521; Dec. of Com'r (1915), 6 St. Dep. Rep. 525; Dec. of Com'r (1910), Jud. Dec. 723; Dec. of Com'r (1910), Jud. Dec. 725. Consolidation based upon educational welfare of community sustained. Dec. of Com'r (1915), 6 St. Dep. Rep. 615; Dec. of Com'r (1915), 6 St. Dep. Rep. 619; Dec. of Com'r (1915), 7 St. Dep. Rep. 568; Dec. of Com'r (1915), 5 St. Dep. Rep. 607; Dec. of Com'r (1916), 9 St. Dep. Rep. 606; Dec. of Com'r (1916), 9 St. Dep. Rep. 611; Dec. of Com'r (1914), 4 St. Dep. Rep. 582.

The burden rests upon the appellant to show that an order of the district superintendent dissolving a district, fails to advance the school welfare of the children of the dissolved districts. Com. of Educ. Decision (1915), 5 State Dep. Rep. 585, 587.

Distance of residents from school.—Appeal sustained and matter referred back to superintendent where it appeared that distance to be traveled by pupils of dissolved district was excessive. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 415.

Existing school facilities.—Order set aside where arrangements have been made for building new schoolhouse. Dec. of Com'r (1915), 5 St. Dep. Rep. 534. A

district able and willing to support its own school should not be dissolved unless there is a positive educational advantage to be gained by dissolution. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 395.

Order of district superintendent dissolving district sustained where district had failed to erect new building in place of old one condemned. Dec. of Com'r (1914), 2 St. Dep. Rep. 626.

Notice to trustees of the dissolved districts, is not required by statute. Com. of Educ. Decision (1915), 5 State Dep. Rep. 585.

Consent of trustees.—Under this section a district superintendent may dissolve a district without the consent of the trustee or hearing upon the matter. Dec. of Com'r (1916), 9 St. Dep. Rep. 582; Dec. of Com'r (1915), 6 St. Dep. Rep. 553; Dec. of Com'r (1915), 5 St. Dep. Rep. 585; Dec. of Com'r (1914), 3 St. Dep. Rep. 521; Dec. of Supt. (1896), Jud. Dec. 699; Dec. of Supt. (1900), Jud. Dec. 735; Dec. of Supt. (1903), Jud. Dec. 1359; Dec. of Com'r (1917), — St. Dep. Rep. —.

§ 130. Consolidation of districts by vote of qualified electors.—Two or more common school districts may be consolidated and created as one common school district, *of two or more union free school districts may be consolidated and created as one union free school district, or one or more common school districts may be consolidated with one or more union free school districts and created as a union free school district, by a vote of the qualified electors thereof as provided in the following sections. (*Former § 130, repealed by L. 1911, ch. 334; new § 130, added by L. 1913, ch. 129.*)

Note. Former § 130 repealed by L. 1911, ch. 334.

Separation of village from union free school district.—A meeting of an incorporated village held pursuant to sections 130, 131 of the Education Law (repealed by L. 1911, ch. 334) voted that the village be separated from the union school district and be and become a separate school district. Pursuant to said section 131(3) the result of the canvass of the vote at said meeting was certified to the county school commissioner with a request that he certify that the territory of the village was a separate school district but he declined so to do until satisfied that the entire territory of the village was within the boundaries of the said union school district. Under section 880(7) of the Education Law the school district and an elector thereof took an appeal to the State Commissioner of Education who, under section 881 of said statute, stayed the issuance of the certificate separating the school district as voted, and a motion of the village to dismiss the appeal upon the ground that the State Commissioner of Education had no jurisdiction to hear it was denied. It was held that the decision of the question whether the village was not wholly within the said union school district as well as the status of the appellants was for the State Commissioner of Education under the provisions of the Education Law; that mandamus would not lie to compel the State Commissioner of Education to rescind the order staying the issuance of a certificate and compel the county school commissioner to issue the said certificate. *People ex rel. Merrill v. Cooley* (1912), 75 Misc. 188, 132 N. Y. Supp. 625.

Withdrawal of village from union free school district.—An action by a union free school district cannot be maintained to restrain the withdrawal (under § 130 repealed by L. 1911, ch. 334) of a village from the district, although such withdrawal be unauthorized. Such a withdrawal, when it does not interfere with or appropriate the school buildings or property of the district, only imposes an additional burden upon the taxpayers of the village, of whose interest the school

* So in original.

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district is not the guardian. *Union Free School District v. Village of Glen Park* (1905), 109 App. Div. 414, 96 N. Y. Supp. 428.

§ 131. Request for meeting to consolidate districts; notices of meeting.—

1. Whenever two-thirds of the qualified electors of each of two or more districts in which there shall be less than fifteen qualified electors, or if there be fifteen or more qualified electors in either of such districts whenever ten or more of such electors shall sign a request for a meeting to be held for the purpose of determining whether such districts shall be consolidated as a common school district, and submit the same to the trustees or board of education of each of such districts, it shall be the duty of such trustees or board of education to give public notice that a meeting of the qualified electors of such districts will be held at some convenient place within such districts, as centrally located as may be, to vote upon the question of consolidating such districts. Such notice shall specify the day and hour when such meeting shall be held, not less than twenty nor more than thirty days after the posting, service or publication of such notice. If the trustees or board of education shall refuse or neglect to give such notice within twenty days after such request is submitted the commissioner of education may authorize and direct any qualified elector of the district to give such notice.

2. If any part of either of such districts is situated wholly or partly within an incorporated village in which one or more newspapers are published, such notice shall be published once in each week for three consecutive weeks before such meeting in all the newspapers published in such village, and shall also be posted at least twenty days prior to such meeting, in at least five conspicuous places in each district. In all other districts the trustees or board of education of each district shall authorize and direct a qualified elector thereof to notify each qualified elector of such district of such meeting by delivering to him a copy of such notice or in case of his absence from home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the place of his abode, at least twenty days prior to the time of such meeting.

3. The reasonable expense of the publication and service of such notice shall be chargeable upon the districts, if the vote be in favor of consolidation, and if not, shall be paid by the persons signing the request for such meeting as provided by section one hundred and forty-four. (*Former § 131, repealed by L. 1911, ch. 334; new § 131, added by L. 1913, ch. 129, and amended by L. 1914, ch. 101.*)

Note.—Former § 131 repealed by L. 1913, ch. 334.

Objections to form of request and notice of meeting not sustained. Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.), 333.

§ 132. Proceedings at meeting for consolidation; adoption of resolution; proceedings to be filed.—Such meeting shall be organized as provided in section one hundred and forty-five. Such meeting may adopt a resolution

to consolidate such districts if two-thirds of the qualified electors of each district having less than fifteen of such electors are present, or in case of districts having fifteen or more qualified electors if ten or more are present. The vote upon such resolution shall be by taking and recording the ayes and noes. The clerk shall keep a poll-list upon which shall be recorded the names of all qualified electors voting upon the resolution, the districts in which such electors reside, and how each elector voted. If it shall appear from the votes so recorded that a majority of the qualified electors present and voting from each district are in favor of such resolution it shall be declared adopted. If a majority of the qualified electors present and voting from each district are not in favor of such resolution, all further proceedings at such meeting, except a motion to reconsider or adjourn shall be dispensed with and no such meeting shall be again called within one year thereafter.

Copies of such request, notice of meeting, order of the commissioner of education directing a qualified elector to call such meeting, if any, and the minutes of the meeting, including the record of the vote upon the resolution, duly certified by the chairman and clerk, shall be transmitted by either the chairman or clerk, one to the commissioner of education, and one to the district superintendent of schools in whose jurisdiction such districts are located. (*Former § 132, repealed by L. 1911, ch. 334; new § 132, added by L. 1913, ch. 129, and amended by L. 1914, ch. 101.*)

Note.—Former § 132 repealed by L. 1911, ch. 334.

Construction.—This section must be construed as restricting the power of a meeting to adopt a resolution of consolidation if the required number of qualified electors from each district are not present. But it does not restrict or limit the power of the meeting to organize or to take any other necessary action in the absence of qualified electors from either of the districts. Com. of Educ. Decision (1915), 4 State Dep. Rep. 644.

Adjournment of a meeting may be taken to a subsequent date to obtain the presence of a sufficient number of qualified electors. Com. of Educ. Decision (1915), 4 State Dep. Rep. 644.

Appeal; presumption in favor of consolidation.—When a substantial majority of the qualified electors of each of the districts sought to be consolidated, vote in favor thereof, a presumption exists that the educational welfare of the community will be thereby promoted and such consolidation will not be disturbed on appeal in the absence of convincing proof to the contrary. Com. of Educ. Decision (1915), 4 State Dep. Rep. 644.

§ 133. *Order creating consolidated district; effect.*—The district superintendent shall thereupon issue an order consolidating such districts and creating a common school district, or union free school district, as the case may be, designating such district by number. Such order shall take effect at some date to be specified therein, not more than three months after the date of the meeting. He shall file such order in the town clerk's office of the town in which such districts are located. If such districts are located in two or more supervisory districts such order shall be executed jointly by the district superintendents of such districts. Such

order shall have the same effect as an order executed by a district superintendent dissolving two or more common school districts and forming a new district therefrom, or dissolving one or more of such districts and uniting the territory thereof to a union free school district. But a district superintendent may, upon a petition of at least twenty-five qualified electors of the consolidated district, where one of the districts consolidated is a union free school district, or shall, when directed by the commissioner of education, direct the clerk of the board of education of such union free school district to call a special meeting of the qualified electors thereof, for the purpose of increasing the number of members of the board of education of such new district, subject to the limitations prescribed by section three hundred and eight of this chapter, or for the purpose of terminating the offices of the members of the board of education in office when the consolidation takes effect. If it be determined to increase the number of such members, such meeting shall elect the additional number so determined upon, as provided in such section three hundred and eight. If it be determined to elect a new board of education in place of the board in office when the consolidation takes effect, such meeting shall proceed with the election of a board of education as provided in sections three hundred and one and three hundred and two of this chapter. (*Added by L. 1913, ch. 129.*)

Note.—Present section 133 renumbered 134a *post*.

§ 134. **District quotas of consolidated districts.**—There shall be apportioned and paid to the district created by the consolidation of districts as provided in sections one hundred and twenty-eight, one hundred and twenty-nine and one hundred and thirty-two of this article district quotas for each of the districts consolidated in the same amount and under the same conditions as though such consolidation had not been effected. Such apportionment shall be based upon the assessed valuation of the taxable property within such districts as they existed at the time of the consolidation, and the trustees or board of education of the consolidated district shall include in their report a statement of such assessed valuation. The money so apportioned and paid to the consolidated district may be applied to the payment of the salaries of teachers, the transportation of pupils and the maintenance of the school in the district. (*Former § 134, repealed by L. 1911, ch. 334; new § 134, added by L. 1913, ch. 129, and amended by L. 1914, ch. 101.*)

Note.—Former § 134 repealed by L. 1911, ch. 334.

§ 134-a. **The bonded indebtedness of certain dissolved districts.**—Whenever two or more districts are dissolved pursuant to the provisions of section one hundred and twenty-eight of this article and annexed to adjoining districts or consolidated as provided in section one hundred and thirty-two, the bonded indebtedness of any such district shall thereupon become a charge upon the enlarged district formed by such annexation.

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The board of education or trustees of such district shall raise by tax an amount sufficient to pay *one of the bonds and interest thereof of such district as the same shall become due. (*Former § 133 renumbered and amended by L. 1913, ch. 129.*)

Source.—Education L. 1909, § 26, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 30, as amended by L. 1899, ch. 540; L. 1905, ch. 258; L. 1907, ch. 609.

§ 135. Continuance of dissolved districts for payment of debts.—Though a district be dissolved, it shall continue to exist in law, for the purpose of providing for and paying all its just debts; and to that end the trustees and other officers shall continue in office, and the inhabitants may hold special meetings, elect officers to supply vacancies and vote taxes; and all other acts necessary to raise money and pay such debts shall be done by the inhabitants and officers of the district.

Source.—Education L. 1909, § 32, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 12; originally revised from L. 1864, ch. 555, tit. 6, § 11.

Trustees after dissolution.—Where a school district was regularly dissolved the trustee at the time of dissolution continues in office; and in the absence of proof that his office became vacant by death or otherwise, another person could not be elected trustee in his place. *School District No. 23 of Town of Mooers v. Raymond* (1904), 90 App. Div. 614, 86 N. Y. Supp. 182. A trustee continues as such after dissolution for the purpose of paying the debts of the district. *Smith v. Coman* (1900), 47 App. Div. 116, 119, 62 N. Y. Supp. 106.

§ 136. Deposit of records of dissolved district.—1. The school commissioner, or a majority of such commissioners in whose districts a dissolved school district was situated, shall by written order delivered to the clerk of the district, or to any person in whose possession the books, papers and records of the district, or any of them, may be, direct such clerk or other person to deposit the same in the clerk's office in the town named in the order.

2. Such clerk or other person, by neglect or refusal to obey the order, shall forfeit fifty dollars, to be applied to the benefit of the common schools of said town.

Source.—Education L. 1909, § 33, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 13; originally revised from L. 1864, ch. 555, tit. 6, § 12.

§ 137. Property of districts consolidated.—When two or more districts shall be consolidated into one, the new district shall succeed to all the rights of property possessed by the annulled districts.

Source.—Education L. 1909, § 34, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 9, in part; originally revised from L. 1864, ch. 555, tit. 6, § 8.

Disposition of property of consolidated districts, see *Board of Education v. Storms* (1911), 147 App. Div. 679, 132 N. Y. Supp. 639.

A teacher's contract executed prior to the taking effect of an order of consolidation becomes the contract of the consolidated district, unless it appears that such contract was executed after due notice of the order of consolidation. *Com. of Educ. Decision* (1916), 8 State Dept. Rep. 599.

* So in original.

§ 138. Sale of property of dissolved district and disposition of proceeds.—

1. When a district is divided into portions, which are annexed to other districts, its property shall be sold by the supervisor of the town, within which its school-house is situated, at public auction, after at least five days' notice.

2. Such notice shall be given by posting the same in three or more public places of the town in which the school-house is situated and in one conspicuous place in the district so dissolved.

3. The supervisor, after deducting the expenses of the sale, shall apply its proceeds to the payment of the debts of the district, and apportion the residue, if any, among the owners or possessors of taxable property in the district, in the ratio of their several assessments on the last corrected assessment-roll of the towns, and pay it over accordingly.

Source.—Education L. 1909, § 35, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 10; originally revised from L. 1864, ch. 555, tit. 6, § 9, as amended by L. 1875, ch. 567, § 14.

§ 139. Collection and distribution of moneys due dissolved district.—The supervisor of the town within which the school-house of the dissolved district was situated may demand, sue for and collect, in his name of office, any money of the district outstanding in the hands of any of its former officers, or any other person; and, after deducting his costs and expenses, shall report the balance to the school commissioner who shall apportion the same equitably among the districts to which the parts of the dissolved district were annexed, to be by them applied as their district meeting shall determine.

Source.—Education L. 1909, § 36, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 11; originally revised from L. 1864, ch. 555, tit. 6, § 10.

Action against former treasurer of dissolved district.—After the dissolution of a school district and its consolidation in its entirety with another district, pursuant to the provisions of the Education Law, the board of education of the consolidated districts may, after demand and refusal, maintain an action against the former treasurer of the dissolved school district individually to recover moneys in his hands which belonged to the dissolved school district, when it is not claimed that said district had at the time of its dissolution any debts or obligations to which the money was applicable. *Board of Education v. Storms* (1911), 147 App. Div. 679, 132 N. Y. Supp. 639.

§ 140. Fees of supervisor and town clerk.—The supervisor and town clerk shall be entitled each, to one dollar and fifty cents a day, for each day's service in any proceeding under section one hundred twenty-five of this article, to be levied and paid as a charge upon their town.

Source.—Education L. 1909, § 37, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 6, § 5; originally revised from L. 1864, ch. 555, tit. 6, § 5.

References.—Compensation of supervisor and town clerk generally, *Town Law*, § 85. Fees of supervisor for disbursing school moneys, *Id.* § 85, subd. 3. Town officer not entitled to per diem allowance unless authorized by law, *Id.* § 87. Compensation a town charge, *Id.* § 170.

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§ 141. **Notice of meeting for establishment of union free school district.**—1. Whenever fifteen persons entitled to vote at any meeting of the inhabitants of any school district in the state, shall sign a request for a meeting, to be held for the purpose of determining whether a union free school shall be established therein in conformity with the provisions of this article, it shall be the duty of the trustees of such district, within ten days after such request shall have been presented to them, to give public notice that a meeting of the inhabitants of such district entitled to vote thereat will be held for such purpose as aforesaid, at the school-house, or other more suitable place in such district, on a day and at an hour to be specified in such notice not less than twenty nor more than thirty days after the publication of such notice.

2. If the trustees shall refuse to give such notice, or shall neglect to give the same for twenty days, the commissioner of education may authorize and direct any inhabitant of such district to give the same.

Source.—Education L. 1909, § 38, revised from former Con. Sch. L. (L. 1894, ch. 556), tit. 8, § 1, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 9, § 1.

Reference.—Qualification of electors prescribed, Education Law, § 203.

Meeting must be specially called in accordance with statute. Dec. of Com'r (1914), 1 St. Dep. Rep. 529.

§ 142. **Posting, publication and service of notice.**—1. Whenever such district shall correspond wholly or in part with an incorporated village, in which there shall be published a daily or weekly newspaper, the notice required in section one hundred and forty-one shall be given by posting the same in five conspicuous places in said district, at least twenty days prior to such meeting, and by causing the same to be published once a week for three consecutive weeks before such meeting, in all the newspapers published in said district.

2. In other districts the said notice shall be given by posting the same as aforesaid, and in addition thereto, the trustees of such district shall authorize and require any taxable inhabitant thereof to notify every other qualified voter in such district of such meeting by delivering to him a copy of such notice or in case of his absence from home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the place of his abode at least twenty days prior to the time of such meeting.

Source.—Education L. 1909, § 39, revised from former Con. Sch. L. (L. 1894, ch. 556), tit. 8, § 2; originally revised from L. 1864, ch. 555, tit. 9, § 2, as amended by L. 1876, ch. 50, § 1.

Reference.—Want of due notice does not affect validity of meeting, Education Law, § 200.

Failure to post notices as required by this section will not invalidate a resolution for the establishment of a Union Free School district, where the resolution was favored by a substantial majority of the qualified electors of the district, and where there is nothing indicating that the failure to post such notice was fraudulent or

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with any purpose of taking unfair advantage of those opposed to the resolution. Com. of Educ. Decision (1915), 4 State Dep. Rep. 642.

Notice of less than 30 days upheld when failure to give full notice was not wilful or fraudulent. Dec. of Supt. (1893), Jud. Dec. 1384. Meeting set aside because only 10 days' notice was given. Dec. of Supt. (1891), Jud. Dec. 1394.

§ 143. Notice in case of adjoining districts.—1. Whenever fifteen persons, entitled as aforesaid, from each of two or more adjoining districts, shall unite in a request for a meeting of the inhabitants of such districts, to determine whether such district shall be consolidated by the establishment of a union free school therein, it shall be the duty of the trustees of such districts, or a majority of them, to give public notice of such meeting, at some convenient place within such districts, and as central as may be, within the time and to be published and served in the manner set forth in sections one hundred forty-one and one hundred forty-two of this article, in each of such districts.

2. The commissioner of education may order such meeting under the conditions and in the manner prescribed in section one hundred forty-one of this article.

Source.—Education L. 1909, § 41, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 4, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 9, § 4, as amended by L. 1865, ch. 647, § 15.

Application.—The provisions of this section as to notice of meeting relate to the establishment of a Union Free School District, and have no bearing upon proceedings relating to the dissolution and consolidation of school districts. Com. of Educ. Decision (1915), 4 State Dep. Rep. 614.

Notice given by the trustees need not be a joint notice. Dec. of Supt. (1894), Jud. Dec. 1370.

§ 144. Expense of notice.—The reasonable expense of the publication and service of such notice, shall be chargeable upon the district, in case a union free school is established by the meeting so convened, to be levied and collected by the trustees, as in case of taxes now levied for school purposes; but in the event that such union free school shall not be established, then the said expense shall be chargeable upon the inhabitants signing the request, jointly and severally, to be sued for, if necessary, in any court having jurisdiction of the same.

Source.—Education L. 1909, § 40, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 3, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 9, § 3.

§ 145. Proceedings at meeting and effect of affirmative vote.—1. Any such meeting held pursuant to the foregoing provisions shall be organized by the election of a chairman and clerk and may be adjourned from time to time, by a majority vote, provided that such adjournment shall not be for a longer period than ten days; and whenever at any such meeting duly called and held under the provisions of sections one hundred forty-one and one hundred forty-two of this article, at least fifteen qualified voters of the districts shall be present; or at such meeting duly called and

held under the provisions of section one hundred forty-three of this article, at least fifteen qualified voters of each of the two or more adjoining districts, joining in the request, shall be present, such meeting may, by the affirmative vote of a majority present and voting, adopt a resolution to establish a union free school in said district, or to consolidate the two or more adjoining districts by establishing a union free school in said districts pursuant to the notice of said meeting. If said meeting shall determine to establish a union free school in said districts as aforesaid, it shall be lawful for such meeting thereafter to proceed to the election of a board of education as provided in sections three hundred and one and three hundred and two of this chapter.

2. The school commissioner in whose district the union free school district is thus organized shall designate such district as union free school district number of the town of and the said board shall have the name and style of the board of education of (adding the designation aforesaid).

3. Copies of said request, notice of meeting, order of the commissioner of education directing some inhabitant to call said meeting, if any, and minutes of said meeting, duly certified by the chairman and clerk thereof, shall be transmitted and deposited, immediately after such meeting by one of such officers, one to and with the town clerk, one to and with the school commissioner in whose jurisdiction said districts are located, and one to and with the commissioner of education.

4. If at any such meeting, the question as to the establishment of a union free school shall not be decided in the affirmative, as aforesaid, then all further proceedings at such meeting, except a motion to reconsider or adjourn, shall be dispensed with, and no such meeting shall be again called within one year thereafter.

5. When any such meeting shall have established a union free school in said districts, such union free school district shall not be dissolved within the period of one year from the first Tuesday of August next after such meeting.

Source.—Education L. 1909, § 42, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 5, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 9, § 5, as amended by L. 1865, ch. 647; L. 1876, ch. 50; L. 1883, ch. 413; L. 1884, ch. 49; L. 1889, ch. 245; L. 1893, ch. 500.

Union free school districts; origin and powers.—Union free school districts, as the result of a general power given by law to the inhabitants of one or more school districts, are solely the creatures of statute, and must look to the statute for all of their powers and the form of their existence. *Bassett v. Fish* (1878), 75 N. Y. 303, 311.

Proceedings to establish union free school district are statutory and if the provisions are complied with the proceedings will not be set aside. Dec. of Supt. (1895), Jud. Dec. 1388. Meeting called to establish union free school district upheld. Dec. of Supt. (1894), Jud. Dec. 1377; Dec. of Supt. (1894), Jud. Dec. 1381.

Election of Board of Education is regular although no mention of such election is made in the notice of meeting. Dec. of Supt. (1895), Jud. Dec. 1395. The

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Board of Education legally elected under this section is entitled to succeed to all the rights of the former trustees. Dec. of Supt. (1899), Jud. Dec. 1390.

Vote to consolidate and form a union free school district set aside. Dec. of Supt. (1892), Jud. Dec. 1362; Dec. of Supt. (1891), Jud. Dec. 1363; Dec. of Supt. (1890), Jud. Dec. 1364; Dec. of Supt. (1891), Jud. Dec. 1364; Dec. of Supt. (1889), Jud. Dec. 1367; Dec. of Supt. (1890), Jud. Dec. 1368. A majority vote against consolidation sustained. Dec. of Supt. (1891), Jud. Dec. 1366.

§ 146. Meeting to determine regarding reorganization as common school district.—In any union free school district established under the laws of this state, and which shall have been established for the period of one year or more, it shall be the duty of the board of education, upon the application of fifteen resident taxpayers of such district, to call a special meeting in the manner prescribed by law, for the purpose of determining whether application shall be made in the manner hereinafter provided, for the dissolution of such union free school district, and for its reorganization as one or more common school districts.

Source.—Education L. 1909, § 43, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 32; originally revised from L. 1880, ch. 210, § 1.

Meeting to be called.—Board must call meeting when petition properly presented. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 390. Refusal of Board to call meeting in response to petition sustained when not presented in good faith. Dec. of Com'r (1905), Jud. Dec. 1333.

§ 147. Result of vote for or against reorganization.—1. Whenever, at any such meeting called and held as aforesaid, it shall be determined by a majority vote of the legal voters present and voting, to be ascertained by taking and recording the ayes and noes, not to dissolve such union free school district, no other meeting for a similar purpose shall be held in said district within three years from the time the first meeting was held.

2. Whenever at any such meeting called and held as aforesaid it shall be determined by a two-thirds vote of the legal voters present and voting, to be ascertained by taking and recording the ayes and noes, to dissolve such union free school district, it shall be the duty of the board of education to present to the school commissioner of the commissioner district in which said union free school is situated, a certified copy of the call, notice and proceedings. If such school commissioner shall approve the proceedings of said meeting, he shall certify the same to the board of education. Such approval shall not take effect until the day preceding the first Tuesday of August next succeeding; but after that date such district shall cease to be a union free school district.

Source.—Education L. 1909, § 44, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 36; originally revised from L. 1880, ch. 210, § 5.

§ 148. Reversion to form of original school districts.—If any union free school district dissolved under the foregoing provisions shall have been established by the consolidation of two or more districts, it shall be lawful for such school commissioner to order that its territory be divided

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into two or more districts, to correspond, so far as practicable, with the districts theretofore consolidated.

Source.—Education L. 1909, § 45, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 34; originally revised from L. 1880, ch. 210, § 3.

§ 149. School commissioner may require equality of partition.—Such school commissioner may make his approval of the proceedings of any such meeting held as aforesaid conditional upon the payment, by the district which has been most greatly benefited by the consolidation in the way of buildings and other improvements to the other districts into which the said union free school district is divided, of such sum of money as he may deem equitable.

Source.—Education L. 1909, § 46, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 33; originally revised from L. 1880, ch. 210, § 2, as amended by L. 1883, ch. 413, § 15; L. 1889, ch. 245.

Reference.—Annual meetings of districts reformed after dissolution of union free school district, Education Law, § 195.

§ 150. Effect of veto by school commissioner regarding subsequent meeting.—If such school commissioner shall not approve the proceedings of any such meeting, held as aforesaid, for the purpose of dissolving a union free school district, no other meeting shall be held in such district, for a similar purpose, within three years from the time the first meeting was held.

Source.—Education L. 1909, § 47, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 39; originally revised from L. 1880, ch. 210, § 8.

§ 151. Report of proceedings to commissioner of education.—Whenever the proceedings of a meeting, held as aforesaid, for the purpose of dissolving a union free school district, shall have been approved by such school commissioner and shall have been certified by him to the board of education, it shall be the duty of the board of education of the district affected forthwith to file with the commissioner of education, copies of the call, notice, proceedings of the meeting, and the action taken by such school commissioner thereon.

Source.—Education L. 1909, § 48, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 40; originally revised from L. 1880, ch. 210, § 9.

§ 152. Distribution of moneys on dissolution.—All moneys remaining in the hands of the treasurer of the union free school district when the order of dissolution shall take effect shall be apportioned equitably among the several districts into which such union free school district is divided, and shall be paid over to the collectors or treasurers of such districts when they shall have been elected and have qualified according to law.

Source.—Education L. 1909, § 49, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 37; originally revised from L. 1880, ch. 210, § 6.

§ 153. School property exempt from taxation.—The grounds, build-

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ings, furniture, books, apparatus and all other property of a school district shall not be subject to taxation for any purpose.

Source.—New.

§ 154. Application of funds obtained from sale of school property.—All moneys obtained from the sale of any school property authorized under the provisions of this chapter shall be applied for the benefit of the district as directed by the voters thereof in any annual or special meeting.

Source.—New.

ARTICLE VI.

SCHOOL NEIGHBORHOODS.

Section 170. Setting off school neighborhoods.

171. Neighborhood meetings.

172. Duties of neighborhood clerk and trustee.

§ 170. Setting off school neighborhoods.—Each school commissioner in respect to the territory within his district shall have power, with the approval of the commissioner of education, to set off by itself any neighborhood adjoining any other state of the union, where it shall be found most convenient for the inhabitants to send their children to a school in such adjoining state, and to deliver to the town clerk of the town in which it lies, in whole or in part, a description of each such separate neighborhood. He shall also prepare a notice, describing such neighborhood, and appointing a time and place for the first neighborhood meeting, and deliver such notice to a taxable inhabitant of such neighborhood. It shall be the duty of such inhabitant to notify every other inhabitant of the neighborhood, qualified to vote at the meeting, by reading the notice in his hearing, or, in case of his absence from home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the place of his abode, at least six days before the time of the meeting. In case such meeting shall not be held, and in the opinion of the school commissioner it shall be necessary to hold such meeting before the time herein fixed for the first annual meeting, he shall deliver another such notice to a taxable inhabitant of the neighborhood, who shall serve it as hereinbefore provided.

Source.—Education L. 1909, § 60, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 51, as amended by L. 1897, ch. 293.

Reference.—Apportionment of public moneys to school neighborhoods; Education Law, § 491, subd. 9.

§ 171. Neighborhood meetings.—The annual meeting of each neighborhood shall be held on the first Tuesday of August in each year, at the hour and place fixed by the last previous neighborhood meeting; or, if such hour and place has not been so fixed, then at the hour and place of

such last meeting; or, if such place be no longer accessible, then at such other place as the trustee, or, if there be no trustee, the clerk, shall in the notices designate. The proceedings of no neighborhood meeting, annual or special shall be held illegal for want of a due notice to all the persons qualified to vote thereat, unless it shall appear that the omission to give such notice was wilful and fraudulent. The inhabitants of any neighborhood, entitled to vote, when assembled in any annual meeting or any special meeting called by the commissioner as above provided, shall have power, by a majority vote of those present, to appoint a chairman for the time being, and to choose a neighborhood clerk and one trustee, and to fill vacancies in office. The provisions of article seven of this chapter, shall apply to and govern such meeting, so far as the same can in substance be applied to the proceedings; and the provisions of article eight of this chapter shall apply to and govern the officers of such neighborhood, so far as the same can in substance be applied thereto.

Source.—Education L. 1909, § 61, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 53, as added by L. 1897, ch. 293.

§ 172. Duties of neighborhood clerk and trustee.—The neighborhood clerk shall keep a record of the proceedings of his neighborhood, and of the reports of the trustees, and deliver the same to his successor. In case such neighborhood shall be annexed to a district within this state its records shall be filed in the office of the clerk of such district. The trustee shall, between the twenty-fifth day of July and the first day of August in every year, make his annual report to the school commissioner, and file it in the office of the clerk of the town of which the neighborhood is a part. Such report shall specify the whole amount of public moneys received during the year and from what public officer, and the manner in which it was expended; the whole number of such children as can be included in the district trustees' report residing in the neighborhood on the thirtieth day of August prior to the making of such report; and any other matters which the commissioner of education may require.

Source.—Education L. 1909, § 62, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 53, as added by L. 1897, ch. 293.

ARTICLE VI-A.

(Article added by L. 1913, ch. 176.)

TEMPORARY SCHOOL DISTRICTS.

- Section 175. Establishment of temporary school districts.
176. Organization of districts; officers.
177. Maintenance of schools; teachers.
178. Payment of expenses; gifts and contributions.
179. Regulations of commissioner of education.

§ 175. Establishment of temporary school districts.—Temporary school

districts may be established outside of cities and union free school districts and public schools shall be maintained therein as hereinafter provided. Such districts may be established whenever any considerable number of persons shall have been congregated in camps or other places of temporary habitation, who are engaged in the construction of public works by, or under contract with, the state, or in the construction of public works or improvements by or under contract with any municipality. Such temporary districts shall be established by order of the district superintendent of schools of the supervisory district within which such camps or other places of temporary habitation are located, subject to the approval of the commissioner of education. Such order shall be filed in the state education department and if the public works or improvements are being constructed by a municipality, a copy thereof shall be filed in the office of the officer or board of the city under whose direction they are being constructed. When so established such districts shall be entitled to share in the apportionment of public money as in the case of other school districts, except that each district quota shall be one hundred and twenty-five dollars. The money so apportioned shall be paid to the treasurer of the district and be applied in the payment of teachers' salaries. (*Added by L. 1913, ch. 176.*)

§ 176. **Organization of districts; officers.**—Each of such districts shall have a trustee who shall be appointed by the district superintendent of schools, and a district clerk and treasurer to be appointed by the trustee. Each of such officers shall serve during the continuance of the camp or other place of temporary habitation, unless sooner removed by the district superintendent. The treasurer shall give a bond to the people of the state, in an amount to be determined by the district superintendent, and with sureties approved by him, conditioned for the proper disbursement and accounting of all moneys received by him in behalf of such district. (*Added by L. 1913, ch. 176.*)

§ 177. **Maintenance of schools; teachers.**—Such schools shall be under the supervision of the district superintendent and shall be maintained pursuant to regulations adopted by the commissioner of education. They shall be free to all children of school age residing in such camps and other places of temporary habitation, and also to all adults residing therein. They shall be open at such hours as may be prescribed by the district superintendent, subject to the approval of the commissioner of education. The trustee of each such district shall employ qualified teachers for the school therein, for such term and at such rate of compensation as may be determined upon by the district superintendent with the approval of the commissioner of education. The said trustees shall provide suitable building or rooms for such school and shall require the same to be kept in proper condition for the maintenance thereof, and shall cause the

same to be equipped and supplied with all necessary books, furniture, apparatus and appliances. (*Added by L. 1913, ch. 176.*)

§ 178. **Payment of expenses; gifts and contributions.**—The costs and expenses of maintaining such schools in temporary districts, exclusive of the amount apportioned thereto out of the public moneys, shall be paid in such districts where the public works are being constructed by the state, out of moneys appropriated for such purpose. In districts where public works or improvements are being constructed for a municipality, such costs and expenses shall be a charge upon such municipality, and shall be paid out of funds available for the payment of the cost of construction of such works or improvements.

The trustee of such district shall prepare an estimate of the amount of probable expenditures for the maintenance of the public schools in such district, which shall include a statement of the amount in the hands of the treasurer available for such maintenance, the amount received by such treasurer from gifts, contributions and other sources, and the amount to be received from the public school moneys, as herein provided, and shall also state the amount required to be raised for such school, specifying the items thereof, for the ensuing school year. The form of such estimate shall be prescribed by the district superintendent. In the districts where the public works are being constructed by a municipality the said estimate shall be executed in duplicate, one of which shall be filed with the state education department, and the other shall be filed in the office of the department or officer of the municipality under whose supervision such public works are being constructed. Upon the approval of such estimates by the state education department, notice thereof shall be given to the said department or officer of the municipality, and payment of the amount specified in such estimate shall be made to the treasurer of such district. The treasurer shall preserve vouchers of all payments made by him on account of the school in his district and shall make no payments for purposes not provided for in the estimate, nor without the order of the trustee of the district accompanied with the necessary vouchers. (*Added by L. 1913, ch. 176.*)

§ 179. **Regulations of commissioner of education.**—The commissioner of education shall make regulations, not inconsistent herewith, for the purpose of providing for the establishment and maintenance of schools as herein provided, and for the purpose of carrying into effect the full intent of this article. (*Added by L. 1913, ch. 176.*)

ARTICLE VI-B.

(Article added by L. 1914, ch. 55.)

CENTRAL RURAL SCHOOLS.

Section 180. Formation of districts.

- 181. Notice of meeting and expense of notice.
- 182. Trustees at meeting.
- 183. Powers and duties of boards of education.
- 184. Powers and limitations of districts.
- 185. State aid.
- 186. Transportation of scholars.

§ 180. Formation of districts.—The commissioner of education is hereby authorized and empowered to lay out in this state in any territory exclusive of a city school districts conveniently located for the attendance of scholars and of suitable size for the establishment of central schools to give instruction usually given in the common schools and in high schools, including instruction in agriculture. (*Added by L. 1914, ch. 55.*)

§ 181. Notice of meeting and expense of notice.—Whenever fifteen persons who are residents and taxable inhabitants in any such district shall unite in a request for a meeting of the inhabitants of such district to determine whether such school shall be established, and file the same in writing with the town clerk of the town in which such district is located, or if located in more than one town, with the town clerk of each town in which any part of such district is, it shall be the duty of each town clerk with whom such notice is filed to post a notice of such meeting, not less than five or more than ten days after the same is filed in his office, in three conspicuous places in the district if the whole thereof be in his town, or if not, in that part of the district located in his town. If the district be located in more than one town the notice shall be prepared by the clerk of the town containing the largest portion of the territory of the district and furnished by him to the other town clerk or clerks for posting. If a weekly or daily newspaper be published within such school district the notice shall be published therein by the clerk preparing the notice, at least three days before the meeting. All reasonable expense of the publication and service of such notice shall be a town charge upon the town or towns in which the said district, or a part thereof, is located, unless the district decides to establish a central school under this act, in which case such expense shall be a charge upon the district. (*Added by L. 1914, ch. 55.*)

§ 182. Trustees at meeting.—1. Any such meeting held pursuant to such notice shall be organized by the election of a chairman and clerk, and may be adjourned from time to time by a majority vote, provided that such adjournment shall not be for a longer period than ten days; and whenever at any such meeting duly called and held under the provisions of this act

fifteen qualified voters of the district shall be present, such meeting may, by an affirmative vote of a majority present and voting, adopt a resolution to establish a central school in said district. If said meeting shall determine to establish such school in said district, it shall be lawful for said meeting thereafter to proceed to the election by ballot of a board of education of not less than three nor more than seven trustees who shall, by the order of said meeting, be divided into three classes, as nearly equal as may be, the first to hold until one, the second until two, and the third until three years from the first Tuesday in August next following. Thereafter there shall be elected in such districts at the annual meeting trustees to supply the places of those whose terms of office by the classification aforesaid expire. The trustees thus elected shall enter at once upon their offices. The said trustees and their successors in office shall constitute the board of education of such district.

2. The commissioner of education shall designate the district thus organized as central school district number of the town or towns of and the said board shall have the name and style of "the board of education of (adding the designation aforesaid)."

3. Copies of said requests, notice of meeting and minutes of said meeting duly certified by the chairman and clerk thereof shall be transcribed and deposit made after such meeting by one of said officers, one to and with the town clerk of each town in which any part of said district is located, one to and with the school superintendent in whose jurisdiction the district or any part thereof is located, and one to and with the commissioner of education.

4. If at any such meeting the question as to the establishment of a central school shall not be decided in the affirmative as aforesaid, then all further proceedings at such meeting, except a motion to reconsider the question, shall be dispensed with, and no such meeting shall be again called within one year thereafter.

5. If any town clerk fail to perform any duty devolving upon him under this act the same may be performed by the commissioner of education. (*Added by L. 1914, ch. 55.*)

§ 183. Powers and duties of boards of education.—Boards of education in any such district shall have the same powers and duties as boards of education in union free school districts as prescribed by this act. Nothing in this act shall be construed to deprive any existing school district of the property belonging to such district, or to affect the indebtedness of said district. (*Added by L. 1914, ch. 55.*)

§ 184. Powers and limitations of district.—Any central district thus established shall have the same powers and be subject to the same limitations that are now conferred or imposed by law upon union free school districts as provided by this act. (*Added by L. 1914, ch. 55.*)

§ 185. **State aid.**—Any district organized under the provisions of this act shall from the time of its organization receive from the state the amount of money on the basis of attendance paid to the common school districts included therein during the year preceding its organization, at the rate that the said districts were then entitled to receive moneys pursuant to law. If a common school district be divided in the formation of a central district the moneys of such common school district shall be apportioned by the commissioner of education, and the share thereof apportioned to that part of the common school district included in the central district shall be paid to the central district. Whenever any such district shall comply with the requirements of section six hundred and four of the education law in relation to the establishment of general schools of agriculture and home making, the commissioner of education shall make the same annual apportionment of state school moneys to such central school as is now required to be made by law to a high school or union free school district complying therewith. Any such central district shall also receive all other allowances of public moneys apportioned by the state which it would be entitled to receive if it were a union free school district. (*Added by L. 1914, ch. 55.*)

§ 186. **Transportation of scholars.**—The commissioner of education shall have power in any such central district to require the payment by the district of such expense of transportation of school children to and from the school as in his judgment justice requires, and the same shall be a charge upon the district. (*Added by L. 1914, ch. 55.*)

ARTICLE VI-C.

(Art. 6-c, added by L. 1917, ch. 137, in effect April 5, 1917.)

CENTRAL HIGH SCHOOL DISTRICTS.

Section 187. **Formation of central high school district.**

- 188. Request for meeting to vote on establishment of district; notice of meeting.
- 189. Expense of notice.
- 189-a. Conduct of meeting.
- 189-b. Proceedings to be submitted to commissioner of education; order establishing district.
- 189-c. Number and election of members of board of education.
- 189-d. Location of high school site.
- 189-e. Acquisition of site and erection of building.
- 189-f. Issue and sale of bonds.
- 189-g. Powers of board of education; laws applicable.
- 189-h. District meetings; vote upon school taxes.
- 189-i. Apportionment of expenses.
- 189-j. District treasurer; custody and disbursement of funds.
- 189-k. State aid.
- 189-l. Transportation of pupils.

§ 187. **Formation of central high school district.**—Two or more adjoining

school districts may be formed into a central high school district in the manner provided in this article, for the purpose of erecting, establishing and maintaining therein a high school for the secondary education of the pupils residing in such district who have completed the work of the elementary grades in the several school districts included in such central high school district. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 188. **Request for meeting to vote on establishment of district; notice of meeting.**—1. Whenever fifteen qualified electors of each of the districts proposing to establish such central high school district shall sign a request in writing for a meeting of the qualified electors of such districts, to be held for the purpose of determining whether a central high school district be established in conformity with the provisions of this article, it shall be the duty of the board of education of each union free school district and of the trustees of each common school district to give public notice that a meeting of the qualified electors of such districts will be held at a time and place to be specified therein. Such place shall be conveniently accessible to the qualified electors of such districts and the notice shall specify the day and hour of the meeting, which shall be not less than twenty nor more than thirty days after the publication of such notice. If the board of education and trustees of such districts refuse or fail to give such notice within twenty days after such request shall have been presented to them, the commissioner of education may by order authorize and direct an inhabitant of any such districts to give such notice.

2. Such notice shall be published once a week for three consecutive weeks before the meeting in all the newspapers published in any of the districts proposed to be established as a central high school district. In addition to such publication, such notice shall be posted in five conspicuous places in each of such districts at least twenty days prior to the meeting. If there are no newspapers published in any of such districts, such notice shall be posted in at least ten conspicuous places in each of such districts at least twenty days prior to the day of the meeting. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189. **Expense of notice.**—The reasonable expense of the publication and service of such notice, together with the expenses actually incurred in the holding of such meeting, shall be chargeable against the central high school district, if it be established, and shall be levied and collected by the board of education of such district, in the same manner as are other expenses chargeable against such district for the establishment and maintenance of a high school therein. In the event that such central high school district is not established, such expenses shall be chargeable upon the qualified electors signing the request, jointly and severally, to be sued for if necessary in any court having jurisdiction of the same. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-a. **Conduct of meeting.**—Such meeting shall be organized by the election of a chairman and a clerk, and may be adjourned from time to time by a majority vote, provided that such adjournment shall not be for a longer period than ten days. If there are at least fifteen qualified electors present from each of the districts proposing to establish such central high school district, such meeting may by the affirmative vote of a majority of those present and voting from each of such districts adopt a resolution to establish a central high school district comprising the districts voting in favor thereof. If when such resolution is presented a majority of the qualified electors present from one or more of such districts is opposed to the establishment of such central high school district, and a majority of the qualified electors present and voting from each of the other districts is in favor of such resolution, the qualified electors present and voting from the districts in favor of the establishment of such district may adopt a resolution for the establishment of a central high school district comprising the districts voting in favor of such resolution.

The resolutions so submitted shall be voted upon by taking and recording the ayes and noes. The clerk of the board shall keep a poll list containing the names of the qualified electors present from each of the districts and indicating how each of such electors voted upon such resolutions. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-b. **Proceedings to be submitted to commissioner of education; order establishing district.**—A copy of the request of the qualified electors for the meeting to establish such central high school district, the notice of the meeting and the minutes of the proceedings thereof, including the resolutions adopted by the electors present thereat, shall be certified by the chairman and clerk of the meeting and shall be submitted to the commissioner of education. The commissioner shall, upon such notice and after such hearing as he may deem proper, consider the papers submitted to him in respect to the establishment of such district and ascertain as to the advisability of establishing such district. If he deems it for the educational interests of the districts affected that such central high school district shall be established, he shall issue an order under the seal of the department, directing that the said districts be established as a central high school district. The original order shall be filed in the office of the commissioner, and copies thereof shall be filed in the offices of the district clerks of the districts comprising such central high school district, and also in the offices of the town clerks of the town in which such districts or any parts thereof are situated. Such district shall be established as a central high school district upon the execution of such order. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-c. **Number and election of members of board of education.**—The order of the commissioner of education establishing such central high school district shall specify the number of members to constitute the board of

education of such district and the number of members representing each of the districts included in such district. The number of such members shall be not less than five. There shall be at least one member of such board from each common school district and at least two from each union free school district. The board of education of each union free school district in such central high school district shall appoint the number of persons so designated by the commissioner to represent such district as members of the board of education thereof. In each common school district having a sole trustee, such trustee shall represent such district as a member of the board of education of such central high school district. If a common school district have three trustees, such board of trustees shall designate one of its members to represent such district as a member of such board of education. The persons so designated shall be members of the board of education of the central high school district during their terms of office as members of the board of education or as trustees of the districts respectively represented by them. Whenever a vacancy shall occur in the office of a member of the board of education of such central high school district, it shall be filled as above provided. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-d. **Location of high school site.**—The board of education of such central high school district shall designate the site of the central high school in such district by resolution containing a description thereof by metes and bounds. If such board of education is unable to agree as to the selection of a site for such high school building, or shall for any reason neglect or refuse to designate such site, the commissioner of education may upon submission of the question to him, after a hearing and due investigation, issue an order determining the location of the site of such building. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-e. **Acquisition of site and erection of building.**—The board of education of a central high school district shall, when the site of the said high school building shall have been designated as provided herein, submit to the qualified electors of such district a proposition authorizing the levy and collection of a tax, in one sum or by installments, sufficient in amount for the purchase or acquisition of such site.

The said board of education shall also submit to the qualified electors of the said central high school district a proposition authorizing the levy and collection of a tax in installments, for the erection on such site of a new building suitable for high school purposes and for the construction of such improvements or structures on such site as may be required for the establishment and maintenance of a high school in such district.

Such propositions shall be voted upon by the qualified electors of the district at a meeting called by the board of education of such central high school district, and for the purpose of voting upon such propositions the said district shall be deemed to be a school district and the provisions of this

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chapter relative to district meetings and the adoption of propositions authorizing the levy of school taxes shall apply to meetings held in such central high school district for the purposes herein specified. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-f. **Issue and sale of bonds.**—The board of education of such central high school district may, when a tax shall have been voted at a meeting of the qualified electors thereof, to be collected in installments, for the purpose of purchasing or acquiring a schoolhouse site or for erecting a school building or for the construction of improvements or structures on such site, as provided in the preceding section, borrow so much of the sum voted as may be necessary, at a rate not exceeding six per centum, and issue bonds or other evidences of indebtedness therefor, which shall be a charge upon the district and be paid at maturity, and which shall not be sold below par. Such bonds shall be sold in the manner provided by section four hundred and eighty of this chapter. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-g. **Powers of board of education; laws applicable.**—The board of education of such central high school district shall have the same powers and duties in respect to the school therein as a board of education of a union free school district has, under this chapter, in respect to the schools in such district. Except as otherwise provided in this article, the provisions of this chapter as to the courses of study, the qualifications and employment of teachers and the maintenance, conduct and supervision of public schools in union free school districts shall apply to a central high school in a central high school district established as herein provided. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-h. **District meetings; vote upon school taxes.**—The annual meeting of a central high school district shall be held on the first Tuesday in June. Special meetings may be called in the same manner and for the same purposes as special meetings in union free school districts. Such meetings shall be held for the same purposes and in the same manner, and be subject to the same provisions of law, as like meetings in union free school districts, and all persons who are qualified electors of the school districts included in such central high school district may vote at such meetings.

The board of education of such district shall present at the annual meeting a detailed statement in writing of the estimated expenditures required for the support and maintenance of the central high school therein for the ensuing year. The said meeting shall vote the necessary taxes to meet such expenditures, in the same manner as taxes are voted at a district meeting in a union free school district. The provisions of sections three hundred and twenty-two to three hundred and twenty-six, inclusive, of this chapter, and all other provisions relative to the making of appropriations, the voting of taxes, and the expenditure of moneys for the

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support, maintenance and expenses of public schools in union free school districts, shall apply to the support, maintenance and expenses of a central high school in a central high school district established as provided in this chapter. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-i. **Apportionment of expenses.**—The board of education of such central high school district shall cause to be apportioned among the school districts included in such district the amount required for the payment of the principal and interest of all bonds issued and sold as provided in this article for the purchase or acquisition of a school house site, the erection thereon of a new school building and the construction of improvements and other structures on such site, and for the payment of the authorized expenditures for the maintenance, support and expenses of such high school during the ensuing school year. There shall be apportioned to each such district such portion of such amount as the assessed valuation of the taxable property in such district bears to the total assessed valuation of all the school districts included in such central high school district. The board of education of such central high school district shall on or before August first of each year present to the board of education of each union free school district and to the trustee or board of trustees of each common school district in such central high school district a certified statement of the portion of such amount to be paid by each of such districts, and the said boards of education, boards of trustees or trustees shall cause the same to be raised by tax on the taxable property in such districts, in the same manner as other taxes for the support and maintenance of the schools therein. The board of education of a central high school district in the county of Westchester shall present such certified statements to the board of education of each union free school district and to the trustees or board of trustees of each common school district in such central high school district on or before the third Tuesday in June each year and such boards of education, boards of trustees or trustees shall include such amount in the annual school taxes of such districts and certify the same to the supervisor of the town before July first each year as provided in the laws applicable to such county. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-j. **District treasurer and clerk; custody and disbursement of funds.**—The board of education of such district shall appoint a treasurer, who shall hold office during the pleasure of the board and shall be subject to the provisions of this chapter relative to the treasurer of a union free school district. The amount raised by tax in the several districts included within the central high school district for the support and maintenance of such central high school, as provided in this section, shall be paid to the treasurer of such central high school district and shall be paid out by him upon the orders of the board of education issued and executed in pursuance of a resolution of said board. The provisions of this chapter relative to the payment of claims against a union free school district shall apply, so far

as practicable, to the payment of claims against a central high school district established as provided in this article. The board of education of such district may appoint one of its members or a qualified elector of such district as clerk of the district. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-k. **State aid.**—Public moneys shall be apportioned to such central high school district on account of the central high school maintained therein, in the same amount and under the same conditions as in the case of apportionments to union free school districts on account of secondary instruction given in the public schools of such districts, under the provisions of this chapter. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

§ 189-l. **Transportation of pupils.**—The board of education of such central high school district may cause transportation to be furnished to the pupils of the districts entitled to attend such central high school who reside so remote from such schools that they will be deprived of the privilege of attendance thereat unless such transportation is furnished. The cost of such transportation shall be a charge against such central high school district and shall be raised by tax without a vote of the district and be paid in the same manner as other expenditures for the support and maintenance of such central high school. The commissioner of education may, upon sufficient notice to such board of education and after an opportunity to such board to be heard in its defense, issue an order directing such board to provide such transportation. (*Added by L. 1917, ch. 137, in effect April 5, 1917.*)

ARTICLE VII.

DISTRICT MEETINGS.

- Section 190. Notice of first meeting of district.
191. Service of notice of first meeting of district.
 192. Second notice of first meeting of district.
 193. Notice of annual meeting.
 194. Time and place of annual meeting.
 195. Annual meetings of districts re-formed after dissolution.
 196. Special meeting to transact business of annual meeting.
 197. Special meetings in common school districts.
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 199. Call of special district meeting by school commissioner.
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 204. Declaration in case of challenge of voter.
 205. Penalty for false declaration or unauthorized vote.
 206. Powers of voters.
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* So in original.

§ 190. **Notice of first meeting of district.**—Whenever any school district shall be formed, or two or more common school districts are consolidated as provided in section one hundred and thirty-two the district superintendent of schools, or any one or more of such district superintendents within whose districts it may be, shall prepare a notice describing such district, and appointing a time and place for the first district meeting, and deliver such notice to a taxable inhabitant of the district. (*Amended by L. 1913, ch. 129.*)

Source.—Education L. 1909, § 80, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 1; originally revised from L. 1864, ch. 555, tit. 7, § 1.

Notice of first meeting.—The notice of the first meeting after the formation of a new school district must be prepared by the commissioner himself and delivered by him to the voter who is to serve the same. *School District No. 23 of Town of Mooers v. Raymond* (1904), 90 App. Div. 614, 86 N. Y. Supp. 182.

§ 191. **Service of notice of first meeting of district.**—It shall be the duty of such inhabitant to notify every other inhabitant of the district qualified to vote at the meeting, by delivering to him a copy of the notice of such meeting, or in case of his absence from home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the place of his abode, at least six days before the time of the meeting.

Source.—Education L. 1909, § 87, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 2; originally revised from L. 1864, ch. 555, tit. 7, § 2.

§ 192. **Second notice of first meeting of district.**—In case such meeting shall not be held, and in the opinion of the school commissioner it shall be necessary to hold such meeting, before the time herein fixed for the first annual meeting, he shall deliver another such notice to a taxable inhabitant of the district, who shall serve it as provided in section one hundred and ninety-one.

Source.—Education L. 1909, § 82, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 3; originally revised from L. 1864, ch. 555, tit. 7, § 3.

§ 193. **Notice of annual meeting.**—1. The district clerk of each common school district shall give notice of the time and place of the annual meeting by posting five notices of such meeting in five conspicuous places in the district five days previous to the date of such meeting. One of such notices must be posted on the front door of the school-house.

2. The clerk of each union free school district shall give notice of the time and place of the annual meeting by publishing a notice once in each week within the four weeks next preceding such district meeting, in two newspapers if there shall be two, or in one newspaper if there shall be but one, published in such district. But if no newspaper shall then be published therein, the said notice shall be posted in at least twenty of the most public places in said district twenty days before the time of such meeting. (*Subd. 2, amended by L. 1915, ch. 171.*)

Source.—Education L. 1909, § 83. This section is new in form.

Publication of notice of annual meeting in Union Free School district. Com. of Educ. Decision (1915), 5 State Dep. Rep. 643.

Failure to properly post the notices of an annual meeting as required by this section does not render the acts and proceedings thereat illegal. Com. of Educ. Decision (1916), 9 State Dept. Rep. 564.

§ 194. Time and place of annual meeting.—The annual meeting of each school district shall be held on the first Tuesday of May in each year, and, unless the hour and place thereof shall have been fixed by a vote of a previous district meeting, the same shall be held in the schoolhouse at seven-thirty o'clock in the evening. If a district possesses more than one schoolhouse, it shall be held in the one usually employed for that purpose, unless the trustees designate another. If the district possesses no schoolhouse, or if the schoolhouse shall not be accessible, then the annual meeting shall be held at such a place as a trustee, or, if there be no trustee, the clerk, shall designate in the notice. Provided, however, that in union free school districts whose limits do not correspond with those of an incorporated city or village, the board of education may at any regular meeting, by resolution duly adopted and entered upon its minutes, determine that the annual meeting of such union free school district shall be held on the first Tuesday in August; and thereafter until such determination shall be changed, such annual meeting shall be held on the first Tuesday in August in each year; and where any such district shall have heretofore or hereafter determined that the election of the members of the board of education shall be held on the Wednesday next following the day designated by law for holding the annual meeting of such district as provided by section three hundred and three of the education law, such election shall be held at the time so determined until such determination shall be changed. (*Amended by L. 1910, ch. 442, L. 1913, ch. 440, and L. 1915, ch. 232.*)

Source.—Education L. 1909, § 84, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 8; originally revised from L. 1864, ch. 555, tit. 7, § 9, as amended by L. 1883, ch. 413; L. 1889, ch. 245; L. 1894, ch. 127.

References.—Annual school meetings in towns and town school units, Education Law, § 355. Annual school elections in cities, Id. § 209.

Hour of meeting.—The provision of this section that the annual meeting shall be held "at 7:30 in the evening" is not mandatory in the sense that every annual meeting held at a later hour in the evening is invalid. Com. of Educ. Decision (1916), 9 State Dept. Rep. 593. Meeting cannot lawfully proceed prior to the hour designated. Dec. of Supt. (1895), Jud. Dec. 350; Dec. of Supt. (1903), Jud. Dec. 359. Delay in calling meeting to order will not in itself invalidate meeting. Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 392.

District meetings.—Acts and proceedings are presumptively regular. General allegations of irregularities not sufficient to invalidate meeting. Dec. of Com'r, 1 St. Dep. Rep. (Unof.), 435.

Proceedings of meeting marked by riotous conduct and confusion set aside. Dec. of Supt. (1888), Jud. Dec. 328; Dec. of Supt. (1887), Jud. Dec. 345; Dec. of

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Supt. (1888), Jud. Dec. 348; Dec. of Supt. (1896), Jud. Dec. 378; Dec. of Supt. (1886), Jud. Dec. 388; Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 387.

Proceedings of district meeting will not be disturbed for the reason that a number of voters did not attend. Dec. of Supt. (1889), Jud. Dec. 327; Dec. of Supt. (1890), Jud. Dec. 321; Dec. of Supt. 1888), Jud. Dec. 329.

§ 195. **Annual meetings of districts re-formed after dissolution.**—The districts formed by the dissolution of a union free school district, as provided in sections one hundred and forty-six and one hundred and forty-seven of this chapter shall hold their annual meetings on the first Tuesday of May next after the dissolution of such union free school district, and shall elect officers as now required by law. (*Amended by L. 1913, ch. 129.*)

Source.—Education L. 1909, § 87, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 38; originally revised from L. 1880, ch. 210, § 7, as amended by L. 1883, ch. 413, § 16, L. 1889, ch. 245, § 13.

§ 196. **Special meeting to transact business of annual meeting.**—Whenever the time for holding the annual meeting in school districts shall pass without such meeting being held in a district, a special meeting shall thereafter be called by the trustees or by the clerk of such district for the purpose of transacting the business of the annual meeting; and if no such meeting be called by the trustees or the clerk within ten days after such time shall have passed, the school commissioner of the commissioner district in which said school district is situated or the commissioner of education may order any inhabitant of such district to give notice of such meeting in the manner provided in section one hundred ninety-one, and the officers of the district shall make to such meeting the reports required to be made at the annual meeting, subject to the same penalty in case of neglect; and the officers elected at such meeting shall hold their respective offices only until the next annual meeting and until their successors are elected and shall have qualified.

Source.—Education L. 1909, § 85, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 9; originally revised from L. 1864, ch. 555, tit. 7, § 10.

Trustee elected at special meeting.—A person elected trustee at such special meeting has all the rights of a person elected at the annual meeting. Dec. of Supt. (1890), Jud. Dec. 1262.

Election of district officers at special meeting called to transact the business of the annual meeting will not be sustained, where no sufficient notice was given, no ballot-box provided or ballot taken. Dec. of Com'r (1917), 10 St. Dep. Rep. 468.

When meeting may be called.—Where annual meeting was in fact held although irregularly conducted there is no authority for calling special meeting under this section until proceedings are set aside on appeal to the commissioner. Dec. of Com'r (1909), Jud. Dec. 302; Dec. of Supt. (1894), Jud. Dec. 402.

§ 197. **Special meetings in common school districts.**—1. A special district meeting shall be held whenever called by the trustees. The notice thereof shall state the purposes for which it is called, and no business shall be transacted at such special meeting, except that which is specified in the

notice; and the district clerk, or, if the office be vacant, or the clerk be sick or absent, or shall refuse to act, a trustee, or some taxable inhabitant, by order of the trustees, shall serve the notice upon each inhabitant of the district qualified to vote at district meetings, at least six days before the day of the meeting, in the manner prescribed in section one hundred ninety-one.

2. The inhabitants of a district may, at any annual meeting, adopt a resolution prescribing some other mode of giving notice of special meetings, which resolution and the mode prescribed thereby shall continue in force until rescinded or modified at some subsequent annual meeting.

Source.—Education L. 1909, § 86, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 6; originally revised from L. 1864, ch. 555, tit. 7, § 6, as amended by L. 1875, ch. 567, § 15.

References.—All districts in towns except union free school districts having a population of 1500 or more or employing fifteen or more teachers are within town system, Education Law, § 331; special elections or school meetings in towns, *Id.* § 357.

Personal service of notice.—A meeting of the inhabitants of a school district held without personal service of notice thereof on any inhabitant of the district, where no resolution changing the mode of notice has been adopted at any annual meeting, is irregular. *Austin v. Board of Trustees* (1910), 68 Misc. 538, 125 N. Y. Supp. 222.

Notice of meeting.—Special meeting called upon two days' notice invalid. *Dec. of Supt.* (1890), *Jud. Dec.* 333. Where every effort was made to serve all voters with notice and it is not shown that illegal votes changed the result, the action of the meeting will be sustained. *Dec. of Supt.* (1887), *Jud. Dec.* 938. Where notice of special meeting was posted in accordance with the custom in the district, and failure to serve was not wilful or fraudulent, action of meeting was sustained. *Dec. of Com'r* (1915), 5 St. Dep. Rep. 583.

Notice to state business to be transacted.—No business may be lawfully transacted at a special meeting except as specified in the notice. *Dec. of Com'r* (1914), 2 St. Dep. Rep. 605. Where certain sites are described in the notice, meeting may not lawfully act on the designation of any other site. *Dec. of Com'r* (1915), 7 St. Dep. Rep. 554.

§ 198. Special meetings in union free school districts.—1. Boards of education shall have power to call special meetings of the inhabitants of their respective districts whenever they shall deem it necessary and proper, in the manner prescribed in subdivision two of section one hundred and ninety-three of this chapter.

2. In union free school districts whose limits correspond with those of any incorporated village or city, the boards of education shall have power to call special meetings of the inhabitants of their respective districts for the purposes mentioned in section four hundred and sixty-seven in the manner prescribed in said subdivision two of section one hundred and ninety-three.

Source.—Education L. 1909, § 88, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 13, subd. 1, 2; originally revised from L. 1864, ch. 555, tit. 9, §§ 9, 14, as amended by L. 1883, ch. 413, §§ 11, 12; L. 1889, ch. 245, §§ 8, 9; L. 1890, ch. 548, § 2; L. 1893, ch. 500, §§ 12, 13.

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References.—Special meetings in towns, Education Law, § 357.

Sufficiency of notice.—The presumption is that the board of education has fairly exercised its discretion in regard to calling of special meeting. Dec. of Com'r (1914), 3 St. Dep Rep. 506; but will not be permitted to call successive meetings to consider matters already passed upon. Dec. of Com'r (1905), Jud. Dec. 87. Meeting set aside for insufficient notice. Dec. of Supt. (1900), Jud. Dec. 356.

§ 199. **Call of special district meeting by school commissioner.**—When the clerk and all the trustees of a school district shall have removed from the district, or their office shall be vacant, so that a special meeting can not be called, as hereinbefore provided, the school commissioner may in like manner given notice of, and call a special district meeting.

Source.—Education L. 1909, § 89, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 4; originally revised from L. 1864, ch. 555, tit. 7, § 4.

§ 200. **Effect of want of due notice of district meetings.**—The proceedings of no district meeting, annual or special, shall be held illegal for want of a due notice to all the persons qualified to vote thereat, unless it shall appear that the omission to give such notice was wilful and fraudulent.

Source.—Education L. 1909, § 90, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 7; originally revised from L. 1864, ch. 555, tit. 7, § 7. A similar provision was also contained in former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 13, subds. 1, 2.

Application.—The provisions of this section will not validate a meeting held without notice to any of the inhabitants. *Austin v. Board of Trustees* (1910), 68 Misc. 538, 125 N. Y. Supp. 222.

This section applies to all meetings, whether special or annual, held in all school districts, and to notices given either by posting, personal service or publication. Com. of Educ. Decision (1915), 5 State Dep. Rep. 643.

The intent of this action is to prevent the nullification of proceedings at district meetings where failure of notice was not intentional, and the qualified electors of the district were not unfairly deprived of the opportunity of participating therein. Com. of Educ. Decision (1915), 5 State Dep. Rep. 643.

Failure to post notices, as required by section 142, will not invalidate a resolution for the establishment of a Union Free School district, where the resolution was favored by a substantial majority of the qualified electors of the district, and where there is nothing indicating that the failure to post such notice was fraudulent or with any purpose of taking unfair advantage of those opposed to the resolution. Com. of Educ. Decision (1915), 4 State Dep. Rep. 642.

Failure to post notices, not wilful or fraudulent, will not invalidate action of meeting. Dec. of Com'r (1916), 9 St. Dep. Rep. 564; Dec. of Com'r (1915), 4 St. Dep. Rep. 642. Irregularity in notice not shown to have affected the result will not be considered. Dec. of Supt. (1890), Jud. Dec. 332; Dec. of Supt. (1890), Jud. Dec. 335; Dec. of Supt. (1886), Jud. Dec. 386. In absence of wilful failure to give proper notice action of meeting will be sustained. Dec. of Com'r No. 363 (1917), 11 St. Dep. Rep.—.

Intentional omission.—Where service of notice upon a majority of the voters was intentionally omitted, meeting is void. Dec. of Supt. (1887), Jud. Dec. 339. Where usual method of calling meeting was intentionally omitted meeting set aside. Dec. of Supt. (1891), Jud. Dec. 341. Where notice is misleading proceedings of meeting set aside. Dec. of Supt. (1891), Jud. Dec. 343.

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Notice of annual meeting.—Proceedings of annual meeting will not be disturbed although no notice was given. The statute fixes the time and place of meeting. Dec. of Supt. (1889), Jud. Dec. 346.

§ 201. **Penalty for failure to serve notice.**—Every taxable inhabitant, to whom a notice of any district meeting shall be delivered for service pursuant to any provisions of this article, who shall refuse or neglect to serve the same, as hereinbefore prescribed, shall forfeit five dollars for the benefit of the district.

Source.—Education L. 1909, § 91, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 5; originally revised from L. 1864, ch. 555, tit. 7, § 5.

§ 202. **Duty to attend district meetings.**—Whenever any district meeting shall be duly called, it shall be the duty of the inhabitants qualified to vote thereat, to assemble at the time and place fixed for the meeting.

Source.—Education L. 1909, § 92, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 10; originally revised from L. 1864, ch. 555, tit. 7, § 11.

Absent voters.—Meeting will not be set aside because voters who knew of meeting chose to absent themselves. Dec. of Supt. (1887), Jud. Dec. 338; Dec. of Supt. (1887), Jud. Dec. 340.

§ 203. **Qualifications of voters at district meetings.**—A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting who is:

1. A citizen of the United States.
2. Twenty-one years of age.
3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following four qualifications:
 - a. Owns or hires, or is in the possession under a contract of purchase of real property in such district liable to taxation for school purposes, or
 - b. Is the parent of a child of school age, provided such child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or
 - c. Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting, or
 - d. Owns any personal property, assessed on the last preceding assessment-roll of the town, exceeding fifty dollars in value, exclusive of such as is exempt from execution.

No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section.

Source.—Education L. 1909, § 93, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 11; originally revised from L. 1864, ch. 555, tit. 7, § 12, as amended by L. 1867, ch. 406, § 7; L. 1881, ch. 492, § 2; L. 1886, ch. 655, § 1. A similar

provision relative to qualifications of voters in union free school districts was contained in former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 8.

Consolidators' note.—This section has been rewritten without change in the qualifications of voters at district meetings for the purpose of simplifying and expressing more clearly the general and the special qualifications which voters must possess in order to be entitled to vote at such meeting.

References.—Qualifications of voters at school meetings in towns, Education Law, § 358. At city school elections, Id. § 210.

Constitutionality.—The trustees of a school district are the authorized managers of the school within its boundaries, and the legislature may determine who shall have the right to vote for such trustees. Matter of Gage (1894), 141 N. Y. 112, 114, 35 N. E. 1094, 25 L. R. A. 781. This case declared L. 1892, ch. 214, permitting women to vote for school commissioners, to be unconstitutional.

Constitutionality of act conferring upon women the right to vote at school meetings considered. Dec. of Supt. (1883), Jud. Dec. 1450.

Qualifications of voters at school district meetings. See Rept. of Atty. Genl. (1905) 519.

The burden of proving disqualification of an elector at a school meeting is upon the person who asserts it, and is not shifted to the alleged illegal voter, until specific facts are presented from which it may be inferred that such voter did not possess the necessary qualifications. Com. of Educ. Decision (1915), 6 State Dep. Rep. 508.

Proof of disqualification.—Allegation as to unqualified voters must be substantiated by competent evidence on appeal. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 408; Dec. of Supt. (1887), Jud. Dec. 205.

The extension of the time for voting until 9 o'clock, although not technically authorized by law, is not a ground for setting aside a meeting where it did not affect the result. Com. of Educ. Decision (1915), 6 State Dep. Rep. 508.

Setting aside election.—An election of a trustee or other school officer may not be set aside on the sole ground that persons voted for such officer who had no right to vote. In order to set aside an election, it must appear affirmatively that a sufficient number of illegal votes were cast for the successful candidate to affect the result. Com. of Educ. Decision (1915), 6 State Dep. Rep. 506.

A person of foreign birth is not a citizen until fully naturalized. Taking out "first papers" is not sufficient. Dec. of Com'r (1915), 6 St. Dep. Rep. 597; Dec. of Supt. (1896), Jud. Dec. 1435; Dec. of Supt. (1854), Jud. Dec. 1419.

Residence of voter.—Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.), 354.

Hiring taxable real property.—A boarder is not a tenant and is not entitled to vote. Dec. of Com'r (1908), Jud. Dec. 1420. Ownership or rental of a room, flat, dwelling or block may entitle person to vote and rent may be payable in work, money, taxes or improvements. Dec. of Supt. (1901), Jud. Dec. 274.

A person who occupies land by sufferance is not entitled to vote under this subdivision. Dec. of Supt. (1889), Jud. Dec. 207.

Clergyman residing in a dwelling owned by church and exempt from taxation is not a hirer of taxable real property within the meaning of the statute. Dec. of Supt. (1894), Jud. Dec. 1444.

Where farmer receives a part of the crops for his services under an agreement to work farm on shares the relation of landlord and tenant does not exist and he is not entitled to vote. Dec. of Supt. (1898), Jud. Dec. 1428; Dec. of Com'r (1907), Jud. Dec. 1432. One who hires real property in the district is entitled to vote although he pays his rent in labor. Dec. of Supt. (1895), Jud. Dec. 1434.

Deeds and leases made for the sole purpose of qualifying a voter are ineffectual for that purpose. Dec. of Com'r (1908), Jud. Dec. 1420.

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An inchoate dower interest in real estate is not sufficient to qualify woman as a voter. Dec. of Supt. (1888), Jud. Dec. 1426.

A reversionary interest in real property subject to life tenancy is not sufficient to qualify voter. Dec. of Com'r (1908), Jud. Dec. 1420; Dec. of Supt. (1888), Jud. Dec. 1426.

Ownership of personal property which is not assessed is not sufficient. Dec. of Supt. (1889), Jud. Dec. 1433. Assessment of personal property must appear on the town assessment rolls of the last preceding year. Dec. of Com'r (1909), Jud. Dec. 1429.

§ 204. Declaration in case of challenge of voter.—If a person offering to vote at any school district meeting shall be challenged as unqualified, by any legal voter in such district, the chairman presiding at such meeting shall require the person so offering, to make the following declaration: "I do declare and affirm that I am, and have been, for the thirty days last past, an actual resident of this school district and that I am qualified to vote at this meeting." And every person making such declaration shall be permitted to vote on all questions proposed at such meeting; but if any person shall refuse to make such declaration, his vote shall be rejected.

Source.—Education L. 1909, § 94, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 12; originally revised from L. 1864, ch. 555, tit. 7, § 13. Challenges at elections in districts of over 300 children of school age were made as provided in former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 15; tit. 8, § 14; such provisions are re-enacted in this section which applies to all school meetings and elections.

References.—Conduct of school meetings in towns and challenges of voters, Education Law, § 362. Challenges of voters on lists of electors in towns, Id. § 359.

Challenges.—Any voter may offer challenge. Dec. of Supt. (1887), Jud. Dec. 206. Chairman may not require voter to answer questions when challenged. Dec. of Supt. (1894), Jud. Dec. 406. Action of meeting not affected by failure to receive challenged vote. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 387.

Failure to challenge.—Where appellant participated in the election, but failed to challenge voters claimed to be disqualified, appeal will not be sustained. Dec. of Com'r (1915), 6 St. Dep. Rep. 515; Dec. of Supt. (1895), Jud. Dec. 247; Dec. of Supt. (1893), Jud. Dec. 415.

Where declaration is made the vote must be accepted. Dec. of Supt. (1888), Jud. Dec. 1436; Dec. of Supt. (1891), Jud. Dec. 1438. The presiding officer is required to administer the declaration when vote is challenged. Dec. of Supt. (1890), Jud. Dec. 214.

§ 205. Penalty for false declaration or unauthorized vote.—A person who shall wilfully make a false declaration of his right to vote at a school meeting, after his right to vote thereat has been challenged, shall be deemed guilty of a misdemeanor. And a person not qualified to vote at such meeting, who shall vote thereat, shall thereby forfeit ten dollars, to be sued for by the supervisor for the benefit of the common schools of the town.

Source.—Education L. 1909, § 95, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 13; originally revised from L. 1864, ch. 555, tit. 7, § 14.

Consolidators' note.—Under the Consolidated School Law there are three separate provisions relative to the penalty for a false declaration of an unauthorized vote. Section 13, tit. 7, makes it a misdemeanor and also provides a penalty of \$5. Section 15 of tit. 7, which relates to common school districts having 300 chil-

dren or more of school age and districts which hold the election on the Wednesday following the day of the annual meeting makes it also a misdemeanor and provides a fine of \$10. Section 14, tit. 8, which relates to union free school districts in which the election is held on Wednesday following the day of the annual meeting, also makes it a misdemeanor and provides a fine of \$10. There appears to be no valid reason for these separate provisions and in this proposed law this section covers all classes of districts. It would seem advisable, therefore, to make the forfeit which may be imposed in a common school district \$10 instead, thus making the law uniform for all classes of districts.

§ 206. **Powers of voters.**—The inhabitants entitled to vote, when duly assembled in any district meeting, shall have power, by a majority of the votes of those present:

1. To appoint a chairman.
2. To appoint a clerk for the time if the district clerk is absent.
3. To adjourn from time to time as occasion may require.
4. To elect one or three trustees as hereinafter provided, a district clerk and a district collector, and in any district which shall so determine, as hereinafter provided, to elect a treasurer, at their first meeting, and so often as such offices or any of them become vacated, except as hereinafter provided.

5. At the first meeting, or at any subsequent annual meeting, or at any special meeting duly called for that purpose, the qualified voters of any school district are authorized to adopt by a vote of a majority of such voters present and voting, to be ascertained by taking and recording the ayes and noes, a resolution to elect a treasurer of said district, who shall be the custodian of all moneys belonging to said district, and the disbursing officer of such moneys. If such resolution shall be adopted, such voters shall thereupon elect by ballot a treasurer for said district. Any person elected treasurer at any meeting other than an annual meeting, shall hold office until the next annual meeting after such election, and until his successor shall be elected or appointed, and thereafter a treasurer shall be elected at each annual meeting for the term of one year (*Subd. 5, amended by L. 1910, ch. 442.*)

6. To fix the amount in which the collector and treasurer shall give bonds for the due and faithful performance of the duties of their offices.

7. To designate a site for a school-house, or for grounds to be used for playgrounds, or for agricultural, athletic center and social center purposes, or, with the consent of the district superintendent of schools within whose district the school district lies, to designate sites for two or more school-houses for the district. Such designation of a site for a school-house, or for such grounds, can be made only at a special meeting of the district, duly called for such purpose by a written resolution in which the proposed site shall be described by metes and bounds, and which resolution must receive the assent of a majority of the qualified voters present and voting, to be ascertained by taking and recording the ayes and noes, or by ballot. (*Subd. 7, amended by L. 1913, ch. 221.*)

8. To vote a tax upon the taxable property of the district, to purchase, lease and improve such sites or an addition to such sites and grounds for the purposes specified in the preceding subdivision, to hire or purchase rooms or buildings for school rooms or school-houses, or to build school-houses; to keep in repair and furnish the same with necessary fuel, furniture and appurtenances, and to purchase such implements, apparatus and supplies as may be necessary to provide instruction in agriculture and other subjects, and for the organization and conduct of athletic, playground and other social center work. (*Subd. 8, amended by L. 1913, ch. 221.*)

9. To vote a tax, not exceeding twenty-five dollars in any one year, for the purchase of maps, globes, reproductions of standard works of art, blackboards and other school apparatus, and for the purchase of text-books and other school necessities for the use of poor scholars of the district. (*Subd. 9, amended by L. 1914, ch. 216.*)

10. To vote a tax for the establishment of a school library and the maintenance thereof, or for the support of any school library already owned by said district, and for the purchase of books therefor, and such sum as they may deem necessary for the purchase of a book-case.

11. To vote a tax to supply a deficiency in any former tax arising from such tax being, in whole or in part, uncollectible.

12. To authorize the trustees to cause the school-houses, and their furniture, appurtenances and school apparatus to be insured by any insurance company created by or under the laws of this state, or any other insurance company authorized by law to transact business in this state.

13. To alter, repeal and modify their proceedings, from time to time, as occasion may require.

14. To vote a tax for the purchase of a book for the purpose of recording their proceedings.

15. To vote a tax to replace moneys of the district, lost or embezzled by district officers; and to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts, or in prosecuting suits or appeals by direction of the district against other parties.

16. To vote a tax to pay whatever deficiency there may be in teachers' wages after the public money apportioned to the district shall have been applied thereto.

17. To vote a tax to pay and satisfy of record any judgments of a competent court which may have been or shall hereafter be obtained in an action against the trustees of the district for unpaid teachers' wages, where the time to appeal from said judgments shall have lapsed, or there shall be no intent to appeal on the part of such district, or the said judgments are or shall be of the court of last resort.

18. Whenever any district shall have contracted with the school authorities of any city, or other school district for the education therein of the

pupils residing in such school district, or whenever in any school district children of school age shall reside so remote from the school-house therein that they are practically deprived of school advantages during any portion of the school year, the inhabitants thereof entitled to vote are authorized to provide, by tax or otherwise, for the conveyance of any or all pupils residing therein to the schools of such city, or district with which such contract shall have been made, or to the school maintained in said district, and the trustees thereof may contract for such conveyance when so authorized in accordance with such rules and regulations as they may establish, and for the purpose of defraying any expense incurred in carrying out the provisions of this subdivision, they may if necessary use any portion of the public money apportioned to such district as a district quota.

Source.—Education L. 1909, § 96, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 14; as amended by L. 1896, ch. 264; L. 1903, ch. 175; L. 1906, ch. 150; originally revised from L. 1864, ch. 555, tit. 7, § 16, as amended by L. 1867, ch. 406, § 8; L. 1875, ch. 567; L. 1881, ch. 632; L. 1893, ch. 500.

References.—Election of members of town board of education, Education Law, §§ 354, 355. Office of trustee, district clerk, collector abolished, Id. § 352. Preparation and adoption of town school budget by town board of education, Id. § 345.

Election of trustee.—Electors may unanimously direct the secretary of the meeting to cast a ballot for trustee, and he may thus be legally elected. Rept. of Atty. Genl. (1894) 250. The superintendents of public instruction, and the present commissioner of education, have held otherwise on appeals from the actions of school meetings. The decisions of the commissioner of education on such appeals are conclusive, Education Law, § 830.

Majority vote of those present and actually voting upon question submitted deemed sufficient. Smith v. Proctor (1892), 130 N. Y. 319, 29 N. E. 312.

Adjourned meeting.—May transact any regular business at adjourned meeting Dec. of Com'r (1907), Jud. Dec. 307; Dec. of Supt. (1887), Jud. Dec. 345. Annual meeting may adjourn and elect trustee at such adjourned meeting. Dec. of Com'r (1909), Jud. Dec. 1442.

Order of business of annual district meeting fully discussed. Dec. of Supt. (1894), Jud. Dec. 1413.

School-houses and sites.—A school district may direct the trustees to accept a conveyance of land as a school-house site, and agree that the district shall build and keep in repair the whole of a division fence. Albright v. Riker (1884), 22 Hun 367, cited 96 N. Y. 643.

The site for a district school-house must be designated by the inhabitants in district meeting; they have no power to delegate the authority to the trustees. Benjamin v. Hull (1837), 17 Wend. 437.

Selection of site.—Notice in common school districts need not contain description of site. Resolution must describe site by metes and bounds. Dec. of Supt. (1903), Jud. Dec. 928. The selection of a site favorably situated and supported by a majority of the voters of the district will be sustained. Dec. of Com'r (1914), 3 St. Dep. Rep. 580. School district meeting duly assembled has jurisdiction to select sites and the department will not interfere unless the proceedings are illegal or grossly opposed to the health and welfare of the school. Dec. of Com'r (1914), 3 St. Dep. Rep. 564; Dec. of Com'r (1905), Jud. Dec. 911; Dec. of Com'r (1907), Jud. Dec. 918; Dec. of Com'r (1907), Jud. Dec. 920; Dec. of Com'r (1905), Jud. Dec. 921; Dec. of Com'r (1910), Jud. Dec. 923; Dec. of Supt. (1886), Jud. Dec. 940;

Dec. of Supt. (1886), Jud. Dec. 941; Dec. of Supt. (1888), Jud. Dec. 946; Dec. of Supt. (1887), Jud. Dec. 949; Dec. of Supt. (1894), Jud. Dec. 959; Dec. of Supt. (1895), Jud. Dec. 961; Dec. of Supt. (1889), Jud. Dec. 967; Dec. of Supt. (1890), Jud. Dec. 968; Dec. of Supt. (1888), Jud. Dec. 969; Dec. of Supt. (1887), Jud. Dec. 970; Dec. of Supt. (1889), Jud. Dec. 978; Dec. of Supt. (1887), Jud. Dec. 981; Dec. of Supt. (1890), Jud. Dec. 982; Dec. of Supt. (1880), Jud. Dec. 983. Action of meeting designating site set aside. Dec. of Supt. (1889), Jud. Dec. 953; Dec. of Supt. (1887), Jud. Dec. 954; Dec. of Supt. (1889), Jud. Dec. 957; Dec. of Supt. (1891), Jud. Dec. 971; Dec. of Supt. (1889), Jud. Dec. 994.

District cannot delegate selection of site to committee. Dec. of Supt. (1886), Jud. Dec. 955. District is not bound by the agreement of trustees to submit price of site to arbitration. Dec. of Supt. (1887), Jud. Dec. 944. Resolution set aside for irregularities. Dec. of Com'r (1915), 4 St. Dep. Rep. 636. Where failure to give due notice prevented the attendance of voters, meeting set aside. Dec. of Supt. (1887), Jud. Dec. 951. School house site cannot be lawfully changed except by action of district meeting duly called for that purpose and by designating new site, described by metes and bounds. Dec. of Com'r (1916), 9 St. Dep. Rep. 603. Board of education directed to call meeting for purpose of voting upon site. Dec. of Com'r (1915), 6 St. Dep. Rep. 544; Dec. of Supt. (1887), Jud. Dec. 939.

Where the site selected is dangerous to health or works a serious hardship to the children the action of the meeting may be set aside. Dec. of Supt. (1894), Jud. Dec. 907; Dec. of Com'r (1906), Jud. Dec. 915; Dec. of Com'r (1906), Jud. Dec. 917; Dec. of Supt. (1888), Jud. Dec. 974.

Written resolution designating site.—The law requires that the new site must be chosen at a special meeting called for such purpose by a written resolution adopted at such meeting in which the proposed site must be described by metes and bounds. No such proceeding is taken at a special meeting where the notice sent out contained a description of three sites which would be considered at such special meeting, and there was no written resolution offered for the adoption of the site in question. Entry in the minutes of the clerk is not sufficient evidence of the adoption of such a resolution. In order to take property by right of eminent domain the school authorities must comply with the conditions of the statute, and until then the land owner may legally object to such condemnation. *Matter of Hemenway* (1909), 134 App. Div. 86, 118 N. Y. Supp. 931.

Voting of tax for school-house.—A tax may be voted at a school meeting for the purpose of paying for a school-house purchased prior thereto. *Williams v. Larkin* (1846), 3 Den. 114.

Insurance of school property.—It is the duty of school trustees to raise funds and insure school property even though not authorized by a district meeting. In case of loss resulting from neglect to do so, the trustees are personally responsible to the district. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 218.

Expense of litigation, power of district meeting to vote a tax to pay. See *People ex rel. Underhill v. Skinner* (1902), 74 App. Div. 58, 77 N. Y. Supp. 36.

The reasonable expenses incurred by a trustee in defending a suit or proceeding in the courts against him in his official capacity or against the district, or in defending an appeal to the Commissioner of Education from his official acts may properly be paid to him under subdivision 15 of this section, but said provision may not be extended to proceedings against the trustee based upon his alleged misconduct. *Com. of Educ. Dec.* (1916), 9 State Dept. Rep. 580.

Proceedings to obtain payment of expenses from district for defending actions and appeals carefully considered and outlined. Dec. of Supt. (1896), Jud. Dec. 36. Action of meeting in allowing claim for legal services paid by officer in defending appeal sustained. Dec. of Supt. (1890), Jud. Dec. 27; Dec. of Supt. (1900), Jud. Dec. 40.

Where district meeting refuses to pay reasonable expenses, appeal may be taken therefrom. Dec. of Supt. (1898), Jud. Dec. 33; such expenses of district officer are chargeable against district. Dec. of Supt. (1885), Jud. Dec. 31; Dec. of Supt. (1890), Jud. Dec. 431; Dec. of Supt. (1895), Jud. Dec. 433.

Tax to pay expenses of committee appointed at annual meeting, in defending libel suits brought against the committee invalid. Dec. of Supt. (1902), Jud. Dec. 776. Tax to pay expense of appeal cannot be allowed unless brought by district officer in his official capacity. Dec. of Supt. (1891), Jud. Dec. 28. Voting tax to pay expenses of litigation not yet commenced is without authority. Dec. of Com'r (1910), Jud. Dec. 304.

Division fences.—School districts are subject to same rules relating to the erection of division fences that apply to all other property owners. Dec. of Supt. (1890), Jud. Dec. 799.

Vocal music.—Voting tax to provide instruction in vocal music sustained. Dec. of Supt. (1888), Jud. Dec. 329.

Rescission of action.—Notice of meeting at which action of former meeting is rescinded not necessarily invalid because it did not state specifically that rescission of former action would be considered where notice fairly informed voters of the purpose. Dec. of Supt. (1890), Jud. Dec. 334.

Transportation.—Where school is maintained in the home district and parents have means of transportation, conveyance at district expense will not be ordered. Dec. of Com'r (1908), Jud. Dec. 1233; Dec. of Com'r (1905), Jud. Dec. 1234. Where distance is too great to walk and parents are unable to provide transportation, district must furnish same. Dec. of Com'r (1913), 1 St. Dep. Rep. 524. It is the settled policy to require transportation in contracting districts where the distance is too great for the children to walk. Dec. of Com'r (1906), Jud. Dec. 155; Dec. of Com'r (1907), Jud. Dec. 170. In contracting districts transportation will not be required unless distance is more than two miles. Dec. of Com'r (1915), 4 St. Dep. Rep. 650. Contract for transportation sustained. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 397.

Public money may not be paid to parents to provide conveyance for their children. A suitable person should be employed by contract to convey pupils. Dec. of Com'r (1905), Jud. Dec. 151.

Trustees may be justified in resisting unreasonable demands with reference to transportation. Dec. of Com'r (1908), Jud. Dec. 167.

§ 207. **Vote on proposition to expend money.**—In all propositions arising at said district meetings, involving the expenditure of money, or authorizing the levy of taxes, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such district meetings.

Source.—Education L. 1909, § 97, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 14; originally revised from L. 1864, ch. 555, tit. 7, § 16, as amended by L. 1867, ch. 406, § 8; L. 1875, ch. 567; L. 1881, ch. 632; L. 1893, ch. 500.

Reference.—Vote on propositions for purchase of sites, erection of buildings, etc., Education Law, § 467, subd. 1.

Vote on appropriation.—Vote must be taken in accordance with the provisions of this section. Dec. of Supt. (1896), Jud. Dec. 126; Dec. of Supt. (1900), Jud. Dec. 265; Dec. of Supt. (1895), Jud. Dec. 270; Dec. of Supt. (1896), Jud. Dec. 368; Dec. of Supt. (1895), Jud. Dec. 410; Dec. of Supt. (1895), Jud. Dec. 1021.

ARTICLE VII-A.

(Added by L. 1917, ch. 791, in effect June 8, 1917.) ,

SCHOOL ELECTIONS IN CERTAIN CITIES.

- Section 208. Application of article.
209. Annual school election.
210. Qualifications of electors.
211. Division of city or district into districts; elections held in school-houses.
212. Notices of election.
213. Preparation of poll lists; correction.
214. Inspectors of election; organization.
215. Nomination and ballot.
216. Conduct of election; challenges.
217. Canvass of votes and return to board of education; declaration of result.
218. Use of voting machines.

§ 208. Application of article.—This article shall apply to each city in the state, in which members of the board of education are elected by the qualified electors of such city at an election other than a general or municipal election. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 209. Annual school election.—1. An annual election shall be held on the first Tuesday of May in each city to which this article applies.

2. The polls of such election shall be open from twelve o'clock noon until eight o'clock in the evening. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 210. Qualifications of voters.—A person shall be entitled to vote at a school election in such city who is:

1. A citizen of the United States.
2. Twenty-one years of age.
3. A resident within the election district for a period of thirty days next preceding the election at which he offers to vote; and who in addition thereto possesses one of the following four qualifications.
 - a. Owns or hires real property in such district or is in the possession of such property under a contract of purchase, assessed upon the last preceding assessment-roll of the city, or
 - b. Is the parent of a child of school age, provided such child shall have attended the public schools in the city in which the election is held for a period of at least eight weeks during the year preceding such election, or
 - c. Not being the parent, has permanently residing with him a child of school age who shall have attended such public schools for a period of at least eight weeks during the year preceding such election, or
 - d. Owns personal property, assessed on the last preceding assessment-

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roll of the city, exceeding fifty dollars in value, exclusive of such as is exempt from execution.

No person shall be deemed to be ineligible to vote at any such election, by reason of sex, who has the other qualifications required by this section. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

Reference.—Same in all respects as qualifications of voters at school district meetings, Education Law, § 203.

§ 211. **Division of city into districts; elections held in schoolhouses.**—The board of education of each such city shall adopt a resolution on or before the first day of April, preceding the first annual school election held hereunder, dividing the city into school election districts. The city shall be so divided, that if circumstances will permit, there shall be a schoolhouse in each district and each district shall contain not more than one thousand qualified voters. The districts thus formed shall continue in existence until modified by resolution of the board of education. Such resolution shall accurately describe the boundaries of such districts by streets, alleys and highways, when practicable, and shall so far as may be, include one or more of the regular election districts of such city. School elections shall be held in such districts so far as may be possible in the public schoolhouses therein. If there is no public schoolhouse in a district the board of education shall by resolution designate the place where the election in such district shall be held. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 212. **Notices of election.**—The board of education shall cause a notice of the annual school election to be published at least once in each week for the four weeks preceding such election, in at least two newspapers published in such city. Such notice shall state the day of the election and the hours during which the polls are to be open, shall accurately describe the boundaries of the school election districts into which the city is divided, and shall specify the schoolhouses or other places therein where such election will be held. Such notice shall also state that poll lists prepared by the clerk of the board of education as required by this article containing the names of the qualified electors of each school election district are on file and may be examined at the office of such clerk or of the superintendent of schools of such city. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 213. **Preparation of poll lists; correction.**—1. The secretary or clerk of the board of education in each such city shall on or before the first day of April in each year prepare a poll list for each school election district which shall contain the names of all persons residing in such district who shall be qualified to vote for candidates for the offices of members of the board of education at the ensuing election. The names on such list shall be arranged alphabetically by the surnames, and the place of residence by street and number of each person named on such list, if any, and if not, some description accurately locating such place of residence shall be given on such list.

2. Such list shall be placed on file in the office of the secretary or clerk of the board of education or some other suitable and accessible place to be designated by the board of education where it may be examined by persons interested therein during the office hours of such secretary or clerk for thirty days preceding the annual school election and from four to eight o'clock in the evening of each Friday and Saturday of the four weeks immediately preceding the election. The secretary or clerk of the board of education or some person to be designated by such board shall attend at such office at such times, and shall permit such lists to be examined by the public.

3. Any person whose name is not upon such list, who is or will be a qualified voter of the city at such election, may file a written statement with the secretary or clerk of the board of education giving his name, place of residence, occupation and the school election district in which he resides, and specifying the qualifications which entitle him to vote at such election. The name of such voter shall thereupon be placed on such poll list. If such person appears before the secretary or clerk of the board of education and furnishes the information above required, such secretary or clerk shall place his name upon the poll list.

4. If a qualified voter is a resident of a school election district and his name appears on a poll list as a resident of another district, a written statement may be filed by such voter with the secretary or clerk of the board of education showing his correct residence and the name of such voter shall thereupon be stricken from such poll list and placed upon the proper poll list.

5. The board of education shall furnish blanks for such statements, which shall be used by the voters in presenting the facts above prescribed. No change or alteration of such list shall be made by any person before the correction and revision thereof as hereinafter provided.

6. Such statements and challenges shall be received and preserved by the secretary or clerk of the board or other person designated by the board, and on the Monday preceding the annual election such secretary or clerk shall correct and revise each of such duplicate lists by striking therefrom and inserting in their proper places the names of persons who have filed the statements above referred to and shall indicate on such lists the persons whose qualifications as voters have been challenged.

7. Such corrected and revised lists shall be filed in the office of the secretary or clerk of the board of education. Such board shall cause a copy of the list of each election district to be delivered on the day of the election, before the opening of the polls therein, to the inspectors of such districts, at the place where the election in such district is to be held.

8. A qualified voter may, upon the examination of such list, file a written challenge of the qualifications as a voter of any person whose name appears on such list. Such challenge shall be written and shall be on blanks

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to be furnished by the board of education. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 214. **Inspectors of election; organization.**—The board of education shall appoint not less than ten days prior to each school election three qualified voters residing in each school election district to act as inspectors of elections in such district at the annual election. The secretary or clerk of the board of education shall give * written notice of appointment to the persons so appointed. If a person appointed an inspector of election refuses to accept such appointment or fails to serve, the board may appoint a qualified voter of the school election district to fill the vacancy. Not more than two additional inspectors of elections for each district may be appointed for one or more of such school election districts, when, in the opinion of the board, special circumstances exist requiring the services of such additional inspectors. Such inspectors shall, before opening the polls in the election district for which they are appointed, organize by electing one of their number as chairman, and one as pole clerk. Each inspector shall receive for his services a compensation of three dollars, to be paid out of the school funds in the same manner as other claims against the city or district. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 215. **Nomination and ballot.**—1. Candidates for members of the board of education in a city to which this article applies shall be nominated by petition directed to the board of education and signed by at least thirty persons qualified to vote at school elections in such city. Such petition shall contain the name and residences of the candidates for the vacancies in the board of education to be filled at the annual election and shall state whether such candidates are nominated for full terms or for the unexpired portions of such terms. Such petitions shall be filed with the secretary or clerk of the board of education on or before the tenth day preceding the day of the annual election.

2. The board of education shall cause to be printed official ballots containing the names of all candidates as above provided. The ballots shall separately state whether the persons named thereon are candidates for full terms or for unexpired terms. The names of the candidates shall be arranged alphabetically according to their surnames in columns under titles or designations showing whether they are to be elected for full terms or unexpired terms. Blank spaces shall be provided so that voters may vote for candidates who have not been nominated for the offices to be filled at such election. The form of such ballots shall conform substantially to the form of ballots used at general elections as prescribed in the election law. Such ballots shall be printed at the expense of the city and the cost thereof shall be paid out of funds appropriated for school purposes and available therefor.

* So in original.

3. There shall be delivered to the inspectors in each school election district on the day of the annual election a supply of such ballots which shall at least equal the number of qualified voters in such district as appears from the poll list thereof.

4. Such ballots shall have printed thereon instructions as to the marking of the ballots and the number of candidates for the several offices for which a voter is permitted to vote.

5. If official ballots are not furnished as above provided, an election of members of a board of education in such city shall not be declared invalid or illegal because of the use of ballots which do not conform to the requirements of this section or of the provisions of the election law, provided the intent of the voter may be ascertained from the use of such irregular or defective ballots and such use was not fraudulent and did not substantially affect the result of the election. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 216. Conduct of election; challenges.—1. Such election shall be conducted, so far as may be, in accordance with the provisions of the election law, relative to general elections, except as otherwise provided herein. Ballot boxes shall be provided by the board of education for each school election district, one to contain the ballots voted and the other for the rejected or defective ballots.

2. All persons whose names appear upon the poll list as residing in such election district shall be permitted to vote and shall be given ballots for such purpose.

3. Booths shall be provided and voters shall be required to enter such booths for the purpose of marking their ballots. The ballots when presented to the inspector shall be folded so as to conceal the names of the candidates for whom the voter has voted.

4. All voters entitled to vote who are in the place where the election is held at or before the time of closing the polls shall be allowed to vote. The inspectors shall keep a poll list, containing the name and address of each qualified elector who votes at such election for the candidates or propositions or questions voted for thereat.

5. Any qualified voter of a district may challenge the right of a person to vote at the time when he requests a ballot. All persons named upon the poll list as having been challenged prior to the day of the election shall also be challenged before they are given ballots to vote. The chairman of the board of inspectors shall administer to each person so challenged the following oath: "I do solemnly swear (or affirm) that I am a citizen of the United States; that I am of the age of twenty-one years or more; that I have been for the thirty days last past an actual resident of this city; and that in addition thereto I possess one of the four qualifications prescribed by section two hundred and ten of the education law, to wit:—(Here state facts upon which qualifications are claimed), and am therefore quali-

fied to vote at this election." The chairman of the board of inspectors shall before administering such oath inform the person so challenged of the four qualifications prescribed by such section. If the person challenged so swears or affirms, he shall be permitted to vote at such election; but if he shall refuse to so swear or affirm, he shall not be given a ballot or be permitted to vote.

6. A person who wilfully swears or affirms falsely as to his right to vote at such election after his right to vote has been challenged is guilty of perjury and may be punished in the manner provided by law for the punishment of such crime. A person who is not qualified to vote at such election who shall vote thereat, although not challenged, shall be guilty of misdemeanor, punishable by a fine of not less than twenty-five dollars, or by imprisonment for not less than thirty days, or by both such fine and imprisonment. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 217. Canvass of votes and return to board of education; declaration of result.—1. Immediately upon the close of the polls the inspectors of each school election district shall count the ballots found in the ballot box without unfolding them, except so far as is necessary to ascertain that each ballot is single. They shall compare the number of ballots found in the ballot box with the number of persons recorded on the poll list as having voted at the election. If the number of ballots found in the ballot box shall exceed the number of names, such ballots shall be replaced without being unfolded in the box from which they were taken and shall be thoroughly mingled in such box and one of the inspectors designated by the board shall then publicly draw out as many ballots as shall be equal to the number of excess ballots. The ballots so drawn out shall be enclosed without unfolding in an envelope which shall be sealed and endorsed with a statement of the number of such excess ballots withdrawn from the box and shall be signed by the inspector who withdrew such ballots. Such envelope with the excess ballots therein shall be placed in the box for the defective or spoiled ballots.

2. The ballots shall be counted or canvassed by the inspectors in the manner provided for the canvassing of ballots at a general election except as otherwise provided herein. The votes cast for each candidate shall be tallied and counted by the inspectors and a statement shall be made containing the names of each candidate receiving votes in such district and the number of votes cast for each candidate. Such statement shall also give the number and describe the ballots which are declared void and shall also specify the number of wholly blank ballots cast. Such statement shall be signed by the inspectors. The ballots which were declared void and not counted shall be enclosed in an envelope which shall be sealed and endorsed as containing void ballots and signed by the inspectors. Such envelope shall be placed in the ballot box containing the defective and spoiled ballots.

3. After the ballots are counted and the statements have been made as

required herein the ballots shall be replaced in the ballot box. Each box shall be securely locked and sealed and deposited by an inspector designated for the purpose with the secretary or clerk of the board of education. The unused ballots shall be placed in a sealed package and returned by the inspector designated for such purpose to the said secretary or clerk at the same time that such ballot boxes are delivered to him. The statement of the canvass of the votes shall be delivered to the secretary or clerk of the board of education on the day following the annual election.

4. The board of education shall meet at the usual place of meeting at eight o'clock in the evening of the day following such election and shall forthwith examine and tabulate the statements of the result of the election in the several school election districts. The said board shall canvass the returns as contained in such statements and shall determine the number of votes cast for each candidate in the several school election districts. The board shall thereupon declare the result of the canvass. The candidates receiving a plurality of the votes cast respectively for the several offices shall be declared elected. The secretary or clerk of the board of education shall record the result of the election as announced by the board of education.

5. The secretary or clerk of the board of education shall within twenty-four hours after the result of the election has been declared serve a written notice either personally or by mail upon each person declared to be elected as a member of the board of education. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

§ 218. **Use of voting machines.**—In a city in which voting machines are used at general or municipal elections, it shall be lawful for the board of education of such city to authorize the use of such voting machines at a school election. When such voting machines are used the law relating to the use of such machines at a general or municipal election shall apply to and govern the use of such machines in a school election. (*Added by L. 1917, ch. 791, in effect June 8, 1917.*)

ARTICLE VIII.

SCHOOL DISTRICT OFFICERS; GENERAL PROVISIONS.

Section 220. Officers of district.

221. Qualifications of officers.

222. Ineligibility to office.

223. Oath of office.

224. Terms of office.

225. Terms of officers of newly created district.

226. Number of trustees; determination of change.

227. Election of officers.

228. Notice and acceptance of election.

229. Refusal of trustee to serve.

230. Penalty for refusal to serve or perform duty.

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- 231. Resignation of district officers.
- 232. Vacating office.
- 233. Filling vacancy in office of trustee.
- 234. Filling vacancy in office of clerk, collector or treasurer.
- 235. Notice of appointment to fill vacancy and filing thereof.
- 236. District records, books, et cetera, are district property.

§ 220. **Officers of district.**—1. Each school district shall have from one to three trustees as the district determines, a clerk, a collector and if the district so decides a treasurer.

2. A union free school district shall have from three to nine trustees as the district shall determine.

Source.—New in form, but declaratory of former provisions creating school offices.

Reference.—Offices of trustee, district clerk, collector and treasurer of common school district, and of members of boards of education of union free school district having less than 1500 population or employing less than fifteen teachers abolished, Education Law, § 352.

§ 221. **Qualifications of officers.**—Every school district officer must be able to read and write and must be a qualified voter of the district.

Source.—Education L. 1909, § 97, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, §§ 23, 14, subd. 5; originally revised from L. 1864, ch. 555, tit. 7, § 24; L. 1864, ch. 555, tit. 7, § 16, as amended by L. 1867, ch. 406; L. 1875, ch. 567; L. 1881, ch. 632; L. 1893, ch. 500.

Reference.—Qualifications of public officers generally, Public Officers Law, § 3.

Qualified electors eligible.—Trustee elected, not being a qualified voter, is not entitled to hold office. Dec. of Supt. (1891), Jud. Dec. 1250. Ownership of one-third interest in real estate situated in the district is sufficient to qualify person to vote and hold office, who possesses qualifications as to age, residence and citizenship. Dec. of Com'r (1916), 8 St. Dep. Rep. 614. The production of written leases was held to show the trustee to be a qualified voter. Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 390.

The mere assertion that a person elected to a district office is not a qualified voter is not sufficient to overturn the election. Dec. of Com'r (1916), 9 St. Dep. Rep. 578.

Under Plattsburgh charter.—Qualifications to hold office of member of board of education under Plattsburgh Charter. Dec. of Com'r (1914), 3 St. Dep. Rep. 557.

§ 222. **Ineligibility to office.**—1. No school commissioner or supervisor is eligible to the office of trustee or member of a board of education, and no trustee can hold the office of district clerk, collector, treasurer or librarian.

2. A person removed from a school district office shall be ineligible to appointment or election to any district office for a period of one year from the date of such removal.

3. Not more than one member of a family shall be a member of the same board of education in any school district.

Source.—Education L. 1909, § 143, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 22; tit. 8, § 5, as amended by L. 1896, ch. 264; tit. 8, § 8, as amended by L. 1896, ch. 337; L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 7, § 23; L. 1864, ch. 555, tit. 9, § 5, as amended by L. 1865, ch. 647; L. 1876, ch. 50; L. 1883,

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ch. 413; L. 1884, ch. 49; L. 1889, ch. 245; L. 1893, ch. 500; L. 1864, ch. 555, tit. 7, § 12, as amended by L. 1886, ch. 655.

Consolidators' note.—Matter included in this section rearranged without change of legal effect.

Reference.—Terms of members of board of education in newly created union School trustee cannot be chosen supervisor, Town Law, § 81.

Eligibility of supervisor.—A trustee of a school district cannot be elected as supervisor. He must resign the office of trustee before his election as supervisor. *People v. Purdy* (1898), 154 N. Y. 539, 48 N. E. 821, 61 Am. St. Rep. 624. See *People ex rel. Martin v. Kenyon* (1912), 152 App. Div. 898, 136 N. Y. Supp. 525, *affd.* (1913), 207 N. Y. 692, 101 N. E. 1117.

The offices of district clerk and collector shall not be held by one person. Com'r of Educ. Dec. (1916), 10 State Dept. Rep. 444.

§ 223. **Oath of office.**—No officer of a school district shall be required to take the constitutional oath of office.

Source.—New.

§ 224. **Term of office.**—1. In a district having three or more trustees the full term of office of trustee shall be three years, but a trustee may be elected for one or two years as provided in this chapter.

2. In a district having a sole trustee the term of office of trustee shall be one year.

3. The term of office of all other district officers shall be one year.

4. One year within the meaning of this section, is a school year. A school year shall be from August first until July thirty-first following (*Subd. 4, amended by L. 1910, ch. 442.*)

Source.—Education L. 1909, § 142, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 24; originally revised from L. 1864, ch. 555, tit. 7, § 25.

Reference.—Superseded so far as relates to officers of common school districts, Education Law, § 352.

§ 225. **Terms of officers of newly created district.**—The terms of all officers elected at the first meeting of a newly created district shall expire on the first Tuesday of May, next thereafter. (*Amended by L. 1913, ch. 129.*)

Source.—Education L. 1909, § 140, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 25; originally revised from L. 1864, ch. 555, tit. 7, § 26, as amended by L. 1883, ch. 413, § 4; L. 1889, ch. 245, § 4; L. 1893, ch. 500, § 7.

§ 226. **Number of trustees; determination of change.**—1. At the first annual meeting next after the erection of a district the electors shall determine, by resolution, whether the district shall have one or three trustees; and if they resolve to have three trustees, shall elect the three for one, two and three years, respectively, and shall designate by their votes for which term each is elected; thereafter in such district, one trustee shall be elected at each annual meeting to fill the office of the outgoing trustee.

2. The electors of any district having three trustees shall have power to decide at any annual meeting by a majority vote of those present and voting, whether the district shall have a sole trustee or three trustees. If they resolve to have a sole trustee, the trustees in office shall continue

in office until their terms of office shall expire. No election of a trustee shall be had in the district until the offices of such trustees shall become vacant by the expiration of their terms of office or otherwise, and thereafter but one trustee shall be elected for said district.

3. The electors of a district having but one trustee may determine at an annual meeting, by a two-thirds vote of the legal voters present thereat, to have three trustees; and upon the adoption of a resolution to that effect, shall proceed to elect three trustees or such number as may be necessary to form a board of three trustees, in the same manner as provided in this section for the election of three trustees at the first annual meeting after the erection of a district; and thereafter in such district, one trustee shall be elected for three years, at each annual meeting, to fill the office of the outgoing trustee.

Source.—Education L. 1909, § 144, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 26; originally revised from L. 1864, ch. 555, tit. 7, § 27, as amended by L. 1883, ch. 413, § 5; L. 1889, ch. 245, § 5; L. 1893, ch. 500.

Reference.—Obsolete because of township system. See Education Law, Art. XIa.

§ 227. Election of officers.—1. All district officers shall be elected by ballot and the trustees shall provide a suitable ballot-box for such purpose.

2. Two inspectors of election shall be appointed in such manner as the meeting shall determine, who shall receive the votes cast, canvass the same and announce the result of the ballot to the chairman.

3. A poll-list containing the name of every person whose vote shall be received shall be kept by the clerk of the meeting.

4. The ballots shall be written or printed, or partly written and partly printed, containing the name of the person voted for and designating the office for which each is voted.

5. The chairman shall declare to the meeting the result of each ballot, as announced to him by the inspectors, and the persons having the majority of votes, respectively, for the several * officers, shall be elected.

Source.—Education L. 1909, § 145, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 14; originally revised from L. 1864, ch. 555, tit. 7, § 16, as amended by L. 1867, ch. 406; L. 1875, ch. 567; L. 1881, ch. 632; L. 1893, ch. 500.

References.—Election of members of board of education in towns and town school units, Education Law, §§ 354, 355. Inspectors of election at town elections, Id. § 361. Conduct of town elections, canvass of votes, declaration of result, Id. §§ 362, 363.

Majority of votes means majority of votes cast, see *Smith v. Proctor* (1892), 130 N. Y. 319, 29 N. E. 312.

Subdivision 5 must be construed as requiring a candidate to receive a majority of the votes cast for all the candidates for the same office. Blank ballots are to be excluded in determining which candidate has received a majority. Com'r of Educ. Dec. (1916), 9 St. Dep. Rep. 593. Candidate must receive majority of all votes cast to be lawfully elected. Dec. of Com'r (1915), 5 St. Dep. Rep. 623; Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 401; Dec. of Com'r (1915), 6 St. Dep. Rep. 533; Dec. of Com'r (1914), 3 St. Dep. Rep. 528; Dec. of Supt. (1893), Jud. Dec.

* So in original.

231; Dec. of Supt. (1895), Jud. Dec. 256; Dec. of Supt. (1894), Jud. Dec. 262. Where officers were elected by a majority of the qualified electors present and voting election sustained. Dec. of Com'r (1915), 6 St. Dep. Rep. 506; Dec. of Com'r (1915), 6 St. Dep. Rep. 540.

Inspectors or tellers appointed by the chairman of the meeting without being authorized to do so by motion or direction having been permitted to serve without protest, will be deemed *de facto* inspectors, and the validity of the election is not impaired by the performance by them of the duties of such officers. Com'r of Educ. Dec. (1916), 9 St. Dep. Rep. 593. Chairman and clerk cannot act as inspectors. Dec. of Supt. (1900), Jud. Dec. 277.

Validity of election; casting of ballot by clerk on motion.—This section requires the election of school officers by votes cast by the qualified electors present and voting at the meeting. The casting of a ballot by the clerk of the meeting as directed by a motion adopted by vote of the qualified electors present, does not constitute the election of a district officer by ballot. Com. of Educ. Decision (1915), 6 State Dep. Rep. 594. Ballot cast by clerk is not a compliance with the statute. Dec. of Com'r (1914), 2 St. Dep. Rep. 650; Dec. of Supt. (1895), Jud. Dec. 214; Dec. of Supt. (1892), Jud. Dec. 259.

Vote must be by ballot.—Procedure defined. Dec. of Supt. (1900), Jud. Dec. 265; Dec. of Supt. (1894), Jud. Dec. 402. An election of district officers by *viva voce* votes is void and of no effect. Com. of Educ. Decisions (1916), 8 State Dep. Rep. 611; Dec. of Com'r (1916), 8 St. Dep. Rep. 611; Dec. of Supt. (1888), Jud. Dec. 1249; Dec. of Supt. (1894), Jud. Dec. 243. Vote by acclamation is not valid. Dec. of Com'r (1914), 2 St. Dep. Rep. 655.

Poll-list.—Election not necessarily illegal because poll-list not kept. Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.), 346.

Commissioner of education has exclusive jurisdiction to determine validity of election of trustees. *Welden v. Lathrop* (1914), 210 N. Y. 434, 104 N. E. 938, Modg. (1912), 149 App. Div. 935, 134 N. Y. Supp. 1150.

The commissioner of education alone has power to declare election invalid upon appeal. Dec. of Com'r (1914), 1 St. Dep. Rep. 542; Dec. of Com'r (1915), 6 St. Dep. Rep. 591; Dec. of Supt. (1895), Jud. Dec. 254. Trustees may not assume to pass upon the validity of the election and call special meeting to elect officers. Dec. of Supt. (1893), Jud. Dec. 395; Dec. of Supt. (1896), Jud. Dec. 427.

When voter precluded from questioning validity of election.—The failure of a voter to participate in the election of trustee and to offer challenges where she deemed the persons to be disqualified, precludes her from questioning the validity of election upon appeal. Com. of Educ. Decision (1915), 6 State Dep. Rep. 615.

Illegal voting; proof.—Election will not be set aside in absence of evidence that sufficient illegal votes were cast for the successful candidate to change the result. Dec. of Com'r (1914), 3 St. Dep. Rep. 584; Dec. of Com'r (1913), 1 St. Dep. Rep. 521; Dec. of Com'r (1916), 8 St. Dep. Rep. 621; Dec. of Com'r (1914), 3 St. Dep. Rep. 517; Dec. of Supt. (1887), Jud. Dec. 205. Where the number of illegal votes cast changed the result a new election was ordered. Dec. of Com'r (1916), 8 St. Dep. Rep. 612. One illegal vote determined the election. Dec. of Com'r 1 St. Dep. Rep. (Unof.), 404; Dec. of Supt. (1887), Jud. Dec. 213. Election set aside where shown that persons desiring to vote were not accorded privilege. Dec. of Com'r (1907), Jud. Dec. 201; Dec. of Supt. (1889), Jud. Dec. 203; Dec. of Supt. (1889), Jud. Dec. 204.

Burden of proof is upon the appellants. Dec. of Com'r (1915), 6 St. Dep. Rep. 508; Dec. of Com'r (1915), 6 St. Dep. Rep. 565. Election will not be set aside where there is insufficient evidence of irregularities. Dec. of Com'r (1915), 6 St. Dep. Rep. 607; Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.), 344.

Irregularities not affecting result of election do not invalidate meeting. Dec. of

L. 1910, ch. 140. School district officers; general provisions. §§ 228, 229.

Com'r (1913), 3 St. Dep. Rep. (Unof.), 350. General charges of fraud and irregularity not sufficient. Facts must be stated and proved. Dec. of Com'r (1914), 2 St. Dep. Rep. 654.

Where appellant participated in meeting and raised no objection to method of voting or other irregularities now complained of election will be sustained. Dec. of Com'r (1915), 6 St. Dep. Rep. 543; Dec. of Supt. (1895), Jud. Dec. 247; Dec. of Supt. (1895), Jud. Dec. 250; Dec. of Supt. (1888), Jud. Dec. 283; Dec. of Supt. (1888), Jud. Dec. 284.

Where irregularities in conduct of meeting are due to the fault and neglect of petitioner he will not be heard to complain. Dec. of Com'r (1914), 2 St. Dep. Rep. 648.

While an informal ballot may be taken, an election may not be declared thereon. Dec. of Supt. (1895), Jud. Dec. 224. Where ballot has been taken which shows a majority for one candidate vote cannot be reconsidered. Dec. of Supt. (1895), Jud. Dec. 245; Dec. of Supt. (1895), Jud. Dec. 281.

Form of ballots.—The words "For Trustee" need not appear on ballot taken at annual meeting. Dec. of Supt. (1895), Jud. Dec. 279. Where one name appeared printed and another written on same ballot, the presumption is that voter intended to vote for latter. Dec. of Supt. (1887), Jud. Dec. 211.

Rules as to counting ballots declared. Dec. of Supt. (1888), Jud. Dec. 237; Dec. of Supt. (1892), Jud. Dec. 241; Dec. of Supt. (1894), Jud. Dec. 235. Where two ballots are found folded together and the number of ballots cast exceeds the poll list, the ballot is presumed to be fraudulent and should be rejected. Dec. of Com'r (1916), 8 St. Dep. Rep. 609. Blank ballots are to be excluded in determining whether a candidate received a majority of the votes cast. Dec. of Com'r (1916), 9 St. Dep. Rep. 593.

Erroneous declaration of result invalidates election. Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.), 353.

Chairman may not decide the election. His duty is to announce the result of the ballot. Dec. of Supt. (1898), Jud. Dec. 218.

Candidate ineligible.—Where candidate elected was not eligible a new election must be ordered. Dec. of Supt. (1885), Jud. Dec. 268.

Official records of meeting will be accepted as true unless impeached by clear evidence. Dec. of Supt. (1889), Jud. Dec. 207.

De facto officer.—Where a person is elected by color or form of election although not valid he becomes a de facto officer. Dec. of Supt. (1894), Jud. Dec. 221. Acts of de facto officer are binding upon the district. Dec. of Supt. (1826), Jud. Dec. 426; Dec. of Supt. (1841), Jud. Dec. 425.

§ 228. Notice and acceptance of election.—1. The district clerk shall forthwith notify in writing each person elected to office of his election and the date thereof.

2. Such person shall be deemed to have accepted the office, unless within five days after the service of such notice, he shall file his written refusal with the clerk. The presence of any such person at the meeting which elects him to office, shall be deemed a sufficient notice to him of his election.

Source.—Education L. 1909, § 146, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 27; originally revised from L. 1864, ch. 555, tit. 7, § 28, as amended by L. 1867, ch. 406, § 11.

§ 229. Refusal of trustee to serve.—A trustee who publicly declares that he will not accept or serve in the office of trustee, or refuses or neglects to

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attend three successive meetings of the board, of which he is duly notified, without rendering a good and valid excuse therefor to the other trustees vacates his office by refusal to serve.

Source.—Education L. 1909, § 147, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 30; originally revised from L. 1864, ch. 555, tit. 7, § 31.

§ 230. Penalty for refusal to serve or perform duty.—1. Every person chosen or appointed to a school district office and being duly qualified to fill the same who shall refuse to serve therein shall forfeit the sum of five dollars.

2. Every person chosen or appointed to a school district office and not refusing to accept the same who shall wilfully neglect or refuse to perform any duty thereof shall by such neglect or refusal vacate his office and also forfeit the sum of ten dollars.

3. The school commissioner of the commissioner district wherein any such person resides may accept his written resignation of the office, and the filing of such resignation and acceptance in the office of the district clerk shall be a bar to the recovery of either penalty under this section.

4. These penalties shall be for the benefit of the district for which such officer was appointed or elected.

Source.—Education L. 1909, § 148, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 33; originally revised from L. 1864, ch. 555, tit. 7, §§ 34, 35, as amended by L. 1888, § 9.

§ 231. Resignation of district officers.—A school district officer may resign to a district meeting. Such officer shall also be deemed to have resigned if he files a written resignation with the school commissioner of his district and such commissioner endorses thereon his approval and files the same with the district clerk.

Source.—New.

Resignation to district meeting must be unequivocal. Dec. of Supt. (1889), Jud. Dec. 1271. Where trustee states to district meeting in substance that he resigns his office and the vacancy is filled at such meeting he cannot afterward maintain that he continues to hold office. Dec. of Com'r (1916), 9 St. Dep. Rep. 597.

Acceptance of resignation by a person who is not authorized to accept it is void and there is no vacancy. Dec. of Supt. (1895), Jud. Dec. 1285.

Intention to resign.—Words indicating future intention to resign may not be construed as a present resignation. Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 396.

Member of board of education cannot resign to the board. His resignation must be approved by the district superintendent. Dec. of Com'r, 1 St. Dep. Rep. (Unof.), 399.

§ 232. Vacating office.—1. A school district office becomes vacant by the death, resignation, refusal to serve, incapacity, removal from the district or from office.

2. The collector or treasurer vacates his office by not executing a bond to the trustees, as herein required.

L. 1910, ch. 140. School district officers; general provisions. § 233.

3. A trustee or a member of a board of education vacates his office by the acceptance of either the office of school commissioner or supervisor.

Source.—Education L. 1909, § 149, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 28, in part; tit. 5, § 5, in part; originally revised from L. 1864, ch. 555, tit. 7, § 23; L. 1864, ch. 555, tit. 7, § 29; L. 1864, ch. 555, tit. 2, § 5.

Reference.—Vacancies in offices of members of town board of education, Education Law, § 335.

Failure to file a bond by the collector within the prescribed time does not invalidate his acts done before filing. Duntley v. Davis (1886), 42 Hun 229.

Trustee cannot assume to declare office of collector vacant for failing to file his bond where he has not notified the collector to file such bond. Dec. of Supt. (1891), Jud. Dec. 423. A collector who refuses to furnish bond vacates his office and the trustee may appoint. Dec. of Supt. (1889), Jud. Dec. 991.

Residence of trustee.—A residence once acquired remains until a new one is acquired. Dec. of Supt. (1900), Jud. Dec. 575. Renting a room and storing goods therein is not sufficient to maintain residence in district. Dec. of Com'r (1906), Jud. Dec. 579.

Absence from district.—Although the trustee has accepted employment out of the district and is absent therefrom his office may not be declared vacant without a proceeding duly brought for that purpose. Dec. of Com'r (1914), 2 St. Dep. Rep. 596. A mere temporary absence does not constitute a removal from the district. Dec. of Supt. (1892), Jud. Dec. 111.

Refusal to serve.—Abandonment of office may constitute refusal to serve. Dec. of Supt. (1890), Jud. Dec. 1276; Dec. of Supt. (1890), Jud. Dec. 1283; Dec. of Supt. (1891), Jud. Dec. 1281; Dec. of Supt. (1894), Jud. Dec. 1278.

Trustee as collector.—Where trustee accepts office of collector he vacates office as trustee. Dec. of Supt. (1890), Jud. Dec. 1273.

Effect of election as town supervisor. See People ex rel. Martin v. Kenyon (1912), 152 App. Div. 898, 136 N. Y. Supp. 525, affd. (1913), 207 N. Y. 692, 101 N. E. 1117 (dissenting opinion of Judge Robson).

Effect of resignation of school trustee after his election as supervisor, see People v. Purdy (1897), 154 N. Y. 439, 48 N. E. 821, affg. (1897), 21 App. Div. 66, 47 N. Y. Supp. 601.

§ 233. Filling vacancy in office of trustee.—1. A vacancy in the office of trustee in any district may be filled by election within thirty days after it occurs. If not so filled the school commissioner of the commissioner district, within which the school-house or principal school-house of the district is situated, may appoint a competent person to fill it.

2. If a vacancy in the office of trustee in a union free school district exists the commissioner of education may order a special election for filling such vacancy. When such special election is ordered the vacancy shall not be filled otherwise.

3. If such vacancy is supplied by a district meeting, it shall be for the balance of the unexpired term; but when such vacancy is supplied by appointment by a school commissioner it shall be only until the next annual meeting of the district.

Source.—Education L. 1909, § 150, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 29; originally revised from L. 1864, ch. 55, tit. 7, § 30, as amended by L. 1888, ch. 331.

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References.—Powers of trustees when vacancies on board exist, Education Law, § 274. Vacancies in board of education, Id. § 310, subd. 16; in town board of education, Id. § 335.

Vacancies in board of education of union free school district.—Where a member of a board of education of a union free school district, whose term will expire July 31, 1911, is re-elected for a full term, at the annual election in May, 1911, but soon afterward dies, successive vacancies will be occasioned, one for the term nearly completed and one August 1st thereafter, on the beginning of the full term for which he was re-elected, each of which vacancies may be filled by special election, if it is ordered, or by appointment by the board of education, in case no special election is held. If the vacancy is filled by election, it will be filled for the remainder of the term, and if by appointment, it will be until the next annual election. Rept. of Atty. Genl. (1911), Vol. 2, p. 572.

A special election may be ordered by the Commissioner of Education for filling a vacancy in the office of trustee of a union free school district. Rept. of Atty. Genl. (1911), 514.

Filling vacancy by school commissioner.—Where district had no notice of vacancy in office appointment made by school commissioner is invalid. Dec. of Supt. (1891), Jud. Dec. 1275.

District meeting cannot elect for a shorter period than the unexpired term. Dec. of Supt. (1888), Jud. Dec. 210.

§ 234. Filling vacancy in office of clerk, collector or treasurer.—A vacancy in the office of clerk, collector or treasurer, may be filled by appointment by the trustees of the district, and the appointees shall hold their respective offices until the next annual meeting of the district, and until their successors are elected and have qualified.

Source.—Education L. 1909, § 151, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 31; originally revised from L. 1864, ch. 555, tit. 7, § 32.

References.—Obsolete so far as relates to school districts in township system, Education Law, § 352. Town collector to collect town school tax, Id. § 346. Appointment of town school clerk and treasurer, Id. § 333.

§ 235. Notice of appointment to fill vacancy and filing thereof.—Every appointment to fill a vacancy shall be forthwith filed, by the school commissioner or trustees making it, in the office of the district clerk, who shall immediately give notice of the appointment to the person appointed.

Source.—Education L. 1909, § 152, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 32; originally revised from L. 1864, ch. 555, tit. 7, § 33, as amended by L. 1888, ch. 331, § 8.

Reference.—School commissioner's duties performed by district superintendent of schools, Education Law, § 397.

§ 236. District records, books, etc., are district property.—The records, books and papers belonging or appertaining to the office of any officer of a school district are hereby declared to be the property of such district and shall be open for inspection by any qualified voter of the district at all reasonable hours, and any such voter may make copies thereof.

Source.—Education L. 1909, § 170, subd. 11.

ARTICLE IX.

DISTRICT CLERK; TREASURER; COLLECTOR.

Section 250. Duties of district clerk.

251. Duties of district treasurer.

252. Collector's bond.

253. Collector to disburse teacher's fund.

254. Clerk, treasurer and collector in union free school district.

255. Payments and reports by collector.

256. Liability of collector for moneys lost.

257. Remedy of trustees against collector in default.

§ 250. Duties of district clerk.—It shall be the duty of the clerk of each school district:

1. To record the proceedings of all meetings of the voters of his district in a book to be provided for that purpose by the district, and to enter therein true copies of all reports made by the trustees to the school commissioner.

2. To give notice, in the manner prescribed by section one hundred ninety-one, of the time and place of holding special district meetings called by the trustees.

3. To affix a notice in writing of the time and place of any adjourned meeting, when the meeting shall have been adjourned for a longer time than one month, in at least five of the most public places of such district, at least five days before the time appointed for such adjourned meeting.

4. To give the required notice of every annual district meeting.

5. To give notice immediately to every person elected or appointed to office of his election or appointment; and also to report to the town clerk of the town in which the school-house of his district is situated, the names and post-office addresses of such officers, under a penalty of five dollars for neglect in each instance.

6. To notify the trustees of every resignation duly accepted by the school commissioner.

7. To keep and preserve all records, books and papers belonging to his office and to deliver the same to his successor. For a refusal or neglect so to do, he shall forfeit fifty dollars for the benefit of the schools of the district, to be recovered by the trustees.

8. To obey the order of the school commissioners as to depositing the books, papers and records of his office in the town clerk's office in case the district shall be dissolved.

9. To attend all meetings of the board of trustees when notified, and keep a record of their proceedings in a book provided for that purpose.

10. To call special meetings of the inhabitants whenever all the trustees of the district shall have vacated their office.

11. To immediately notify the county treasurer of the name and address of persons elected to the office of district treasurer, if a treasurer is

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elected, and of the district collector. (*Subd. 11, added by L. 1916, ch. 314.*)

Source.—Education L. 1909, § 170, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 34; originally revised from L. 1864, ch. 555, tit. 7, § 27, as amended by L. 1865, ch. 647, § 10.

References.—Office of district clerk of common school district abolished, Education Law, § 352. Town board of education to appoint district clerk and prescribe his duties, Id. § 333.

Inspection of records.—It is the duty of the clerk to permit free inspection of the records of the district at reasonable times. Dec. of Supt. (1893), Jud. Dec. 438.

§ 251. Duties of district treasurer.—1. The treasurer of a school district shall be the custodian of all moneys belonging to the district from whatever source derived, and it is hereby made the duty of the trustees of such district to pay to such treasurer any and all moneys that may come into their hands belonging to such district derived from sales of personal or real property of the district, from insurance policies, from bonds of the district issued and sold by them, or from any other source whatever.

2. The collector of such district shall pay over to such treasurer all moneys collected by him under and by virtue of any tax list and warrant issued and delivered to him.

3. Such treasurer is hereby authorized and empowered to demand and receive from the supervisor of the town in which such school district is situated all public money apportioned to said district.

4. It shall be the duty of such treasurer within ten days after notice of his election to execute and deliver to the trustees of such district, his bond in such sum as shall have been fixed by a district meeting or as such trustees shall require, with at least two sureties to be approved by such trustees, conditioned to faithfully discharge the duties of his office, and to well and truly account for all moneys received by him, and to pay over any sums of money remaining in his hands to his successor in office. Such bond when so executed and approved in writing by such trustees shall be filed with the district clerk.

5. No moneys shall be paid out or disbursed by such treasurer except upon the written orders of a sole trustee, or a majority of the trustees.

6. Such treasurer shall, whenever required by such trustees report to them a detailed statement of the moneys received by him, and his * disbursements, and at the annual meeting of such district he shall render a full account of all moneys received by him and from what source, and when received, and all disbursements made by him and to whom and the dates of such disbursements respectively, and the balance of moneys remaining in his hands.

Source.—Education L. 1909, § 171, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 35.

References.—Office of district treasurers in common school districts and union

* So in original.

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free school districts within township system, abolished, Education Law, § 352. Appointment of treasurer by town board of education, Id. § 333.

Enforcement of treasurer's bond.—The bond of a treasurer may be enforced against sureties, even if not under seal. Board of Education v. Fonda (1879), 77 N. Y. 350. As to leave to bring action on bond running to People under § 1888 of Code of Civil Procedure, see Town of Ulysses v. Ingersoll (1905), 182 N. Y. 369, 75 N. E. 225, rvg. (1903), 81 App. Div. 304, 80 N. Y. Supp. 924.

Liability of treasurer.—Treasurer may be held liable for moneys lost through failure of bank in which money was deposited. Dec. of Supt. (1903), Jud. Dec. 866.

Treasurer de facto.—A treasurer who does not give a bond is an officer *de facto*. Board of Education v. Fonda (1879), 77 N. Y. 350.

Notice of lien filed with treasurer.—The treasurer of the district is the proper person with whom to file a notice of a lien for materials furnished for the erection of a school building. Terwilliger v. Wheeler (1903), 81 App. Div. 460, 465, 81 N. Y. Supp. 173.

§ 252. Collector's bond.—1. Within such time, not less than ten days, as the trustees shall allow him for the purpose, the collector, before receiving the first warrant for the collection of money, shall execute a bond to the trustees, with one or more sureties, to be approved by a majority of the trustees, in such amount as the district meeting shall have fixed, or if such meeting shall not have fixed the amount then in such amount as the trustees shall deem reasonable, conditioned for the due and faithful execution of the duties of his office.

2. The trustees, upon receiving said bond, shall, if they approve thereof, indorse their approval thereon, and forthwith deliver the same to the town clerk of the town in which said collector resides, and said clerk shall file the same in his office, and enter in a book to be kept by him for that purpose, a memorandum, showing the date of said bond, the names of the parties and sureties thereto, the amount of the penalty thereof, and the date and time of filing the same, and said town clerk is authorized to receive as a fee for such filing and memorandum the sum of twenty-five cents, which sum is hereby made a charge against the school district interested in said bond.

Source.—Education L. 1909, § 172, revised from former Con. Sch. L. (L. 1864, ch. 556) tit. 7, § 80; originally revised from L. 1864, ch. 556, tit. 7, § 83, as amended by L. 1875, ch. 567, § 24; L. 1887, ch. 334; L. 1890, ch. 175.

References.—Office of collector in common school district and union free school district in township system abolished. Education Law, § 352. Town school taxes to be collected by town collector, Id. § 346. Town collector's bond, and filing and lien thereof, Town Law, §§ 114, 115, and cases cited thereunder. Satisfaction of town collector's bond, Tax Law, § 88. Official undertakings generally, Public Officers Law, §§ 11–13.

Construction.—The provision prescribing time within which a bond shall be given is directory. Duntley v. Davis (1886), 42 Hun 229.

Bond; necessity for.—A collector cannot execute a warrant until he has given the bond required by this section. Woodhull v. Bohenblost (1875), 4 Hun 399.

Action on bond.—An action lies in favor of a trustee on the bond: 1st. When he fails to execute his warrant. 2d. If, by his laches, any tax is lost to the dis-

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trict, or he has neglected to pay over any balance in his hands to his successor. *Woodhull v. Bohenblost* (1875), 4 Hun 399.

Action on bond of collector; report of collector.—Where, on appeal from a judgment rendered in Justice's Court in an action by the trustee of a school district on the bond of the school collector of said district to recover forty-four dollars for which, as claimed, he had failed to account, the report of plaintiff prepared and filed pursuant to section 276 of the Education Law, while showing a balance of seventy-two dollars and eight cents in favor of the district, did not disclose whether said amount was in the hands of the supervisor or collector, there being no treasurer of the school district, and the public moneys apportioned to said district are not shown to have been paid to the collector, he is not accountable for money retained by the supervisor and disbursed by him on the order of the trustee, and the judgment in plaintiff's favor will be reversed and a new trial ordered. *Wise v. Bull* (1913), 80 Misc. 205, 141 N. Y. Supp. 917.

§ 253. Collector to disburse teachers' fund.—1. The trustees of a school district which has not a treasurer may direct by resolution duly entered on the minutes of their proceedings the collector of such district to disburse to teachers the money apportioned by the state for teachers' salaries.

2. The collector shall thereupon execute a bond to the trustees, with two or more sureties, in double the amount of the last apportionment, with like condition of sureties, approval of trustees, and amount and like directions as to filing as are required in the preceding section for a bond for the collection of taxes, and conditioned also for the due and faithful execution of the duties of his office as such disbursing agent.

Source.—Education L. 1909, § 173, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 80; originally revised from L. 1864, ch. 555, tit. 7, § 83, as amended by L. 1875, ch. 567, § 24; L. 1887, ch. 334; L. 1890, ch. 175.

Reference.—Disbursement of public moneys by supervisor on order of trustees where collector has not given bond as required in this section, Education Law, § 253. Section rendered obsolete by abolition of office of collector, Id. § 352. Public moneys to be paid to treasurer of town, Id. § 350.

Custody of public moneys.—The supervisor and collector are the custodians of school district moneys and the trustees have no authority to recover or retain such moneys. Dec. of Supt. (1896), Jud. Dec. 868.

§ 254. Clerk, treasurer and collector in union free school district.—1. In every union free school district the board of education shall have power to appoint one of their number, or some other qualified voter in said district who is not a teacher employed therein as clerk of the board of education of such district.

2. Such clerk shall also act as clerk of said district, and shall perform all the clerical and other duties pertaining to his office, and for his services he shall be entitled to receive such compensation as shall be fixed at an annual meeting of such district.

3. In case no provision is made at an annual meeting for the compensation of a clerk the board of education may fix the same.

4. Said board of education in every union free school district whose limits do not correspond with those of an incorporated village or city shall

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appoint a district treasurer, and a collector who shall hold office during the pleasure of the board. The board shall also fix the compensation of the treasurer.

5. Such treasurer and collector shall each, and within ten days after notice in writing of his appointment, duly served upon him, and before entering upon the duties of his office, execute and deliver to the said board of education a bond, with such sufficient penalty and sureties as the board may require, conditioned for the faithful discharge of the duties of his office; and in case such bond shall not be given within the time specified, such office shall thereby become vacant, and said board shall thereupon, by appointment, fill such vacancy.

6. So much of this section as relates to the election of a clerk shall not apply to the towns of Cortlandt and White Plains in Westchester county.

Source.—Education L. 1909, § 174, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 7, in part, as amended by L. 1896, ch. 264; L. 1897, ch. 466, tit. 8, § 42, as amended by L. 1904, ch. 427; originally revised from L. 1864, ch. 555, tit. 9, § 7, as amended by L. 1877, ch. 161. The first sentence of such section is re-enacted in Education Law, § 300. Subdivision 3 of the above section was derived from Cons. Sch. L. (L. 1894, ch. 556) tit. 8, § 42, in part, as amended by L. 1904, ch. 427.

Consolidators' note.—Consolidated School Law, tit. 8, § 7, provides that every union free school district whose boundaries are not the same as the boundaries of an incorporated village shall have a clerk of the board who shall be clerk of the district, and such clerk shall be appointed by the board of education. The law nowhere makes provision for a clerk of a board of education in a district whose boundaries are the same as the boundaries of an incorporated village. Such district is presumed, however, to have a secretary as other provisions of the law relating to the issuance of bonds by a union free school district of this class contain a provision relative to the secretary of the board. In many districts the clerk of the village has acted as clerk of the board of education under the assumption that under a provision of the Village Law he is required to do so. The Village Law provides that the clerk of the village shall be the clerk of all boards, commissions, etc., of the village; but the board of education is not a part of the village. The school district is a separate and distinct corporation and the board of education is no way connected with the village. It seems advisable to correct this matter by providing that in every union free school district the board shall appoint a clerk. This will not bar the board of the district whose boundaries are the same as the boundaries of an incorporated village from appointing the village clerk if they desire to do so. If this change is made in this section of the law, it becomes necessary in the latter part of such section to insert this restrictive clause in the appointment of a district treasurer for the reason that the law provides that the treasurer of the village shall be the treasurer of the school district.

Same person holding two offices.—Duties of clerk and collector are conflicting and these offices may not be held by the same person. Dec. of Com'r (1916), 10 St. Dep. Rep. Appointment of same person as clerk and collector or clerk and treasurer is void. Offices are incompatible. Dec. of Supt. (1896), Jud. Dec. 1403. Same person may not be legally appointed both treasurer and collector. Dec. of Supt. (1901), Jud. Dec. 1416.

Election of district clerk.—Voters in union free school district cannot elect district clerk. Appointment must be by board. Dec. of Supt. (1893), Jud. Dec. 226.

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Review of appointment.—Discretion of the board in appointing treasurer is subject to review. Appointment of an unfit and incompetent person will be set aside. Dec. of Com'r (1908), Jud. Dec. 1398.

Removal of treasurer.—Where treasurer is appointed for a definite term he may not be removed during that term except for cause. Dec. of Supt. (1896), Jud. Dec. 1409.

§ 255. **Payments and reports by collector.**—1. The collector shall keep in his possession all moneys received or collected by him by virtue of any warrant, or received by him from the county treasurer or board of supervisors for taxes returned as unpaid, or moneys apportioned by the state or raised by direct taxation for teachers' wages or library, and pay the same out upon the written order of a majority of the trustees.

2. When a treasurer shall have been elected in a district, the collector shall pay over the moneys collected by him by virtue of his warrant, to said treasurer as provided in section two hundred and fifty-one; and he shall report in writing, at the annual meeting, all his collections, receipts and disbursements, and shall report to the supervisor on or before the first Tuesday of March in each year the amounts of school moneys in his hands not paid out on trustees' orders, and shall pay over to his successor in office, when such successor has duly qualified and given a bond as required by section two hundred and fifty-two, all moneys in his hands belonging to the district.

Source.—Education L. 1909, § 175, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 86; originally revised from L. 1864, ch. 555, tit. 7, § 88, as amended by L. 1887, ch. 333, § 2; L. 1890, ch. 175, § 8.

Reference.—Obsolete so far as relates to common school districts and union free school districts within township system, Education Law, § 352.

Payment of moneys.—A collector is not required to pay moneys collected by him unless an order is drawn upon him therefor. *Woodhull v. Bohenblost* (1875), 4 Hun 399. Order should state purpose of payment. Dec. of Supt. (1886), Jud. Dec. 424.

§ 256. **Liability of collector for moneys lost.**—If by the neglect of the collector any moneys shall be lost to a school district, which might have been collected within the time limited in the warrant delivered to him for their collection, he shall forfeit to such district the amount of the moneys thus lost, and shall account for and pay over the same to the trustees of such district, in the same manner as if they had been collected.

Source.—Education L. 1909, § 176, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 7; originally revised from L. 1864, ch. 555, tit. 7, § 89.

§ 257. **Remedy of trustees against collector in default.**—For the recovery of all such forfeitures, and of all balances, in the hands of the collector, which he shall have neglected or refused to pay to his successor, or to the treasurer of such district, the trustees, in their name of office, shall have their remedy upon the official bond of the collector, or any action and any remedy given by law; and they shall apply all such moneys, when recovered, in the same manner as if paid without suit.

Source.—Education L. 1909, § 177, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 88; originally revised from L. 1864, ch. 555, tit. 7, § 90.

ARTICLE X.

TRUSTEES.

Section 270. Trustees constitute a board and body corporate.

- 271. Property held by trustees as corporation.
- 272. Powers and duties of a sole trustee.
- 273. Mode of exercise of trustees' powers.
- 274. Powers of trustees when vacancies on board exist.
- 275. Powers and duties of trustees.
- 276. Trustees' annual report.
- 277. Annual report of trustees of certain joint districts.
- 278. Trustees' annual report to district.
- 279. Penalty for failure of trustee to account.
- 280. Payment by trustee to successor.
- 281. Trustees' right * to action against predecessors.
- 282. Notice of non-payment of moneys apportioned.
- 283. Taxation for expenses incurred by trustees.
- 284. Issuing order in excess of available funds a misdemeanor.
- 285. Trustees must not be interested in district contracts.

§ 270. Trustees constitute a board and body corporate.—The sole trustee or the trustees of a school district shall constitute a board for such district and such board is hereby created a body corporate.

Source.—Education L. 1909, § 190, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 42.

References.—Board of education of union free school district a body corporate, Education Law, § 300; so also as to town board of education, *Id.* § 336.

Powers of trustees as body corporate.—This section creates the trustees as a body corporate, and the powers conferred by this article are given to the corporate body. *Bassett v. Fish* (1878), 75 N. Y. 303; *Porter v. Robinson* (1883), 30 Hun 209; *Beck v. Kerr* (1902), 75 App. Div. 173, 77 N. Y. Supp. 370.

Power of trustees to contract with librarian for care of school library. See *Bell v. City of New York* (1899), 46 App. Div. 195, 61 N. Y. Supp. 709.

Trustees have those powers which are possessed by a corporation at common law, in addition to the powers expressly conferred, and such corporation may employ an attorney. *Gould v. Board of Education* (1884), 34 Hun 16.

§ 271. Property held by trustees as corporation.—All property which is now vested in, or shall hereafter be transferred to the trustees of a district, for the use of schools in the district, shall be held by them as a corporation.

Source.—Education L. 1909, § 191, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 43; originally revised from L. 1864, ch. 555, tit. 7, § 45.

§ 272. Powers and duties of a sole trustee.—The sole trustee of a district shall possess all the powers and be subject to all the duties, liabilities and penalties which the law imposes upon a board of three trustees.

* So in original.

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Trustees.

L. 1910, ch. 140.

Source.—Education L. 1909, § 192, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 44; originally revised from L. 1864, ch. 555, tit. 7, § 46.

Reference.—Obsolete because office is abolished, Education Law, § 352.

Discharge of teacher.—The sole trustee of a school district has power to discharge a teacher at any time, although the latter's term of service has not expired and he is properly qualified. *Kelderhouse v. Brown* (1886), 17 Abb. N. C. 401, 404. This power is subject to the right of appeal to the commissioner of education as provided in Education Law, § 565.

§ 273. **Mode of exercise of trustees' powers.**—1. The powers committed by law to the trustees of a district must be exercised by them as a board. The board must meet for the transaction of business in accordance with notice of time and place.

2. In a board composed of three trustees, when only two meet to deliberate upon any matter, and the third, if notified, does not attend, or the three meet and deliberate thereon, the conclusion of two upon the matter, and their order, act or proceeding in relation thereto, shall be as valid as though it were the conclusion, order, act or proceeding of the three; and a recital of the two in their minute of the conclusion, act or proceeding, or in their order, act or proceeding of the fact of such notice, or of such meeting and deliberation, shall be conclusive evidence thereof.

3. A meeting of the board may be ordered by any member thereof, by giving not less than twenty-four hours' notice of the same.

Source.—Education L. 1909, § 193, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 45; originally revised from L. 1864, ch. 555, tit. 7, § 47.

Reference.—Obsolete because office of trustee abolished, Education Law, § 352.

Notice of meeting.—Each of the trustees of a school district should be notified of a meeting held for the purpose of signing a warrant for the collection of a school tax and a renewal of such warrant. If one of three trustees is not notified of such meeting and no effort is made to procure his signature to such warrant and renewal, such warrant and renewal are invalid. *Beck v. Kerr* (1902), 75 App. Div. 173, 77 N. Y. Supp. 370. Action of two trustees without notice to third is illegal. Dec. of Supt. (1890), Jud. Dec. 996.

Trustees must meet and act as a board, Dec. of Com'r (1915), 7 St. Dep. Rep. 570.

§ 274. **Powers of trustees when vacancies on board exist.**—1. While there is one vacancy in the office of trustee, the two trustees shall have all the powers and be subject to all the duties and liabilities of the three. And while there are two such vacancies, the trustee in office shall have all the powers and be subject to all the duties and liabilities of the three, as though he were a sole trustee.

2. When a vacancy shall occur in the office of trustee, the board shall immediately call a special meeting of the district to supply such vacancy.

Source.—Education L. 1909, § 194, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 46; originally revised from L. 1864, ch. 555, tit. 7, § 48.

Reference.—Obsolete because office of trustee abolished, Education Law, § 352.

§ 275. **Powers and duties of trustees.**—It shall be the duty of the trustees of a school district, and they shall have power:

1. To call special meetings of the inhabitants of such districts, when ever they shall deem it necessary and proper.

2. To give notice of special, annual and adjourned meetings in the manner prescribed in this chapter, if there be no clerk of the district, or he be absent or incapable of acting, or shall refuse to act.

3. To make out a tax-list of every district tax voted by a district meeting, or authorized by law, which shall contain the names of all the taxable inhabitants residing in the district at the time of making out the list, and the amount of tax payable by each inhabitant, as directed in article fifteen of this chapter.

4. To purchase or lease such schoolhouse sites and other grounds to be used for playgrounds, or for agriculture, athletic center and social center purposes, and to purchase or build such schoolhouses, as a district meeting may authorize; to hire temporarily such rooms or buildings as may be necessary for school purposes; and to purchase such implements, supplies and apparatus as may be necessary to provide instruction in agriculture, or to equip and maintain playgrounds, and to conduct athletic and social center activities in the district, when authorized by a vote of a district meeting. (*Subd. 4, amended by L. 1913, ch. 221.*)

5. To have the custody and safe-keeping of the district school-houses, their sites and appurtenances.

6. To insure the school buildings, furniture and school apparatus in some company created by or under the laws of this state, or in an insurance company authorized by law to transact business in this state, and to comply with the conditions of the policy, and raise by a district tax the amount required to pay the premiums thereon.

7. To insure the school library in such a company in a sum fixed by a district meeting, and to raise the premium by a district tax, and comply with the conditions of the policy.

8. To contract with and employ as many legally qualified teachers as the schools of the district require; to determine the rate of compensation and the term of the employment of each teacher and to determine the terms of school to be held during each school year, and to employ persons to supervise, organize, conduct and maintain athletic, playground and social center activities when they are authorized by a vote of a district meeting as provided by law. The regular teachers of the school may be employed at an increased compensation or otherwise, and by separate agreement, written or oral, for one or more of such purposes. (*Subd. 8, amended by L. 1913, ch. 221.*)

9. To establish rules for the government and discipline of the schools.

10. To prescribe the course of studies to be pursued in such schools. Provisions shall be made for instructing pupils in all schools supported by public money, or under state control, in physiology and hygiene, with special reference to the effect of alcoholic drinks, stimulants and narcotics upon the human system, and in the humane treatment and protection of animals

and birds. (*Subd. 10, amended by L. 1917, ch. 210, in effect April 19, 1917.*)

11. To pay, towards the wages of legally qualified teachers the public moneys apportioned to the district for such purpose by giving them orders therefor on the supervisor, or on the collector or treasurer of such district when duly qualified to receive and disburse the same.

12. To collect by district tax an amount sufficient to pay any judgment or the salaries of teachers for the current school year after deducting from the aggregate amount required for this purpose the amount of public money in the hands of the supervisor, collector or treasurer applicable to the payment of teachers' salaries and to pay the same by written orders on the collector or treasurer.

13. To draw upon the supervisor, the collector or treasurer, when duly qualified to receive and disburse the same, for the school moneys, by written orders signed by the sole trustee, or where there are three trustees, signed by a majority of said trustees as prescribed by subdivisions one and two of section three hundred and sixty of this chapter.

14. To keep each of the school-houses under their charge, and its furniture, school apparatus and appurtenances, in necessary and proper repair, and make the same reasonably comfortable for use, but shall not expend therefor without vote of the district an amount to exceed fifty dollars in any one year.

15. To make any repairs and abate any nuisances, pursuant to the direction of the school commissioner as herein provided, and provide fuel, stoves or other heating apparatus, pails, brooms and other implements necessary to keep the school-houses and the school-rooms clean, and make them reasonably comfortable for use, when no provision has been made therefor by a vote of the district, or the sum voted by the district for said purposes shall have proved insufficient.

16. To provide for building fires and cleaning the school-rooms, and for janitor work generally in and about the school-house, and pay reasonable compensation therefor.

17. To provide bound blank-books for the entering of their accounts, the records of the district and the proceedings of district and trustee meetings, and a list of the movable property of the district and they shall deliver such books to their successors in office.

18. To expend in the purchase of a dictionary, books, reproductions of standard works of art, maps, globes or other school apparatus, including implements, apparatus and supplies for instruction in agriculture, or for conducting athletic playgrounds and social center activities, a sum not exceeding twenty-five dollars in any one year, without a vote of the district. (*Subd. 18, amended by L. 1913, ch. 221, and by L. 1914, ch. 216.*)

19. To establish temporary or branch schools in such places in the district as shall best accommodate the children, and to hire rooms or buildings therefor and to fit up and furnish such rooms or buildings in a suitable

manner for conducting school therein when it is shown:

a. That any considerable number of the children residing in a portion of the district are so remote from the school-house as to render it difficult for them to attend school in such school-house in inclement weather, or;

b. That the school building is overcrowded and proper accommodations are not afforded all the children of the district, or;

c. That for any other sufficient reason suitable and proper school facilities are not provided by the present school accommodations.

Any expenditure made or liability incurred in pursuance of this section shall be a charge upon the district.

Source.—Education L. 1909, § 195, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 47, as amended by L. 1896, ch. 264; L. 1906, ch. 150; originally revised from L. 1864, ch. 555, tit. 7, § 49, as amended by L. 1865, ch. 647, § 9; L. 1867, ch. 406; L. 1879, ch. 264; L. 1888, ch. 331; L. 1890, chs. 73, 175; L. 1884, ch. 30, § 1; L. 1887, ch. 335; L. 1889, ch. 328, §§ 2, 3. Education L. 1909, § 196, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 50, in part; originally revised from L. 1864, ch. 555, tit. 7, § 50, as amended by L. 1884, ch. 179; L. 1886, ch. 292; L. 1893, ch. 500; L. 1867, ch. 406, § 14; L. 1875, ch. 567, § 19. Education L. 1909, § 197, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 53, in part; originally revised from L. 1864, ch. 555, tit. 7, § 53, as amended by L. 1867, ch. 406, § 15. The part of the former section relating to school registers is found in Education Law, §§ 557–558.

Consolidators' note.—Part in regard to procuring a school register omitted for the reason that a uniform register is now furnished by the department to all schools.

References.—Provisions for suitable outbuildings, Education Law, § 457. School commissioner may direct repairs to be made, Id. § 393, subd. 3. Verification of register, Id. § 560, *post*. Town board of education has powers of trustees of school districts, Id. § 340.

Assessment.—A trustee elected after a tax has been voted by the district, is authorized to carry that vote into execution by assessment. *Rawson v. Van Riper* (1873), 1 T. & C. 370, 375.

De facto trustee.—Mere claim to the office and exercising certain duties are not sufficient to constitute a person trustee *de facto*. *Hand v. Deady* (1894), 79 Hun 75, 29 N. Y. Supp. 633.

De facto trustee may contract for purchase of charts, and on dissolution of district, he continues in office for purpose of paying contract price. *Smith v. Coman* (1900), 47 App. Div. 116, 62 N. Y. Supp. 106.

Purchase of school house sites.—See as to designation of site, Education Law, § 460; as to acquisition of lands for site, Id. § 463; acquisition of school house sites by town board of education, Id. § 343.

A deed which conveys land to school trustees for use and purposes of district upon which to erect a school house, without covenant that such lands should not be used for any other purpose, and without provision for forfeiture or a re-entry, transfers title in fee absolute. *Board of Education v. Reilly* (1902), 71 App. Div. 468, 75 N. Y. Supp. 876.

School-house.—Trustee may procure, furnish and heat a room for school purposes when there is no school-house within the district. *De Wolf v. Watterson* (1885), 35 Hun 111, 113.

Library.—Trustees having power to care for a school library may contract with a person to act as librarian thereof. *Bell v. City of New York* (1899), 46 App. Div. 195, 61 N. Y. Supp. 709.

When special meeting to be called.—Trustee should call a special meeting when requested by a reasonable number of the voters to consider the question of building or other proper business. Dec. of Supt. (1887), Jud. Dec. 331; Dec. of Supt. (1896), Jud. Dec. 366; Dec. of Supt. (1896), Jud. Dec. 376. Where there is good reason for meeting the trustee is remiss in not calling meeting as requested by the voters. Meeting ordered called. Dec. of Supt. (1889), Jud. Dec. 305; Dec. of Supt. (1890), Jud. Dec. 323.

There should be substantial reason for calling special meeting. Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 391. Trustee will not be required to call special meeting to reconsider a resolution adopted at a previous meeting providing for a new school building. Dec. of Com'r (1916), 7 St. Dep. Rep. 608.

Discretion of trustees in refusing to call special meeting will be sustained in absence of evidence that the action taken at previous meeting was against the welfare of the district. Dec. of Com'r (1914), 3 St. Dep. Rep. 578. Refusal of trustees to call special meeting sustained. Dec. of Com'r (1915), 4 St. Dep. Rep. 608; Dec. of Supt. (1890), Jud. Dec. 322.

Contracts for building.—Trustees not required to let contract to lowest bidder unless so instructed by voters. Dec. of Supt. (1860), Jud. Dec. 804. Action of trustees in accepting building sustained. Dec. of Supt. (1890), Jud. Dec. 336.

Direction as to construction of building.—Duty of trustee to contract for erection of building when money has been voted by district. Dec. of Com'r (1910), Jud. Dec. 815. Trustee should carry out directions of district meeting relative to new school building. Dec. of Supt. (1887), Jud. Dec. 1261.

Building committee appointed by voters has only advisory powers. May not control action of trustee. Dec. of Com'r (1905), Jud. Dec. 810; Dec. of Supt. (1887), Jud. Dec. 147; Dec. of Supt. (1868), Jud. Dec. 148; Dec. of Com'r (1905), Jud. Dec. 149; Dec. of Supt. (1884), Jud. Dec. 150.

District to own building.—It is the policy of the state that district own its school buildings. Leasing buildings and rooms for school purposes is not authorized except under extraordinary conditions. Dec. of Supt. (1898), Jud. Dec. 560; Dec. of Supt. (1898), Jud. Dec. 568; Dec. of Supt. (1902), Jud. Dec. 572.

Trustees have power to hire rooms for school purposes when necessity requires. Dec. of Supt. (1900), Jud. Dec. 40.

Employment of teachers.—Trustees cannot make a contract with an unlicensed teacher. *Blandon v. Moses* (1883), 29 Hun 606; *Gillis v. Space* (1872), 63 Barb. 177; *O'Connor v. Francis* (1899), 42 App. Div. 375, 59 N. Y. Supp. 28.

A contract made with a teacher beyond the term of the trustee is valid and binding upon the trustee's successors, if in good faith, and without fraud or collusion. *Wait v. Ray* (1876), 67 N. Y. 36.

Trustee not bound by action of district meeting in regard to employment of teacher. Dec. of Com'r (1905), Jud. Dec. 810; Dec. of Com'r (1906), Jud. Dec. 1252. Trustee may pay teacher more than sum authorized by district meeting. Dec. of Com'r (1914), 1 St. Dep. Rep. 560.

Disciplining pupils.—Action of board suspending pupil pending suitable apology to teacher sustained. Dec. of Com'r (1907), Jud. Dec. 509. Indecent acts and language grounds for expulsion. Dec. of Supt. (1895), Jud. Dec. 521. Trustee has not the right to impose a fine on pupil and suspend him until fine is paid. Dec. of Supt. (1873), Jud. Dec. 514. Teacher has no claim upon pupil's time during the noon hour. Dec. of Supt. (1883), Jud. Dec. 519.

Garb of teacher.—Teachers may not wear unusual or distinctive garb indicating membership in a particular sect and calculated to exert sectarian influence upon pupils attending the public schools. Dec. of Supt. (1887), Jud. Dec. 533; Dec. of Supt. (1896), Jud. Dec. 538; Dec. of Supt. (1897), Jud. Dec. 554; Dec. of Supt.

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(1898), Jud. Dec. 560; Dec. of Supt. (1898), Jud. Dec. 568; Dec. of Supt. (1902), Jud. Dec. 572.

Religious exercises.—There is no warrant in law for directing that religious exercises be conducted in school during school hours. Dec. of Supt. (1870), Jud. Dec. 524; Dec. of Supt. (1884), Jud. Dec. 531.

Payment of salaries of teachers; of judgments.—Trustees may levy tax sufficient to pay wages of teachers without vote of the district. Dec. of Supt. (1891), Jud. Dec. 997. Trustees may pay judgment against district out of available funds, or may levy tax for same without vote of district. Dec. of Com'r (1914), 2 St. Dep. Rep. 608.

Repairs and supplies.—Authorized expenses for school purposes are made a charge upon the district and the trustees may raise the amount thereof by tax. *Norris v. Jones* (1894), 81 Hun 304, 308, 27 N. Y. Supp. 209, 30 N. Y. Supp. 1134; *De Wolf v. Watterson* (1885), 35 Hun 111.

Insurance of school property.—It is the duty of school district trustees to raise funds and insure school property even though not authorized by a district meeting. In case of loss resulting from neglect to do so, the trustees are personally responsible to the district. Rept. of Atty. Genl. (1912) Vol. 2, p. 218.

Fuel and heating apparatus.—Action of trustee in expending \$150 for heating apparatus when but \$35 was appropriated by district meeting sustained. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 422. A teacher may close school until fuel is provided to render school room safe and comfortable. Dec. of Com'r (1905), Jud. Dec. 139.

Contract for employment of janitor not authorized by board is not binding. Contract not in writing and not to be performed within one year from the making thereof is void. Dec. of Com'r (1915), 4 St. Dep. Rep. 594.

Purchase of charts, etc.—Where trustee purchased and paid for charts upon his own motion, the district was required to reimburse him for the expense. Dec. of Supt. (1890), Jud. Dec. 767.

Purchase of incidentals.—Trustee may not draw funds from the collector and hold such funds for the purchase of incidentals. Dec. of Com'r (1907), Jud. Dec. 307.

Branch schools.—Where there is a sufficient number of children so remote from the main school as to be deprived of school advantages a branch should be established and maintained. Dec. of Supt. (1893), Jud. Dec. 135; Dec. of Supt. (1895), Jud. Dec. 137; Dec. of Com'r (1905), Jud. Dec. 139. It is intended that trustees exercise a discretion in determining whether a branch school be established for the accommodation of children. Dec. of Com'r (1914), 3 St. Dep. Rep. 531. Direction of trustee in establishing branch school overruled. Dec. of Supt. (1859), Jud. Dec. 136. Branch school not required. Transportation ordered to main school. Dec. of Com'r (1915), 4 St. Dep. Rep. 651.

A board of education will not be required to establish a branch school for the children of one family, two in number. Dec. of Com'r (1916), 8 St. Dep. Rep. 623. Three children is not a "considerable number" within the meaning of this section. Dec. of Com'r (1909), Jud. Dec. 143.

Trustees must exercise reasonable discretion in determining what children of the district shall attend the branch school. Dec. of Com'r (1909), Jud. Dec. 145.

§ 276. **Trustees' annual report.**—The trustees of each district shall make a full report to the commissioner of education upon any particular matter relating to their schools whenever such report shall be required by said commissioner. The trustees of each school district shall, on the first day

of August in each year, make to the school commissioner a report in writing for the year ending on July thirty-first preceding. Such report shall be in such form as the commissioner of education shall prescribe. In every case the trustees shall sign and certify to said report and deliver it to the clerk of the town, in which the school-house of the district is situated; and every such report shall certify:

1. The whole time school has been maintained in their district during the year ending on the day previous to the date of such report, and stating what portion of the time such school has been taught by qualified teachers, and the whole number of days, including holidays, in which the school was taught by qualified teachers.

2. The amount of their drafts upon the supervisor, collector or treasurer for the payment of teachers' salaries during such year, and the amount of their drafts upon him for the purchase of books and school apparatus during such year, and the manner in which such moneys have been expended.

3. The number of children taught in the district school during such year by qualified teachers, and the aggregate days' attendance of all such children upon the school.

4. The number of children residing in their district, over five and under eighteen years of age, who shall have been, on the thirtieth day of August last preceding the date of such report, legal residents of such district. Children supported at a county poor-house or an orphan asylum shall not be included in such enumeration.

5. The number of vaccinated and unvaccinated children of school age in their respective districts.

6. The amount of money paid for teachers' salaries, in addition to the public money paid therefor, the amount of taxes levied in said district for purchasing school-house sites, for building, hiring, purchasing, repairing and insuring school-houses, for fuel, for school libraries, or for any other purpose allowed by law.

7. Such additional information in relation to the schools under their management and control as the commissioner of education shall require.

Source.—Education L. 1909, § 198, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, §§ 59, 60; originally revised from L. 1864, ch. 555, tit. 7, § 60, as amended by L. 1867, ch. 406, § 16; L. 1883, ch. 413; L. 1884, ch. 49; L. 1889, ch. 245; L. 1890, ch. 175; L. 1893, ch. 500; L. 1864, ch. 555, tit. 7, § 61, as amended by L. 1883, ch. 413.

Consolidators' note.—Consolidated School Law, tit. 7, § 60, substituted for same, § 59, subd. 4, which is covered by said § 60.

Reference.—Town board of education to perform duties required of trustees, Education Law, § 340.

Contents of report.—The provisions of subdivisions 2 and 6 of section 276 of the Education Law, relating to the report of a trustee of a school district, contemplate an exact and specific statement of the receipts and payments by the district including the amount of drafts upon the supervisor and collector respectively. *Wise v. Bull* (1913), 80 Misc. 205, 141 N. Y. Supp. 917.

Section cited.—*People ex rel. Brooklyn Children's Aid Society v. Hendrickson*

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(1907), 54 Misc. 337, 104 N. Y. Supp. 122, *affd.* (1908), 125 App. Div. 256, 109 N. Y. Supp. 403, *affd.* (1909), 196 N. Y. 551, 90 N. E. 1163

§ 277. **Annual report of trustees of certain joint districts.**—Where a school district lies in two or more counties, its trustees shall file their annual report in the office of the clerk of the town in which the principal school-house of the district is situated.

Source.—Education L. 1909, § 199, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 61; originally revised from L. 1864, ch. 555, tit. 7, § 62.

§ 278. **Trustees' annual report to district.**—The trustees shall render to the district, at its annual meeting, a just, full and true account in writing, of all moneys received by them respectively for the use of the district, or raised or collected by taxes, the preceding year, and of the manner in which the same shall have been expended, and showing to which of them an unexpended balance, or any part thereof, is chargeable; and of all drafts or orders made by them upon the supervisor, collector, treasurer or other custodian of moneys of the district; and a full statement of all appeals, actions or suits and proceedings brought by or against them, and of every special matter touching the condition of the district.

Source.—Education L. 1909, § 201, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 55; originally revised from L. 1864, ch. 555, tit. 7, § 55.

Reference.—This report required to be made by town board of education to annual school meeting in town, Education Law, § 340.

§ 279. **Penalty for failure of trustee to account.**—By a wilful neglect or refusal to render such account, a trustee forfeits any unexpired term of his office, and becomes liable to the trustees for any district moneys in his hands.

Source.—Education L. 1909, § 200, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 57; originally revised from L. 1864, ch. 555, tit. 7, § 58.

§ 280. **Payment by trustee to successor.**—An outgoing trustee shall forthwith pay, to his successor or any other trustees of the district in office, all moneys in his hands belonging to the district.

Source.—Education L. 1909, § 202, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 56; originally revised from L. 1864, ch. 555, tit. 7, § 56.

§ 281. **Trustees' right of action against predecessor.**—The trustees in office shall sue for and recover any district moneys in the hands of any former trustee, or of his personal representatives, and apply them to the use of the district.

Source.—Education L. 1909, § 203, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 58; originally revised from L. 1864, ch. 555, tit. 7, § 59.

§ 282. **Notice of non-payment of moneys apportioned.**—If any portion of the moneys apportioned to the district shall not be paid by the supervisor, the collector or treasurer, upon the due requirement of the trustees,

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they shall forthwith notify the treasurer of the county and the commissioner of education of the fact.

Source.—Education L. 1909, § 204, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 54; originally revised from L. 1864, ch. 555, tit. 7, § 54, as amended by L. 1890, ch. 175.

§ 283. **Taxation for expenses incurred by trustees.**—When trustees are required or authorized by law, or by a vote of their district, to incur any expenses for such district, and when any expenses incurred by them are made, by express provision of law, a charge upon such district, they may raise the amount thereof by tax in the same manner as if the definite sum to be raised had been voted by a district meeting.

Source.—Education L. 1909, § 205, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 51; originally revised from L. 1864, ch. 555, tit. 7, § 51.

§ 284. **Issuing order in excess of available funds a misdemeanor.**—1. The trustees of a school district shall not issue an order or draft upon a supervisor, collector or treasurer for the payment of the salary of a teacher unless there shall be in the hands of such supervisor, collector or treasurer at the time sufficient money belonging to the district to meet such order or draft.

2. A violation of this section by the trustees of a district shall be a misdemeanor.

Source.—Education L. 1909, § 195, subd. 14.

§ 285. **Trustees must not be interested in district contracts.**—No trustee shall be personally interested directly or indirectly in any contract which he makes in behalf of the district.

Source.—New; but see Education L., 1909, § 241, and Penal Law, § 1868.

Reference.—Public officer not to be interested in contract, Penal Law, § 1868.

Contracts with trustee.—Trustee may not charge district for his own work. Dec. of Supt. (1889), Jud. Dec. 1256; Dec. of Supt. (1889), Jud. Dec. 1256; Dec. of Supt. (1889), Jud. Dec. 1257; Dec. of Supt. (1889), Jud. Dec. 800; Dec. of Supt. (1889), Jud. Dec. 793; Dec. of Supt. (1890), Jud. Dec. 1254; Dec. of Supt. (1895), Jud. Dec. 1009; Dec. of Com'r (1905), Jud. Dec. 448. Trustee removed from office who accepted employment from contractor having contract with district. Dec. of Supt. (1890), Jud. Dec. 463.

Insurance policy may not be written by member of board of education who is also a member of firm of insurance agents and receives a portion of the commissions. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 424.

Purchase of site from member of school board pursuant to resolution adopted at district meeting does not violate this section. Dec. of Com'r (1914), 2 St. Dep. Rep. 641.

Trustee as subcontractor.—Where a board of education contracted for the construction of a school building, the fact that one of the subcontractors subsequently became a member of the board does not deprive him of full rights to enforce his contract, nor does the fact that a member of the board was a stockholder in a corporation, one of the subcontractors, invalidate the lien of that company or make illegal a payment for work actually done and accepted. *Goodrich v. Board of Education*, 137 App. Div. 499, 122 N. Y. Supp. 50.

ARTICLE XI.

BOARDS OF EDUCATION.

- Section 300. Boards of education corporate bodies.
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302. Board of education in district whose boundaries are coterminous with those of an incorporated village or city.
303. Provisions for separate elections in certain districts.
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321. Records; reports.
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328. Application of this article.

§ 300. Boards of education corporate bodies.—The board of education of each union free school district or city is hereby created a body corporate and it shall, at its first meeting and at each annual meeting thereafter, elect one of its members president.

Source.—Education L. 1909, § 220, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 7, as amended by L. 1896, ch. 264; L. 1897, ch. 466; originally revised from L. 1864, ch. 555, tit. 9, § 7, as amended by L. 1877, ch. 161.

* So in original.

References.—Trustees constitute body corporate, Education Law, § 270; so also as to town board of education, Id. § 336.

Action by board of education.—A board of education cannot maintain an action in behalf of the taxpayers of a district, to set aside a legislative act transferring a portion of its territory to another district, on the ground of unconstitutionality. The only persons interested in that question are the taxpayers or creditors of the district affected. Board of education, Union Free School District, No. 6, Town of Cortlandt v. Board of Education, 76 App. Div. 355, 78 N. Y. Supp. 522.

Board of education of city of Little Falls, under city charter (L. 1895, ch. 565, § 42), is not a distinct corporate entity, but is a city agency. Ocorr & Rugg Co. v. City of Little Falls (1902), 77 App. Div. 592, 79 N. Y. Supp. 251, *affd.* (1904), 178 N. Y. 622, 70 N. E. 1104.

Union free school district as municipal corporation may sue and be sued (see General Corporation Law, § 3, sub. 1) but only as to functions falling within the purview of its corporate powers. It may not sue to prevent the withdrawal of a village from the district since such withdrawal only imposes an additional burden on the taxpayers of the district and the school district is not the guardian of the interests of such taxpayers except so far as they pertain to the school affairs of the district. Union Free School District No. 1, Town of Brownville v. Glen Park (1905), 109 App. Div. 414, 96 N. Y. Supp. 428.

Board of education exercises state function.—The board of education of city of New York is independent of city government. "Whether it was a corporate body is not material, for although formally constituted a department of the municipal government, the duties which it was required to discharge were not local or corporate, but related and belonged to an important branch of the administrative department of the state government. . . . If only elected or appointed in accordance with mandates of the law to perform a duty which is neither local nor corporate, and if they are independent of the corporation in the tenure of their offices, and the mode of discharging its duties, they are not servants or agents of the (city) corporation, but public or state officers with such powers and duties as the statute prescribes, and no action lies against the (city) corporation for their acts of negligence." Ham v. City of New York (1877), 70 N. Y. 459. See also Gunnison v. Board of Education (1903), 176 N. Y. 11, 68 N. E. 106.

Not department of state.—Union free school district or board of education thereof is not a public department of state for purpose of compelling preferential employment of veteran as janitor of school building. People ex rel. Burlingame v. Hayward (1897), 19 App. Div. 46, 46 N. Y. Supp. 1083.

Liability of board of education.—The board of education of each free school district or city is a body corporate and any liability created by a wrongful discharge of a teacher employed by it is a liability of the corporation and not that of the members of the board as individuals. Reynolds v. Foster (1910), 66 Misc. 133, 123 N. Y. Supp. 273.

Corporate powers.—Board of education a corporation and to exercise powers as such. Bassett v. Fish (1878), 75 N. Y. 303; Porter v. Robinson (1883), 30 Hun 209.

§ 301. Board of education in district whose boundaries are not coterminous with those of an incorporated village or city.—1. Whenever a union free school district shall be established pursuant to the provisions of sections one hundred and forty-one to one hundred and forty-five of this chapter and the boundaries of such district shall not be coterminous with the boundaries of an incorporated city or village, it shall be the duty of the meeting at which such union free school district is established to elect

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by ballot not less than three nor more than nine trustees, who shall, by the order of such meeting, be divided into three classes, the first to hold until one, the second until two, and the third until three years from the first Tuesday of August next following, except as in the next section provided. Thereafter there shall be elected in such districts, at the annual meeting, trustees to supply the places of those whose terms of office, by the classification aforesaid, expire.

2. The trustees thus elected, shall enter at once upon their offices, and the office of any existing trustees in such districts, before the establishment of a union free school therein, shall cease, except for the purposes stated in section one hundred and thirty-five of this chapter. The said trustees and their successors in office shall constitute the board of education of the union free school district thus established. (*Subd. 2, amended by L. 1910, ch. 442.*)

Source.—Education L. 1909, § 221, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 5, in part, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 9, § 5; as amended by L. 1865, ch. 647; L. 1876, ch. 50; L. 1883, ch. 413; L. 1884, ch. 49; L. 1889, ch. 245; L. 1893, ch. 500. The balance of this section is re-enacted in Education Law, §§ 145, 222, 232.

Consolidators' note.—Part relating purely to district organization is contained in § 145, Article 2, "School districts." Part relating to eligibility of member of board is contained in § 232.

Number of members.—The board of education cannot have less than three members. Dec. of Supt. (1900), Jud. Dec. 107.

§ 302. Board of education in district whose boundaries are coterminous with those of an incorporated village or city.—Whenever said board of education shall be constituted for any district whose limits correspond with those of any incorporated village or city, the trustees so elected shall, by the order of such meeting, be divided into three classes: The first class to serve until one; the second, until two; and the third, until three years after the date of the next charter election in such village or city, and their regular term of service shall be computed from the several dates of such charter elections. Thereafter, there shall be annually elected in such villages and cities, at the charter elections, by separate ballot, to be indorsed "school trustee," in the same manner as the charter officers thereof, trustees of the said union free schools, to supply the places of those whose terms by the classification aforesaid expire.

Source.—Education L. 1909, § 222, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 6; originally revised from L. 1864, ch. 555, tit. 9, § 6.

Annual election of trustees in the Pulaski school district should be held at the same time as the charter election in said village. Rept. of Atty. Genl. (1910) 955.

§ 303. Provisions for separate elections in certain districts.—1. In union free school districts whose limits do not correspond with those of an incorporated village or city, and in which the number of children of school age exceeds three hundred, as shown by the last annual report of the board of education to the school commissioner, the qualified voters of any such

district may by a vote of a majority of those present and voting, at any annual meeting, or at any duly called special meeting, to be ascertained by taking and recording the ayes and noes, determine that the election of the members of the board of education shall be held on the Wednesday next following the day designated by law for holding the annual meeting of said district.

2. Until such determination shall be changed, such election shall be held on the Wednesday next following the day on which such annual meeting of such district shall be held between the hours of twelve o'clock noon and four o'clock in the afternoon at the principal school-house in the district, or at such other suitable place as the trustees may designate.

3. When the place of holding such election is other than at the principal school-house, the trustees shall give notice thereof by the publication of such notice, at least one week before the time of holding such election, in some newspaper published in the district, or by posting the same in three conspicuous places in the district. The trustees may, by resolution, extend the time of holding the election from four o'clock until sunset.

4. Such members of the board of education as may be present, shall act as inspectors of election. If a majority of such board shall not be present at the time of opening the polls, those members of the board in attendance may appoint any of the legal voters of the district present, to act as inspectors in place of the absent trustees; and if none of the board of education shall be present at the time of opening the polls, the legal voters present may choose three of their number to act as inspectors.

5. The clerk of the board of education shall attend at the election and record in a book, to be provided for that purpose, the name of each elector as he deposits his ballot. If the clerk of the board of education shall be absent, or shall be unable or refuse to act, the board of education or inspectors of election shall appoint some person who is a legal voter in the district to act in his place. Any clerk or acting clerk who shall neglect or refuse to record the name of a person whose ballot is received by the inspectors, shall be liable to a fine of twenty-five dollars, to be sued for by the supervisor of the town.

6. The board of education shall, at the expense of the district, provide a suitable box in which the ballots shall be deposited as they are received. Such ballots shall contain the names of the persons voted for, and shall designate the office for which each of said names is voted. The ballots may be either written or printed, or partly written and partly printed. The inspectors immediately after the close of the polls shall proceed to canvass the votes. They shall first count the ballots to determine if they tally with the number of names recorded by the clerk, and if they exceed that number, enough ballots shall be withdrawn to make them correspond. Such inspectors shall count the votes and announce the result. The persons having a plurality of the votes respectively for the several offices

shall be elected, and the clerk shall record the result of such ballot and election as announced by the inspectors. (*Subd. 6, amended by L. 1910, ch. 442.*)

7. Whenever the time for holding such election, as aforesaid, shall pass without such election being held in any such district, a special election shall be called by the board of education, but if no such election be called by said board within twenty days after such time shall have passed, the school commissioner or the commissioner of education may order any inhabitant in said district to give notice of such election in the manner prescribed by section one hundred and ninety-three; and the officers elected at such special election shall hold their respective offices only until the next annual election, and until their successors are elected and shall have qualified, as in this chapter provided.

8. The foregoing provisions shall not apply to union free school districts in cities, nor to union free school districts whose boundaries correspond with those of an incorporated village, nor to any school district organized under a special act of the legislature, in which the time, manner and form of the election of district officers shall be different from that prescribed for the election of officers in union free school districts, organized under the general law, nor to any of the union free school districts in the counties of Suffolk, Chenango, Warren and Saint Lawrence. (*Subd. 8, amended by L. 1917, ch. 270, in effect April 27, 1917.*)

Source.—Education L. 1909, § 223, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 14, as amended by L. 1895, ch. 853; L. 1896, ch. 196; L. 1897, ch. 466; originally revised from L. 1878, ch. 248, as amended by L. 1882, ch. 115; L. 1882, ch. 381; L. 1883, ch. 172; L. 1883, ch. 413; L. 1884, ch. 89; L. 1886, ch. 199; L. 1888, ch. 209; L. 1889, ch. 245.

Election, when held.—Election may not be held on the Wednesday following the annual meeting unless the voters have so determined in accordance with the statute. Dec. of Com'r (1905), Jud. Dec. 175.

Conduct of election.—Ballots should designate the term of office for which the candidate is nominated. Dec. of Com'r (1908), Jud. Dec. 198. Where two ballots are found folded together, the presumption is that the ballots are fraudulent and where the total number of ballots exceeds the poll list both ballots should be rejected. Dec. of Supt. (1887), Jud. Dec. 190.

Where the total number of ballots do not exceed the poll list ballots folded together should not be discarded. Dec. of Supt. Jud. Dec. 193. Procedure upon counting ballots. Dec. of Com'r (1909), Jud. Dec. 188; Dec. of Com'r (1909), Jud. Dec. 197.

§ 304. **Determination of election disputes.**—All disputes concerning the validity of any district election or of any of the acts of the officers of such election shall be referred to the commissioner of education for determination and his decision in the matter shall be final and not subject to review. The commissioner may in his discretion order a new election.

Source.—New.

§ 305. **Election and organization of board of education in new district**

where union free school district containing two incorporated villages is divided.—1. Within ten days after the school commissioner shall have designated any separate school district organized under the provisions of sections one hundred and thirty and one hundred and thirty-one of this chapter, he shall call a special meeting of the qualified voters of such school district at a time and place to be named by him to elect a board of education to consist of six members, two of whom shall be elected for one year, two for two years and two for three years from the date of the annual school meeting next succeeding such special meeting. The call for such special meeting shall be published in the manner provided in section one hundred and thirty for calling a special meeting to determine as to whether the school district shall be divided.

2. The school commissioner shall call such special meeting to order and the voters present shall elect a chairman and secretary for such meeting and appoint three tellers to canvass the votes cast. After the votes shall have been canvassed the chairman and secretary shall forthwith certify the result of such canvass to the said school commissioner, who shall within five days thereafter convene the members of the board of education, shown by said certificate to have been elected, for the purpose of organization, and said certificate of the result of such canvass shall thereupon become a part of the record of said school district.

Source.—Education L. 1909, § 224, revised from L. 1903, ch. 125, § 3. Other parts of this act re-enacted in Education Law, §§ 130–132.

§ 306. Annual meetings of boards of education.—1. The annual meeting of the board of education of every union free school district whose limits do not correspond with those of an incorporated village or city shall be held on the first Tuesday in August of each year, except in districts in which the annual meeting is held on the first Tuesday in August, in which case the annual meeting of the board of education of such district shall be held on the second Tuesday in August.

2. The annual meeting of the board of education of every union free school district whose limits correspond with those of an incorporated village or city shall be held on the Tuesday next after the election of the members of such board at the annual charter election of the village or city. (*Amended by L. 1911, ch. 830, and L. 1915, ch. 232.*)

Source.—Education L. 1909, § 225, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 13, subds. 1, 2, in part; originally revised from L. 1864, ch. 555, tit. 9, §§ 9, 14, as amended by L. 1883, ch. 413; L. 1889, ch. 245; L. 1890, ch. 548; L. 1893, ch. 500. Other parts of these subdivisions were re-enacted in Education Law, §§ 198, 673.

§ 307. Change in number of members of board of education in union free school district whose boundaries are coterminous with those of an incorporated village or city.—The number of members of the board of education of a union free school district whose limits correspond with those of an

incorporated village or city, may be increased to not more than nine or decreased to not less than three in the following manner:

1. The board of education of such union free school district, shall, upon the application of at least fifteen resident taxpayers of such district, submit to a special meeting, held at least thirty days prior to the annual charter election, in such village or city, a proposition for the increase or decrease of the number of members of the board of education to a number specified in the proposition.

2. Such special meeting shall be called and held in the manner prescribed by subdivision two of section one hundred and ninety-three of this chapter.

3. If such proposition is adopted and it is determined thereby to increase the number of members of the board of education of such district, there shall be elected at the next ensuing annual village or city election, a sufficient number of members of the board of education so that the total number of members of the board will be the number specified in such proposition. Such additional members shall be elected for such terms so that as nearly as possible the terms of one-third of the members of such board will expire annually. Successors to such additional members shall be elected in like manner.

4. If such proposition is adopted and it is determined thereby to decrease the number of the board of education in such district, no members of the board of education of such district shall thereafter be elected until by expiration of term the number of members of the board of education will be less than the number specified in such proposition; and thereafter the number of members of the board of education of such district shall be the number specified in such proposition. Not more than one proposition under this section shall be submitted in any calendar year.

Source.—Education L. 1909, § 226, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 6, subd. 1, as added by L. 1903, ch. 489, § 1.

§ 308. Change in number of members of board of education in union free school district whose boundaries are not coterminous with those of an incorporated village or city.—1. The number of members of the board of education of a union free school district whose limits do not correspond with those of an incorporated village or city may be increased or decreased at an annual meeting by a majority vote of the qualified voters present and voting to be ascertained by taking and recording the ayes and noes. The number of such board shall not be increased to more than nine nor decreased to less than three.

2. No vote shall be taken upon the proposition to increase or decrease the number of members of such board of education unless the notice of the annual meeting shall contain a statement to the effect that the voters of such district will vote upon such proposition. The board of education of any such district shall, upon the application of at least fifteen voters of such

district, include in the notice of the annual meeting a statement that the proposition to increase or decrease such board will be presented to the annual meeting for determination. If the board refuses or fails to give such notice the notice may be given in such manner as the commissioner of education may direct.

3. If any such board shall consist of less than nine members and such meeting shall determine to increase the number, such meeting shall elect the additional number so determined upon and shall divide such number into three classes, the first to hold office one year, the second two years and the third three years.

4. If such meeting shall determine to diminish the number of members composing such board, no election shall be held in such district to fill the vacancies of the outgoing members until the number of such members shall correspond to the number which such meeting shall determine to compose such board.

Source.—Education L. 1909, § 227, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 31, as amended by L. 1903, ch. 463.

Notice of increase.—Notice must be given and vote taken as prescribed in the statute. Dec. of Com'r (1907), Jud. Dec. 1237; Dec. of Supt. (1894), Jud. Dec. 102; Dec. of Supt. (1902), Jud. Dec. 105; Dec. of Supt. (1896), Jud. Dec. 126; Dec. of Supt. (1900), Jud. Dec. 356; Dec. of Supt. (1905), Jud. Dec. 317. Where board wrongfully refuses to include in notice of meeting proposition to increase membership of board, the same may nevertheless be included and vote taken upon such proposition. Dec. of Com'r (1909), Jud. Dec. 99.

§ 309. Power of removal of member of board of education.—For cause shown, and after giving notice of the charge and opportunity of defense, the commissioner of education may remove any member of a board of education. Wilful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or wilful violation or neglect of duty is cause for removal.

Source.—Education L. 1909, § 228, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 29; originally revised from L. 1864, ch. 555, tit. 9, § 26.

Certiorari.—Removal under this section may be reviewed by the courts. Matter of Light (1898), 30 App. Div. 50, 55, N. Y. Supp. 743. As to conclusiveness of decision of commissioner of education, see Education Law, § 880.

Power to determine as to title to office.—The power to remove school officers, given to the Commissioner of Education by this section and section 95, necessarily devolves upon him the duty to decide whether accused trustees of a union free school district were holding office at the time of the determination as to charges against them. People ex rel. Jennings v. Finley (1916), 175 App. Div. 205, 161 N. Y. Supp. 817.

Grounds for removal.—Board of education will not be removed for trivial violations of law without wilful intent. Dec. of Com'r (1914), 2 St. Dep. Rep. 616. Removal of members of board for wilful official misconduct. Dec. of Com'r (1914), 2 St. Dep. Rep. 628.

Extravagance in management of district affairs, unjust preference in employment of teachers and clear intention to defraud district sufficient to require removal of board from office. Dec. of Com'r (1916), 8 St. Dep. Rep. 626.

§ 310. Powers and duties of boards of education.—The said board of education of every union free school district shall have power, and it shall be their duty:

1. To adopt such by-laws and rules for its government as shall seem proper in the discharge of the duties required under the provisions of this chapter.

2. To establish such rules and regulations concerning the order and discipline of the schools, in the several departments thereof, as they may deem necessary to secure the best educational results.

3. To prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant.

4. To prescribe the text-books to be used in the schools, and to compel a uniformity in the use of the same, pursuant to the provisions of this chapter, and to furnish the same to pupils out of any moneys provided for that purpose.

5. To make provision for the instruction of pupils in physiology and hygiene with special reference to the effect of alcoholic drinks, stimulants and narcotics upon the human system, and in the humane treatment and protection of animals and birds. (*Subd. 5, amended by L. 1917, ch. 210, in effect April 19, 1917.*)

6. To purchase sites, or additions thereto, for recreation grounds, for agricultural purposes, and for schoolhouses for the district, when designated by a meeting of the district; and to construct such schoolhouses and additions thereto as may be so designated; to purchase furniture and apparatus for such schoolhouses, and to keep the furniture and apparatus therein in repair; and, when authorized by such meeting, to purchase implements, supplies, and apparatus for agricultural, athletic, playground, and social center purposes. (*Subd. 6, amended by L. 1913, ch. 221.*)

7. To hire rooms in which to maintain and conduct schools when the rooms in the school-houses are overcrowded, or when such school-houses are destroyed, injured or damaged by the elements, and to fit up and furnish such rooms in a suitable manner for conducting schools therein.

8. To insure the school-houses and their furniture, apparatus and appurtenances, and the school library, in some company created by or under the laws of this state, or in some insurance company authorized by law to transact business in this state, and to comply with the conditions of the policy, and raise the sums paid for premiums by district tax.

9. To take charge and possession of the school-houses, sites, lots, furniture, books, apparatus, and all school property within their respective districts; and the title of the same shall be vested respectively in said board of education.

10. To sell, when authorized by a vote of the qualified voters of the school district, any former school site or lot, or any real estate the title

to which is vested in the board, and the buildings thereon, and appurtenances or any part thereof, at such price and upon such terms as said voters shall prescribe, and to convey the same by deed to be executed by the board or a majority of the members thereof. Also to exchange real estate belonging to the district for the purpose of improving or changing school-house sites.

11. To take and hold for the use of the said schools or of any department of the same, any real estate transferred to it by gift, grant, bequest or devise, or any gift, legacy or annuity, of whatever kind, given or bequeathed to the said board, and apply the same, or the interest or proceeds thereof, according to the instructions of the donor or testator.

12. To have in all respects the superintendence, management and control of said union free schools, and to establish therein, in conformity with the regents' rules, an academic department, whenever in their judgment the same is warranted by the demand for such instruction; to receive into said union free schools any pupils residing out of said district, and to regulate and establish the tuition fees of such nonresident pupils in the several departments of said schools.

13. To provide fuel, furniture, apparatus and other necessities for the use of said schools.

14. To appoint such librarians as they may from time to time deem necessary.

15. To contract with and employ such persons as by the provisions of this chapter are qualified teachers, to determine the number of teachers to be employed in the several departments of instruction in said school, and at the time of such employment, to make and deliver to each teacher a written contract as required by section five hundred and sixty-one of this chapter; and employ such persons as may be necessary to supervise, organize, conduct and maintain athletic, playground and social center activities, or for any one or more of such purposes. The regular teachers of the school may be employed at an increased compensation or otherwise, and by separate agreement, written or oral, for one or more of such purposes. (*Subd. 15, amended by L. 1913, ch. 221.*)

16. To fill any vacancy which may occur in said board by reason of the death, resignation, removal from office or from the school district, or refusal to serve, of any member or officer of said board; and the person so appointed in the place of any such member of the board shall hold his office until the next annual election of trustees.

17. To remove any member of their board for official misconduct. But a written copy of all charges made of such misconduct shall be served upon him at least ten days before the time appointed for a hearing of the same; and he shall be allowed a full and fair opportunity to refute such charges before removal.

18. To provide and maintain suitable and convenient water-closets as provided in section four hundred and fifty-seven of this chapter.

19. To borrow money in anticipation of taxes remaining uncollected which have been levied by such district for the current fiscal year, and not in excess thereof, whenever in the discretion of the board of education it shall be necessary to do so for the purpose of paying the current expenses of the district for such current fiscal year, by issuing certificates of indebtedness, in the name of the board of education, signed by the president and clerk thereof, which certificates must be payable within such current fiscal year or within nine months thereafter, and shall bear interest at a rate not exceeding six per centum per annum.

20. To raise by tax upon the property of the district any moneys required to pay the salary of teachers employed after applying thereto the school moneys apportioned to the district by the state.

21. To provide for the medical inspection of all children in attendance upon schools under their supervision whenever in their judgment such inspection shall be necessary and to pay any expense incurred therefor out of funds authorized by the voters of the district or city or which may properly be set aside for such purpose by the common council or the board of estimate and apportionment of a city. Provided, however, that no such funds shall be appropriated or authorized by the voters of a union free school district situate wholly within a city of the third class, unless the board of education shall incorporate in the notice of the annual meeting or election a statement to the effect that at such meeting or election a proposition to appropriate such funds will be voted upon, specifying the amount. (*Subd. 21, added by L. 1910, ch. 602, and amended by L. 1912, ch. 215.*)

Source.—Subdivisions 1-19, derived from Education L. 1909, § 229, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 15, in part, as amended by L. 1896, ch. 264, § 16; L. 1903, ch. 233; L. 1906, ch. 150; originally revised from L. 1864, ch. 555, tit. 9, § 13, as amended by L. 1865, ch. 647; L. 1879, ch. 134; L. 1888, ch. 331; L. 1884, ch. 413, § 1, as amended by L. 1885, ch. 403; L. 1887, ch. 335; L. 1887, ch. 538. See L. 1864, ch. 555, tit. 7, §§ 21, 22, 49. Parts of this section were re-enacted in Education Law, § 116, subds. 2, 117, 565, 566. Subdivision 20, derived from Education L. 1909, § 240, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 11; originally revised from L. 1864, ch. 555, tit. 9, § 11, as amended by L. 1867, ch. 406, § 26.

Consolidators' note.—New matter in subd. 11, "to determine the number of teachers to be employed" is from Consolidated School Law, tit. 7, § 47, subd. 9, as applied by same, tit. 8, § 16, "boards of education shall possess all the powers * * * in respect to common schools * * * in any union free school in said district, which the trustees of common schools possess under this chapter."

Reference.—Powers of trustees in common school districts, Education Law, § 272. Board of education as corporation, *Id.* § 300. Board of education of town possesses powers and performs duties of board of education of union free school district, *Id.* § 340.

Corporate powers.—Trustees of union free school districts have those powers expressly given them by statute, in addition to powers possessed by a corporation under the common law. *Bassett v. Fish* (1878), 75 N. Y. 303; *Porter v. Robinson* (1883), 30 Hun 209; *Gould v. Bd. of Education* (1884), 34 Hun 16.

But the board of education of the city of Little Falls, created pursuant to its charter, is not necessarily a corporation, but is simply one of the agencies of the municipal government, and its acts, if within the scope of such agency and within the provisions of the charter, are the acts of the city. *Ocorr & Rugg Co. v. City of Little Falls* (1902), 77 App. Div. 592, 602, 79 N. Y. Supp. 251, affd. 178 N. Y. 622, 70 N. E. 1104.

Courses of instruction.—The statute confers upon school authorities discretionary power to determine the character and extent of instruction to be given in the schools under their control, subject to the supervision of the Commissioner of Education. *Com'r of Educ. Decisions* (1916) 10 State Dep. Rep. 449.

Rules of board.—Board should have some definite system for calling special meetings and for the transaction of its business. *Dec. of Com'r* (1904), Jud. Dec. 301.

Power to increase compensation of teachers.—A board of education may not, by voluntary act, without special cause, increase the compensation to be paid to teachers under contracts made by their predecessors in office. A board of education may increase by supplementary contracts the compensation to be paid teachers under contracts originally made by a former board. *Com. of Educ. Decision* (1915), 7 State Dep. Rep. 560.

Discipline of pupils.—Board of education may require pupil to take a certain course of study as disciplinary measure as directed by teacher. *Dec. of Com'r* (1913), 3 St. Dep. Rep. (Unof.), 327.

School authorities may legally exercise control over publications issued by pupils purporting to represent the school. *Dec. of Com'r* (1904), Jud. Dec. 94.

Action of board suspending pupil pending apology to teacher for impudence and insubordination sustained. *Dec. of Com'r* (1907), Jud. Dec. 509.

Board required to admit pupil to school after expulsion where punishment has evidently been sufficient. *Dec. of Supt.* (1890), Jud. Dec. 517.

Construction of buildings; improvements.—Contract will not be set aside although not awarded to lowest bidder. *Dec. of Com'r* (1915), 4 St. Dep. Rep. 593. Expenditure of moneys in excess of appropriation not ground for removal of trustees where made in good faith. *Dec. of Com'r* (1913), 3 St. Dep. Rep. (Unof.), 340.

Power to contract for repairs.—Where the voters of a school district authorize the board of education to erect an addition to the present building at a cost not to exceed a certain sum to be raised by tax, the board cannot lawfully make contracts providing at a cost of more than one-third the entire sum, for alterations in the existing school-house, so extensive as to constitute a remodeling of the entire interior of the building. *Union Free School District No. 4, v. Grear* (1908), 57 Misc. 472, 109 N. Y. Supp. 931.

School buildings and sites.—Board may locate new building upon such portion of the school lot as may seem advisable, in absence of direction of district meeting. *Dec. of Supt.* (1897), Jud. Dec. 927.

Leasing of temporary school rooms is in the discretion of the board. *Dec. of Com'r* (1914), 3 St. Dep. Rep. 554; *Dec. of Supt.* (1900), Jud. Dec. 805.

Filling vacancies.—Where a quorum of the board is present a person receiving a majority of the votes of those present is properly appointed to fill vacancy. *Dec. of Supt.* (1884), Jud. Dec. 120; *Dec. of Supt.* (1895), Jud. Dec. 117.

On appeal from an appointment made by the board at a meeting at which less than a quorum was present, the commissioner declared the appointment void and ordered a special meeting of the district to fill the vacancy. *Dec. of Supt.* (1895), Jud. Dec. 108.

Less than a majority of the board may fill vacancies where a majority of the board has resigned. *Dec. of Supt.* (1889), Jud. Dec. 435. Where appointments

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to fill vacancies are made by less than a majority of the full board of trustees are at least *de facto* trustees and may act until their appointment is set aside in proceeding brought for that purpose. Dec. of Com'r (1916), 8 St. Dep. Rep. 603.

Where board fails to fill vacancy for a period of thirty days district superintendent may appoint. Dec. of Supt. (1899), Jud. Dec. 114.

A vacancy in the office of trustee of a union free school district may be filled by appointment by the board of education, if a special election is not called by the Commissioner of Education. Rept. of Atty. Genl. (1911) 514.

Borrowing money.—A board of education is not authorized to borrow money to meet general expenses except as authorized by this subdivision. Dec. of Com'r (1905); Jud. Dec. 86; Dec. of Com'r (1905), Jud. Dec. 95.

§ 311. **Night schools; kindergartens.**—The board of education of each school district and of each city may maintain:

1. Night schools and determine the courses of instruction to be given therein. Such schools shall be free to all persons residing in the district or city.

2. Kindergartens which shall be free to resident children between the ages of four and six years.

Source.—New in part; see Education L., 1909, § 840.

§ 312. **Appointment of superintendent of schools.**—1. In any union free school district having a population of five thousand or more, which fact shall be determined by the commissioner of education, as provided in section four hundred and ninety-two of this chapter, the board of education may appoint a superintendent of schools.

2. Such superintendent shall be under the direction of the board of education, which shall prescribe his powers and duties. He shall be paid a salary from the teachers' fund, to be fixed by the board of education, and he may be removed from office by a vote of the majority of all the members of such board. Whenever such superintendent shall be appointed, the said union free school district shall be entitled to the benefits of the provisions of section four hundred * and ninety-two of this chapter.

Source.—Education L. 1909, § 230, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 17; originally revised from L. 1864, ch. 555, tit. 9, § 13, subd. 12, as added by L. 1889, ch. 90, § 3.

§ 313. **Regular meetings; visitation of schools.**—1. It shall be the duty of each board of education elected pursuant to the provisions of this article to have a regular meeting at least once in each quarter.

2. Each board shall appoint one or more committees, to visit every school or department under its supervision and such committee shall visit such schools at least twice in each quarter, and report at the next regular meeting of the board on the condition thereof.

3. The meetings of all such boards shall be open to the public, but said boards may hold executive sessions, at which sessions only the members of such boards or the persons invited shall be present.

* So in original.

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Source.—Education L. 1909, § 231, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 22; originally revised from L. 1864, ch. 555, tit. 9, § 19.

Exclusion of public from meetings.—Under this provision, all meetings of a board of education must be public, except where the board determines, as the occasion requires, that public interests require that such meetings or parts thereof be executive. The law may not be complied with by a resolution or by-law that the public be excluded from stated meetings of the board. Com. of Educ. Decision (1915), 6 State Dep. Rep. 517.

The public may not be excluded from meetings of the board of education, except where it is determined by the official act of a majority of the board that the particular business to be transacted at a particular meeting is of such a nature that it should be considered in executive session. Com. of Educ. Decision (1915), 6 State Dep. Rep. 517.

§ 314. Limitation upon expenditures.—No board of education shall incur a district liability in excess of the amount appropriated by a district meeting unless such board is specially authorized by law to incur such liability.

Source.—Education L. 1909, § 232, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 23; originally revised from L. 1864, ch. 555, § 20.

Reference.—Moneys apportioned to be expended in payment of teachers' wages, Education Law, § 490.

§ 315. Deposit, custody and payment of moneys in cities and villages.—

1. All moneys raised for the support of schools in any city or in any union free school district whose boundaries are coterminous with the boundaries of an incorporated village or apportioned to the same by the education department or otherwise, shall be paid into the treasury of such city or village to the credit of the board of education therein; and the funds so received into such treasury shall be kept separate and distinct from any other funds received into the said treasury. And the officer having the charge thereof shall give such additional security for the safe custody thereof as the corporate authorities of such city or village shall require.

2. No money shall be drawn from such funds, credited to the several boards of education, unless in pursuance of a resolution of said board, and on drafts drawn by the president and countersigned by the secretary or clerk, payable to the order of the persons entitled to receive such money, and stating on their face the purpose or service for which such moneys have been authorized to be paid by the said board of education.

Source.—Education L. 1909, § 233, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 24; originally revised from L. 1864, ch. 555, tit. 9, § 21.

§ 316. Moneys and accounts in union free school districts whose boundaries are not the same as the boundaries of incorporated cities and villages.—

1. All moneys raised in a union free school district whose limits do not correspond with those of a city or an incorporated village, or apportioned thereto by the education department or otherwise, shall be paid to the treasurer of the district entitled to receive the same, and be applied to the uses of the district and the board shall annually render their accounts of all moneys received and expended by them for the use of said schools.

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2. No money shall be drawn from such funds in possession of such treasurer, unless in pursuance of a resolution of said board, and on drafts drawn by the president and countersigned by the clerk payable to the order or the persons entitled to * receive such money, and stating on their face the purpose or service for which said moneys have been authorized to be paid by the said board of education.

Source.—Education L. 1909, § 234, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 25; originally revised from L. 1864, ch. 555, tit. 9, § 22.

Form of payment.—This section does not make invalid a payment actually made upon a valid debt though not in the form prescribed. *Goodrich v. Board of Education* (1910), 137 App. Div. 499, 122 N. Y. Supp. 50.

§ 317. **Boards of education have powers of trustees of common schools and trustees of academies.**—The board of education shall possess all the powers and privileges, and be subject to all the duties in respect to the common schools, or the common school departments in any union free school in said districts, which the trustees of common schools possess or are subject to under this chapter, not specially provided for in this article, and not inconsistent with the provisions of this article; and to enjoy, whenever an academic department shall be by them established, all the immunities and privileges now enjoyed by the trustees of academies in this state.

Source.—Education L. 1909, § 235, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 16; originally revised from L. 1864, ch. 555, tit. 9, § 13, subd. 11.

§ 318. **Academy may be adopted as academic department.**—Whenever a union free school shall be established under the provisions of article five, and there shall exist within its district an academy, the board of education, when authorized by a vote of the voters of the district, may adopt such academy as the academic department of the district, with the consent of the trustees of the academy, and thereupon the trustees by a resolution to be attested by the signatures of the officers of the board and filed in the office of the clerk of the county, shall declare their offices vacant, and thereafter the said academy shall be the academic department of such union free school. The board of education when thereto authorized by a vote of the qualified voters of the district may lease said academy and site, and maintain the academic department of such union free school therein and thereon.

Source.—Education L. 1909, § 236, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 27; originally revised from L. 1864, ch. 555, tit. 9, § 24.

§ 319. **Contracts with academies.**—The board of education of a union free school district, with the approval of the commissioner of education, may adopt an academy as the academic department thereof, and contract for the instruction therein of pupils of academic grade, residing in the district. The academy thereupon becomes the academic department of such union free school, and the district is entitled to the same rights and privi-

* So in original.

leges, is subject to the same duties, and the apportionment and distribution of state school money shall be made to it, as if an academic department had been established in such school.

Source.—Education L. 1909, § 237, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 27-a, as added by L. 1902, ch. 325.

§ 320. Retransfer of academy to its former trustees.—If there shall be in a dissolved union free school district, an academy which shall have been adopted as the academic department of the union free school, under the provisions of title nine, chapter five hundred and fifty-five of the laws of eighteen hundred and sixty-four, and any amendment thereof, or title eight of chapter five hundred and fifty-six of the laws of eighteen hundred and ninety-four, and any amendment thereof, or under this chapter, it shall, upon the application of a majority of the surviving resident former trustees or stockholders, be transferred by the board of education to said former trustees or stockholders.

Source.—Education L. 1909, § 238, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 35; originally revised from L. 1880, ch. 210, § 4.

References.—Dissolution of union free school districts, Education Law, §§ 146-152.

§ 321. Records; reports.—It shall be the duty of said board to keep an accurate record of all its proceedings in books provided for that purpose. It shall be the duty of said board to cause to be published once in each year, and twenty days next before the annual meeting of the district, in at least one public newspaper, printed in such district, a full and detailed account of all moneys received by the board or the treasurer of said district, for its account and use, and of all the money expended therefor, giving the items of expenditure in full; should there be no paper published in said district said board shall publish such account by notice to the taxpayers, by posting copies thereof in five public places in said district. (*Amended by L. 1910, ch. 442.*)

Source.—Education L. 1909, § 241, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 18, in part; originally revised from L. 1864, ch. 555, tit. 9, § 15, as amended by L. 1893, ch. 485.

§ 322. Reports to commissioner of education.—1. The board of education of each district and of each city shall make such detailed report and in such form upon any matter relating to the schools under their management and control as the commissioner of education shall from time to time require.

2. Such board of education shall also make an annual report giving the information relating to their schools required of trustees under section two hundred and seventy-six of this chapter. Such report shall also contain such information as the commissioner of education shall require and shall be in the form prescribed by him. Such report shall be made on the first day of August of each year and, in the case of a board of edu-

cation of a union free school district, shall be delivered to the town clerk of the town in which the school-house of such district is located.

Source.—New.

§ 323. **Estimated expenses for ensuing year.**—It shall be the duty of the board of education of each district to present at the annual meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, exclusive of the public moneys, specifying the several purposes and the amount for each. This section shall not be construed to prevent the board from presenting such statement at a special meeting called for the purpose, nor from presenting a supplementary and amended statement or estimate at any time.

Source.—Education L. 1909, § 242, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 18, in part; originally revised from L. 1864, ch. 555, tit. 9, § 15, as amended by L. 1893, ch. 485.

§ 324. **Vote upon school taxes.**—After the presentation of such statement or estimate, the question shall be taken upon voting the necessary taxes to meet the estimated expenditures, and when demanded by any voter present, the question shall be taken upon each item separately, and the inhabitants may increase the amount of any estimated expenditures or reduce the same, except for teachers' wages, and the ordinary contingent expenses of the schools.

Source.—Education L. 1909, § 243, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 19; originally revised from L. 1884, ch. 555, tit. 9, § 16.

§ 325. **Levy of tax for certain purposes without vote.**—If the inhabitants shall neglect or refuse to vote the sum estimated necessary for teachers' wages, after applying thereto the public school moneys, and other moneys received or to be received for that purpose, or if they shall neglect or refuse to vote the sum estimated necessary for ordinary contingent expenses, the board of education may levy a tax for the same, in like manner as if the same had been voted by the inhabitants.

Source.—Education L. 1909, § 244, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 20; originally revised from L. 1864, ch. 555, tit. 9, § 17, as amended by L. 1889, ch. 328, § 5.

§ 326. **Reference to commissioner of education.**—If any question shall arise as to what are ordinary contingent expenses the same may be referred to the commissioner of education, by a statement in writing, signed by one or more of each of the opposing parties upon the question, and the decision of the commissioner shall be conclusive.

Source.—Education L. 1909, § 245, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 21; originally revised from L. 1864, ch. 555, tit. 9, § 18.

§ 327. **Corporate authorities must raise tax certified by board of education.**—1. The corporate authorities of any incorporated village or city in which any such union free school shall be established, shall have power, and

it shall be their duty, to raise, from time to time, by tax, to be levied upon all the real and personal property in said city or village, as by law provided for the defraying of the expenses of its municipal government, such sum as the board of education established therein shall declare necessary for teachers' salaries and the ordinary contingent expenses of supporting the schools of said district.

2. The sums so declared necessary shall be set forth in a detailed statement in writing, addressed to the corporate authorities by the board of education, giving the various purposes of anticipated expenditure, and the amount necessary for each; and the said corporate authorities shall have no power to withhold the sums so declared to be necessary; and such corporate authorities as aforesaid shall have power, and it shall be their duty to raise, from time to time, by tax as aforesaid, any such further sum to be set forth in a detailed statement in writing, addressed to the corporate authorities by the board of education, giving the various purposes of the proposed expenditure, and the amount necessary for each which may have been or which may hereafter be authorized by a majority of the voters of such union free school district present and voting at any special district meeting duly convened for any of the purposes stated in section four hundred and sixty-seven of this chapter.

Source.—Education L. 1909, § 247, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 9, in part; originally revised from L. 1864, ch. 555, tit. 9, § 8, as amended by L. 1890, ch. 548. Other parts of § 9 were re-enacted in Education Law, § 531.

§ 328. Application of this article.—The provisions of this article shall apply to all union free schools heretofore organized pursuant to the provisions of chapter four hundred and thirty-three of the laws of eighteen hundred and fifty-three and the amendments thereof, chapter five hundred and fifty-five of the laws of eighteen hundred and sixty-four, and the amendments thereof, and of chapter five hundred and fifty-six of the laws of eighteen hundred and ninety-four and the amendments thereof; and sections three hundred and twenty-seven, four hundred and sixty, four hundred and sixty-seven and four hundred and eighty of this chapter are made applicable to all school districts established by and organized under special statutes, except those of cities; and sections three hundred and ten, subdivision nineteen, three hundred and twelve and four hundred and fifty-eight of this chapter are made applicable to all school districts having a population of five thousand and upwards established by and organized under special statutes.

Source.—Education L. 1909, § 248, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 42, in part, as amended by L. 1904, ch. 427. For balance of § 42, see Education Law, § 254, subd. 6.

ARTICLE XI-A.

(Added by L. 1917, ch. 328, in effect May 2, 1917.)

TOWN BOARDS OF EDUCATION.

- Section 330. School districts continued.
331. Town board of education.
332. Qualification of members of board of education.
333. Appointment of officers by board.
334. Bond of treasurer.
335. Vacancies in school offices.
336. Board to constitute a body corporate.
337. Meetings of board.
338. Duties of clerk.
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341. Schools to be free to children of town.
342. Transfer of pupils.
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344. Erection, repair and improvement of school buildings.
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346. Levy and collection of taxes.
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350. State funds to be used for schools of town.
351. Certain union free school districts not subject to provisions of article.
352. School district officers abolished; terms continued to collect funds, pay claims, et cetera.
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356. Notice of annual school meeting.
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359. Preparation of list of qualified electors.
360. Nominations and ballots.
361. Inspectors of election.
362. Conduct of school meetings; challenges.
363. Canvass of votes; declaration of result.
364. Successful candidates to be notified of election.
365. Appeals to the commissioner of education.

§ 330. School districts continued.—Each school district in the state is hereby continued as such district exists at the time this act goes into effect or until modified as provided in this chapter. No order consolidating two or more school districts shall be effective until such order is approved by a majority vote of the town board of education of the town or towns in which such districts are located, and thereafter approved by a majority vote of the qualified electors of each district present and voting at a meeting of the

districts consolidated by said order. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

References.—Formation of new school districts, Education Law, § 120. Alteration of boundaries, Id. §§ 124-127. Dissolution and consolidation of school districts by district superintendent, Id. §§ 128, 129; by vote of districts, Id. §§ 130-134.

§ 331. Town board of education.—1. A town board of education in each town of the state, having jurisdiction over all the schools in the town as hereinafter provided, except in union free school districts having a population of fifteen hundred or more or employing fifteen teachers or more at the time this act takes effect, and the school districts in the several towns of a county which adjoins a city having a population of one million or more and in which there are only two district superintendents, is hereby established to begin on the first day of August, nineteen hundred and seventeen. Such board shall consist of three members in each town in which the number of school districts under its jurisdiction is five or less and shall consist of five members in all other towns. The term of office of each member shall be three years except that, of the members first elected hereunder, in a town having three members on such board, one shall hold office until August first, nineteen hundred and eighteen, one until August first, nineteen hundred and nineteen, and one until August first, nineteen hundred and twenty, and in a town having five members, two shall hold office until August first, nineteen hundred and eighteen, two until August first, nineteen hundred and nineteen, and one until August first, nineteen hundred and twenty. The terms of office of such members shall begin on the first day of August following their election.

2. Where there are two or more union free school districts each having a population of less than fifteen hundred, each maintaining an academic department which has been admitted to the university of the state of New York and the principal school-house in each is situated wholly in the same town, the district superintendent shall issue an order dividing the town into as many units as there are such union free school districts situated in the town and designating the several school districts of the town to be associated with such union free school districts to form such units. The said units shall be known as town school units and shall be numbered by the district superintendent at the time of such division. Each union free school district and the districts so associated with it in forming such unit shall have a separate board of education to be elected in the same manner as boards of education in towns are elected. Such board shall have and exercise the jurisdiction and powers, and perform the duties in respect to the schools in the districts forming said unit, conferred or imposed upon a town board of education as to the schools of the several districts in a town. Wherever in this article reference is made to the town board of education, to the school officers of the town, to the school meeting of the town, or to the school electors of the town it shall be construed as

referring also to the boards of education, school officers, school meeting or school electors of such units as the case may be.

3. Whenever twenty-five duly qualified voters from each of such separate units in a town having two or more boards of education shall present a petition to the district superintendent to have all of the schools situated within the limits of the town united under one town board of education as provided by subdivision one of this section, the district superintendent shall direct each separate board of education to submit to the voters of their unit at the next annual school meeting the question "Shall all the schools in the town of be placed under the jurisdiction of one town board of education?" If a majority of the voters in each separate unit, voting at such election, shall vote in favor thereof, the terms of office of each of the members of the boards of education in such town shall terminate one year from the first day of August next following such annual meeting, and there shall be elected at the next annual meeting a new town board of education as provided by section three hundred and fifty-four of this act, which board shall take charge of all the schools of the town on the first day of August following such election.

4. In a town in which there is, wholly or in part, a union free school district having a population of fifteen hundred or more or employing fifteen teachers or more, the principal schoolhouse of which is situate in such town, such district may by resolution, duly submitted and adopted as provided by law at a district meeting, determine to become subject to the provisions of this article. The board of education shall, upon the petition signed by not less than fifteen per centum of the qualified electors of such district, give notice of the submission of such resolution to an annual or special meeting, in the manner provided by law. If such resolution be adopted at such meeting, the board of education of the town in which the schoolhouse of such district is situate, shall, upon petition signed by fifteen per centum of the qualified electors of such town, residing outside of such union free school district, submit a resolution to an annual or special meeting of such town as provided in this article, for the purpose of determining whether such union free school district shall become subject to the provisions of this article. If such resolution be adopted by such town, the schools of such union free school district shall become subject to the jurisdiction of the board of education of such town and the provisions of this article shall apply to such district and the schools thereof, notwithstanding the exception contained in subdivision one of this section, and thereupon the terms of office of the officers of such union free school district shall terminate. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 332. Qualifications of members of board of education.—A member of a board of education must be a qualified elector at the school meetings of the town for which he is chosen. A district superintendent of schools, or a supervisor shall not be eligible to the office of member of a board of educa-

tion. Not more than one member of a family shall be a member of the same board of education in a town. A person who is removed from his office as a member of a board of education shall be ineligible to appointment or election to any school office in the town for a period of five years from the date of such removal. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

References.—Qualifications of school district officers, Education Law, § 221. Ineligibility of certain persons to hold office of trustee or member of board of education, Id. § 222.

§ 333. **Appointment of officers by board.**—The board of education of each town shall elect one of its members chairman who shall serve until the next annual meeting of the board, and shall also appoint a clerk of the board and a town school treasurer to serve during the pleasure of such board. Any person who is qualified to vote at a school meeting in the town may be appointed as clerk or treasurer. A member of the board or a teacher employed in a public school of the town shall not hold the office of clerk or treasurer. The board shall determine the duties and fix the compensation of such clerk and treasurer. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 334. **Bond of treasurer.**—The treasurer, within ten days after the receipt of notice in writing of his appointment, duly served upon him, and before entering upon the duties of his office, shall execute and deliver to the board of education a bond, in a sum to be prescribed by the board and with sureties to be approved by it, conditioned for the faithful discharge of the duties of his office. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

References.—Bond of treasurer of union free school district, Education Law, § 254. Official undertakings, force and effect, Public Officers Law, § 12; if executed by surety company, fee a charge against town, Id. § 11.

§ 335. **Vacancies in school offices.**—1. A school office becomes vacant by death, resignation, refusal to serve, incapacity, removal from the town or from office.

2. A member of a board of education who publicly declares that he will not accept or serve in the office of member of the board of education, or refuses or neglects to attend three successive meetings of the board of which he is duly notified, without rendering a good and valid reason therefor to the board of education, vacates his office by refusal to serve.

3. A member of a board of education vacates his office by the acceptance of either the office of district superintendent of schools or of supervisor.

4. A treasurer vacates his office by failure to execute a bond to the board of education as herein required.

5. A vacancy in the office of member of a board of education may be filled by the board. A person appointed to fill such vacancy shall hold office until the next annual school meeting of the town, when such vacancy shall be filled by election for the balance of the unexpired term.

6. When a vacancy has existed in the office of a member of a board of education for thirty days, the district superintendent of schools shall appoint a person qualified to vote at school meetings in the town to fill such vacancy and the person so appointed shall hold office until the next annual school meeting of the town, when the vacancy shall be filled for the balance of the unexpired term. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

References.—Resignation of school officers, Education Law, § 231. Vacancies in school offices, how filled, Id. § 233.

§ 336. **Board to constitute a body corporate.**—The board of education of each town shall be a corporation. All property which is now vested in, or shall be hereafter transferred to, the board of education of a town for the use of schools therein shall be held by such board as a corporation. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

References.—School trustees body corporate, Education Law, § 270; so also board of education of union free school district, Id. § 300.

§ 337. **Meetings of board.**—The annual meeting of a board of education of a town shall be held on the first Tuesday in August of each year. A regular meeting of the board shall be held at least once in each quarter. The board may adopt by-laws prescribing the time and place where regular meetings shall be held, and regulate the conduct of such meetings. Such board shall also prescribe a method of calling special meetings. The meetings of the board shall be open to the public but the board may hold executive sessions at which business may be transacted which should not, in its judgment, be transacted in an open session, at which sessions only member of the board or persons invited shall be present. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 338. **Duties of clerk.**—The clerk of the board of education of each town shall have the powers and perform the duties of the clerk of a school district as provided in this chapter. In addition to such powers and duties, such clerk shall

1. Act as clerk at all meetings of the board and record the proceedings of such meetings, and the orders and resolutions adopted thereat, in proper books.

2. Draw and sign warrants upon the treasurer for all moneys to be disbursed by the town for school purposes and present them to the chairman to be countersigned by that officer. Each warrant shall specify the object for which it is drawn, the fund from which it is payable and the name of the individual or corporation to whom the amount thereof is payable.

3. When directed by the board of education, prepare all reports required by law and forward the same to the proper officers.

4. Perform such other duties as are or shall be required by law or by the board of education. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§§ 339, 340.

Town boards of education.

L. 1910, ch. 140.

Reference.—Duties of clerk of school district, Education Law, § 250.

§ 339. Duties of treasurer.—The treasurer shall have the powers and perform the duties of a district treasurer as provided in this chapter, and in addition thereto shall

1. Be the custodian of all school moneys of the town and be responsible for the safekeeping and accurate account thereof.

2. Pay all orders or warrants lawfully drawn upon him out of the moneys in his hands belonging to the funds upon which such orders or warrants are drawn.

3. Keep accurate accounts of all moneys received and disbursed by him, the sources from which they are received and the persons to whom, and the objects for which, they are disbursed.

4. Prepare and submit as required by law annual reports of receipts and disbursements, and render at such times as may be required by law or directed by the board of education, a report or statement relative to the school funds of the town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

Reference.—Duties of treasurer of school district, Education Law, § 251.

§ 340. Powers of board of education.—The board of education of each town shall, in respect to the public schools and school officers of the town,

1. Exercise the powers and perform the duties conferred or imposed by law upon boards of education or trustees of school districts, so far as they may be applicable to the schools or other educational affairs of the town and not inconsistent with the provisions of this article. Any power, duty, liability or obligation which is conferred or imposed by this chapter, or any other statute, upon the board of education of a union free school district or the trustees of a school district, shall be exercised or performed by the board of education of a town, and such board shall be subject to such liability or obligation, in respect to the schools in the town, in the same manner and to the same extent as in the case of boards of education in union free school districts or trustees of school districts.

2. Determine the number of teachers to be employed in the several schools of the town and to contract with principals and teachers for the maintenance and operation of such schools pursuant to the provisions of this chapter; employ or appoint medical inspectors, nurses, attendance officers, janitors and other employees required for the proper and efficient management of the schools and other educational affairs under their direction and control.

3. Provide transportation when necessary for children attending school, under regulations to be prescribed by it.

4. Have the care, custody, control and safekeeping of all school property or other property of the town used for educational, social or recreational work and not specifically placed by law under the control of some

other body or officer, and prescribe rules and regulations for the preservation of such property.

5. Purchase and furnish such apparatus, maps, globes, books, reproductions of standard works of art, furniture and other equipment and supplies as may be necessary for the proper and efficient management of the schools.

6. Establish and maintain elementary schools, high schools, vocational, industrial, agricultural and home-making schools or classes, night schools, or such other schools and classes as shall be deemed necessary to meet the needs and demands of the town.

7. Establish and maintain school libraries which may be open to the public as provided by law.

8. Prescribe courses of study which shall be followed in the schools or classes established and maintained in the town.

9. Contract with boards of education of other towns, and of union free school districts and cities for the instruction of pupils of the town, and when any such contract is made the public money or state tuition apportioned for such instruction shall be paid to such town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

References.—General powers of trustees of school districts, Education Law, § 276; of boards of education of union free school districts, Id. § 310. Contracts for instruction of children, Id. § 580.

§ 341. **Schools to be free to children of town.**—Each school maintained in a town under the supervision and control of a town board of education, and each department of such school and each course of study maintained therein, shall be free to the children of school age residing in such town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 342. **Transfer of pupils.**—Where pupils of school age residing in a town may be more conveniently instructed in the school or schools of an adjoining town, or of a union free school district or city, the board of education of such town may provide for the transfer of such pupils to the school or schools in such adjoining town or an adjoining union free school district or city in or out of the town. The board of education making such transfer shall send notice thereof to the board of education of the town, union free school district or city to which it is proposed to transfer such pupils, and provisions shall thereupon be made by the board of education of the town, union free school district or city wherein such pupils are to be instructed, for the accommodation of such pupils, upon the approval of the commissioner of education. The commissioner of education shall not approve the transfer of such pupils, when such action shall require the town, union free school district or city receiving such pupils to provide additional teachers or other school accommodations, without the consent of the board of education of such town, district or city. Whenever pupils have been transferred as herein provided, the board of education of the town,

union free school district or city to which the transfer is made shall submit, through its chairman and clerk, to the board of education of the town where the pupils reside, a verified statement of the cost of the instruction of such pupils. The cost of the instruction of such pupils shall be a charge against the town wherein such pupils reside, and the board of education thereof shall direct the payment of the cost of such instruction out of the school funds of the town, in the same manner as other charges upon such funds are paid.

The amount charged for such instruction may be determined by agreement between the board of education of the town wherein the pupils reside and the board of education of the town, union free school district or city in which such pupils are to be instructed, or if such boards are unable to make such agreement the matter may be referred to the commissioner of education for determination; and in making such determination the per capita cost of the instruction of the pupils of the town, village or city to which such pupils have been transferred may be used as a basis. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 343. **School house sites.**—The board of education of a town, whenever in its judgment it is necessary for the interest of the schools of the town, may designate a new site for the school house, or enlarge the site of an existing school house. Whenever a new site is designated, or an existing site is enlarged, the board shall pass a resolution stating the necessity therefor, describing by metes and bounds the land to be acquired for either of such purposes, and estimating the amount of funds necessary therefor. Such resolution must be adopted by the votes of at least a majority of the members of the board of education. When such resolution is adopted the land described therein may be acquired by the board of education in the manner provided by law for the acquisition of real property for school purposes. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 344. **Erection, repair and improvement of school buildings.**—The board of education of a town shall provide for the repair of school buildings in the town, or other buildings under its control and management, and shall expend therefor an amount not exceeding the amount included in the annual school tax budget. The board may also remodel, enlarge or improve such school buildings or other buildings under its control and management, and may construct new buildings, whenever required, for the proper accommodation of the school children of the town. The board of education shall not expend in any one year for the remodeling, improvement or enlargement of existing school buildings or for the construction of new buildings an aggregate amount in excess of one-half of one per centum of the assessed valuation of the town and in no case an amount in the aggregate in excess of five thousand dollars without a vote of the school meeting of the town, except as hereinafter provided. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 345. Annual school budget.—1. On or before the first day of July in each year the board of education shall prepare in triplicate an itemized tax budget containing the amounts required to be raised by tax for school purposes in the town for the ensuing school year. Such tax budget shall contain a statement of the probable amount to be received by the town in the next apportionment of school funds from the state and the estimated amount to be received from all other sources, and shall specify the several amounts to be raised for the following purposes:

a. The salaries and compensation of principals, teachers, medical inspectors, nurses, attendance officers, janitors and other employees appointed or employed by said board of education.

b. All necessary incidental and contingent expenses of the schools of the town, including transportation, the purchase of fuel and light, supplies, text-books, school apparatus, furniture and other articles and services necessary for the proper maintenance, operation and support of the schools of the town.

c. The ordinary repairs of school buildings and other buildings under its control and management.

d. The remodeling, improvement or enlargement of existing buildings, and the construction of new buildings and the furnishing and equipment thereof.

e. The amount required to be raised for the payment of the interest and principal of bonds and other indebtedness lawfully incurred or to be incurred for school purposes and which are a charge against the town.

f. The amount which may be required for the payment of any other claim against the town arising from the support and maintenance of the schools of the town.

g. The amount voted at the annual or a special school meeting in the town on a proposition or question lawfully submitted at such meeting.

h. The amount determined upon as the proportionate share of the cost of maintaining a school in a district partly in two or more towns, required to be paid by said board.

2. The clerk shall cause such budget to be published at length once in each week for the four weeks next preceding the first day of August, in two newspapers if there shall be two, or in one newspaper if there shall be but one, published in such town. A written or printed copy of such budget shall be posted in at least five of the most public places in the town at least twenty days before the first day of August.

3. Such tax budget shall be signed in duplicate by a majority of the members of the board of education. On or before the first day of September such duplicate tax budget shall be filed as follows: one in the office of the clerk of the board of education and one in the office of the clerk of the town.

4. The board of education of a town may, in the manner herein provided, prepare a supplemental budget to raise money for any lawful purpose.

a. When authorized by a vote of an annual or special school meeting in the town,

b. When the amounts stated in the annual tax budget for the purposes specified are insufficient therefor and such amounts may be raised by tax without a vote of a school meeting in the town.

Such supplemental budget shall not authorize the levy of a tax for the purposes therein specified or be effectual for any purpose unless there shall be endorsed thereon the certificate of the district superintendent of the supervisory district in which such town is situated to the effect that the purposes for which the amount therein specified is to be raised are lawful. Such supplemental tax budget shall be prepared in the same manner and filed with the same officers as the annual tax budget.

5. The commissioner of education may prescribe the form of such budget. He may adopt regulations not inconsistent with law, providing for the examination, review, correction and the modification of such budgets and the instruction and assistance of school authorities in the performance of duties in respect thereto.

6. District superintendents shall, during the month of August in each year, examine the tax budgets on file in the office of each clerk of the board of education of each town in his supervisory district, and shall advise with and aid boards of education in the preparation and correction of such budgets, and perform such other duties in respect thereto as may be prescribed by the commissioner of education. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 346. Levy and collection of taxes.—1. The board of education of the town shall, within ten days after the first day of September in each year, cause the amounts specified in such tax budget and supplemental tax budgets, if any, to be levied and assessed against the taxable property within that portion of the town which is subject to the provisions of this article. The board of education shall immediately upon the completion of its tax list annex thereto a warrant for the collection thereof, which shall direct the collector of the town to collect the tax so levied and assessed and to pay over the amount thereof to the town school treasurer. The town collector of taxes shall have the same power and jurisdiction in respect to the collection of such taxes as he has in respect to the collection of other taxes levied upon taxable property in the town, and the provisions of law relative to the collection of such taxes, except as otherwise provided in this chapter, shall apply to the collection of such school taxes.

2. The town collector shall before receiving the warrant for the collection of such taxes execute a bond to the board of education of the town, with one or more sureties to be approved by the board, and in the amount to be prescribed by such board, conditioned for the due and faithful collection of the taxes under such warrant and the return thereof to the proper officer.

3. The provisions of article fifteen of this chapter relating to the assess-

ment and collection of taxes shall apply to the assessment of school taxes in a town by the board of education thereof, and to the collection of the taxes assessed and levied as herein provided, except so far as the provisions thereof may be in conflict with the provisions of this article.

4. If a district is situated partly in two or more towns, the taxable property in that portion of such district lying in a town other than that in which the principal schoolhouse is situated, shall be assessed for school purposes at the same rate as the taxable property of the town in which such principal schoolhouse is located. The valuation of the real property in the portions of such district lying in two or more towns, as appearing upon the several assessment rolls of such towns, may be equalized by the supervisors of such towns upon the request of the boards of education of such towns, or of three or more persons liable to pay taxes upon real property in either of such towns, and the provisions of section four hundred and fourteen of this chapter shall apply to such equalization. The taxable property in the portions of such district located in a town or towns other than the town in which the principal schoolhouse of such district is located, shall not be assessed for school purposes in such towns. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 347. **Borrowing money in anticipation of collection of taxes.**—The board of education of a town may borrow money in anticipation of the levy and collection of a tax, for any of the purposes specified in a budget or supplemental budget filed with the clerk of the board of education and the other officers with whom the same is required to be filed as herein provided. Certificates of indebtedness may be issued by such board of education which shall be signed by the president of the board and countersigned by the treasurer thereof. Such certificate shall not be issued for more than one year from the date thereof, and shall bear interest at a rate not exceeding six per centum per annum. The money borrowed shall be placed in the custody of the treasurer and shall be paid out by him on the order of the board of education in the same manner as money collected by taxes levied against the taxable property of the town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 348. **Submission of certain questions to a vote of the town.**—1. Whenever the board of education of a town shall deem it necessary to expend an amount exceeding the sum of five thousand dollars for the repair, remodeling, improvement or enlargement of existing school buildings or the construction of a new school building it shall submit a proposition therefor to a vote of the qualified school electors of the town at either an annual school meeting of the town or a special school meeting called for such purpose.

2. If a school building in the town shall have been condemned by the district superintendent as unfit for use and not worth repairing and the amount required to be raised by tax therefor shall exceed the sum of five thousand dollars the board of education shall submit a proposition for the

construction of such new building to the qualified school electors of the town as above provided. If the amount to be raised for the erection of a new building in place of a building which has been condemned is less than five thousand dollars the amount thereof shall be included in the annual school tax budget of the town. Except as herein provided the board of education of a town shall be subject to the same powers and duties in relation to the erection of a new schoolhouse, when the schoolhouse in a district in such town has been condemned, which are imposed upon trustees of school districts under the provisions of the educational law.

3. The board of education of a town may in its discretion submit a proposition to the qualified electors of the town at an annual or special school meeting of the town for the voting of a tax in an amount not less than one thousand dollars for the erection of a new building, the repair, remodeling, improvement or enlargement of an existing building, the purchase of a new site or of an addition to an existing site.

4. When the electors at a school meeting in a town adopt a proposition for any of the purposes specified in this section they may direct the levy of a tax to meet the expense incurred thereby either in one levy or by instalments.

5. The provisions of section four hundred and sixty-seven of this chapter relative to the notice of the meeting and the levy of a tax by instalments in a union free school district shall apply, except when inconsistent with this act, to the submission of the propositions herein authorized and the levy and collection of taxes for the purposes specified. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 349. **Issue and sale of school bonds.**—Whenever a tax shall have been voted to be collected in instalments for any of the purposes specified in the preceding section the board of education of the town may borrow so much of the sum voted as may be necessary at a rate not exceeding six per centum per annum. The board may issue bonds or other evidences of indebtedness for such purposes which shall not be sold below par. The interest and principal of such bonds or other evidences of indebtedness shall be a charge upon the town and shall be paid when due. Such bonds or other evidences of indebtedness shall be sold by the board of education in the manner provided by section four hundred and eighty of this chapter. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 350. **State funds to be used for schools of towns.**—Funds hereafter apportioned by the state under the provisions of this chapter to school districts under the supervision and control of a town board of education shall be apportioned on the basis provided in this chapter, but the funds so apportioned to the several school districts of a town shall be paid by the county treasurer to the town school treasurer. Funds apportioned for teachers' salaries shall be paid on the order of the board of education of the town for the payment of the salaries of teachers employed in such town

L. 1910, ch. 140.

Town boards of education.

§§ 351, 352.

and funds apportioned for school libraries, apparatus, maps or works of art, shall be paid respectively in like manner for school libraries, apparatus, maps or works of art, in such town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

References.—Apportionment of public money generally, Education Law, §§ 490-502. State aid for vocational instruction, Id. § 604; for physical training, § 697.

§ 351. **Certain union free school districts not subject to provisions of article.**—This article shall not apply to a union free school district having a population of fifteen hundred or more or employing fifteen teachers or more at the time this act takes effect unless a resolution shall have been adopted by such district making such article applicable to such district as provided in section three hundred and thirty-one of this article and the provisions of such article shall not apply to the school districts in the several towns of a county which adjoins a city having a population of one million or more and in which there are only two district superintendents. Unless such resolution shall have been adopted, a school tax in a town in which the whole or any portion of such a district is situate shall be levied only against the taxable property in the town outside of the boundaries of such union free school district and the inhabitants of such district shall not be permitted to vote for candidates for members of the town board of education or upon any proposition or question submitted at an annual or regular school meeting in the town. School districts which, under the provisions of this section, are exempt from the provisions of this act shall continue to be subject to and regulated by the provisions of law which now regulate and control the affairs of such districts. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 352. **School district officers abolished; terms continued to collect funds, pay claims, et cetera.**—1. All trustees, members of boards of education and other school officers of school districts subject to this article, in office when this act takes effect shall continue in office to and including the thirty-first day of July, nineteen hundred and seventeen, when the offices of trustees, members of boards of education, district clerks, collectors, treasurers and other school district officers of such districts shall be and are hereby abolished and the terms of such officers shall cease except as herein provided.

2. The trustees, boards of education and other officers, of each district, enumerated in subdivision one of this section are hereby continued in office with all the powers and duties conferred on such officers by the education law or other statutes, including the power to levy, assess and collect taxes for the purpose of closing up the business and financial affairs of such district and of satisfying its obligations, except bonded indebtedness, adjusting its claims, collecting funds due it and paying its just debts. After liquidating all outstanding obligations except bonded indebtedness, and settling or adjusting all claims against such district, and closing up all its financial affairs as a district, such officers shall apportion any funds re-

maining in the treasury, except moneys received from the state, among the taxpayers of the district in the manner now provided by law. Such apportionment shall be based upon the relation of the assessed valuation of such taxpayers to the aggregate assessed valuation of the district. The portion of such funds which consists of moneys received from the state shall be paid into the town school treasury. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 353. **Outstanding bonds; existing school property.**—1. The bonded indebtedness of the school districts in a town which are subject to the provisions of this article, including a union free school district having a population of fifteen hundred or employing fifteen teachers or more, which has adopted a resolution pursuant to the provisions of section three hundred and thirty-one of this article, existing and outstanding at the time of the taking effect of this article shall be a charge against the property which is subject to tax for the maintenance of the schools in such town or union free school district.

2. Within one year from the taking effect of this article the value of the school property in the several districts which are made subject to the provisions hereof shall be appraised and determined by a commission consisting of the supervisor of the town, the chairman of the town board of education and the district superintendent of schools.

3. The value of the school property in each district as so appraised shall, after deducting the outstanding bonded indebtedness of such district, be credited to such district and charged against the town. The total amount charged to the town as a result of such appraisal shall be raised by tax upon the taxable property of the town in the same manner as other school expenses are raised. Such tax shall be levied and collected in five equal, annual instalments and the amount required shall be included by the board of education in the annual tax budget of the town.

4. The commission hereinbefore created shall, upon appraising such property and determining the credit to be allowed to each district, apportion the amount so credited to such district among the owners or possessors of taxable property in the district in the ratio of their several assessments on the last corrected assessment-roll of the town. The said commission shall report to the board of education of the town the apportionment so made and the board shall cause to be issued to each of such owners or possessors, a certificate of credit stating the amount so apportioned. Such certificates of credit shall be transferable by the persons to whom they are issued, and shall be payable only out of moneys raised by tax as herein provided for the payment of the charge against the town on account of the school property acquired by such town. They shall be issued in such denominations and shall be due at such times as to provide for their payment out of the moneys raised by tax for the payment of such charge.

5. The commissioner of education shall prescribe rules governing the

commission in the appraisal of school property as herein provided and regulating the distribution and apportionment of the credits and charges herein referred to and the form and denomination of such certificate. An appeal will lie from such appraisal or from any act of such commission or board of education in respect to the apportionment of credits, the distribution of charges and the levy and collection of a tax on account of such school property to the commissioner of education in the same manner and under the same conditions as in the case of other appeals to the commissioner of education. A like appeal will lie from the apportionment of the bonded indebtedness of any town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 354. Election of board of education.—1. The first board of education of each town thereof shall be elected by the trustees and members of the boards of education of the several school districts in such town, subject to the provisions of this article. The said trustees and members of boards of education shall meet for such purpose on the second Tuesday in June, nineteen hundred and seventeen, in one of the schoolhouses in the town to be designated by the district superintendent of schools. The said trustees and members of boards of education shall organize by the election of a chairman and clerk. They shall thereupon proceed to elect members of the board of education of the town to hold office for the term specified in section three hundred and thirty-one of this article. The persons elected as members of such board shall be residents of the town and qualified electors at school meetings therein. Not more than three of the members of such board of education shall reside in the same school district, except in towns in which there are less than three school districts. The chairman and clerk of the meeting shall canvass the votes cast for the candidates for the offices to be filled and the candidate receiving a majority of the votes cast shall be elected. The chairman and clerk of the meeting shall thereupon notify the district superintendent in writing of the persons declared elected as members of said board, and the district superintendent shall give notice of such election to the persons so elected. As the terms of office of such members expire their successors shall be elected at the annual school meeting.

The district superintendent of schools shall call a meeting of the board of education of each town in his supervisory district, elected as above provided, on the first day of August in nineteen hundred and seventeen, at the principal schoolhouse of the town, for the purpose of organization and the transaction of any other business which may properly come before such board. Upon the election of a clerk of such board, the chairman and clerk of the meeting held for the purpose of electing members of the board of education shall file the minutes of the meeting with such clerk. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 355. Time and place of annual meeting.—1. The annual school meet-

ing in each town shall be held on the first Tuesday in May in each year, at which members of the board of education shall be elected and such business as may legally come before such meeting shall be transacted. Such meeting shall be held at the schoolhouse in the town which is the most conveniently accessible to a majority of the qualified electors of such town. The board of education shall designate the schoolhouse at which such meeting shall be held.

2. The board of education may divide the town into school election districts, whenever it deems it necessary for the convenience of the qualified electors, because of the territorial extent of the town or the number of such electors. If a town is divided into school election districts, the board shall designate the schoolhouse in each district where the annual meeting shall be held.

3. The polls for the election of members of the board of education at such meeting shall be open from nine o'clock in the morning to four o'clock in the afternoon. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 356. **Notice of annual school meeting.**—The clerk of each board of education shall give notice of the time when and the places where the annual school meeting in the town is to be held, by publishing such notice once in each week for the four weeks next preceding such meeting, in two newspapers, if there shall be two, or in one newspaper, if there shall be but one, published or circulated in such town. If no newspaper shall be published or circulated therein, such notice shall be posted on the door of each schoolhouse in the town and in at least ten other public places in said town, at least twenty days before the time of such meeting. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 357. **Special school meetings in towns.**—The board of education of each town shall have power to call a special meeting of the qualified electors of the town, whenever it deems necessary and proper, and whenever required by law, in the manner prescribed for the giving of a notice of the annual meeting. Such special meetings shall be held at the schoolhouse or schoolhouses at which the annual school meeting of the town is required to be held. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 358. **Qualifications of voters at school meetings.**—1. To be eligible to vote at annual or special town school meetings, a person must possess the qualifications prescribed in section two hundred and three of this chapter, except as provided in the following subdivision:

2. In a school district located in two or more towns, those persons possessing the qualifications required under subdivision one of this section shall be entitled to vote at annual or special town school meetings in the town in which the principal schoolhouse of the district in which they reside is located, irrespective of the town in which they reside. A person entitled to vote under this subdivision, at an annual or special town school

meeting in a town other than the town in which he resides shall not be entitled to vote at such meetings in the town in which he resides. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 359. **Preparation of list of qualified electors.**—1. The clerk of the board of education in each town shall, on or before the first day of April in each year, prepare a list of the persons qualified to vote at annual or special school meetings held in the town. If the town is divided into school election districts, a separate list shall be prepared, as herein provided, containing the names of the qualified electors, residing in each district. The names on such list shall be arranged alphabetically, according to the surnames of such electors, and shall contain a statement as to the place of residence of each elector.

2. Such list shall be placed on file in the office of the clerk of the board of education or at some other place, to be designated by the board, where it may be examined by any person interested therein, from four to eight o'clock in the evening of each Friday and Saturday of the four weeks immediately preceding the annual school meeting. The clerk of the board of education or some person to be designated by the board, shall attend at such office or place, at such times, and permit public inspection of such list. A person, whose name is not upon such list, who is or will be a qualified voter at the annual meeting, may submit to the clerk of the board, evidence, showing such fact, and the clerk shall correct such list, by inserting his name therein. If the name and residence of a qualified elector are incorrectly stated upon such list, the clerk, upon satisfactory evidence being presented to him, may correct such errors.

3. A qualified voter at the annual school meeting of the town may, upon the examination of such list, file with the clerk of the board a written challenge of the qualifications as an elector of any person, whose name appears upon such list. The board of education of the town shall meet on the Monday preceding the annual school meeting and may, upon satisfactory evidence being presented to it, correct the errors in such list of qualified electors and add thereto the names of persons, ascertained by it to be qualified electors at such annual meeting. The board shall also indicate upon the list of qualified electors, the persons whose qualifications as electors have been challenged.

4. If the annual school meeting is held in election districts, a separate list for each district, revised and corrected as above provided, shall be delivered by the clerk of the board of education to the inspectors appointed, as hereinafter provided, to conduct such school meeting in each of such districts. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 360. **Nominations and ballots.**—1. Candidates for members of the board of education in a town shall be nominated by petition. Such petition shall be directed to the clerk of the board of education of the town and shall be signed by at least twenty-five qualified electors thereof. It

shall state the names and residences of the candidates and whether such candidates are nominated for full terms or for the unexpired portion of such terms. Each petition shall be filed with the clerk of the board of education on or before the fifteenth day preceding the day of the annual school meeting.

2. The board of education shall cause to be printed official ballots, containing the names of all candidates nominated as above provided. Such ballots shall separately state whether the persons named thereon are candidates for full terms or for portions of terms. The names of the candidates shall be arranged alphabetically according to their surnames, in columns under titles or designations, showing whether they are to be elected for full terms or portions of terms. Blank spaces shall be provided so that persons may vote for candidates who have not been nominated for the offices to be filled at such election. Such ballots shall have printed thereon instructions as to the marking of the ballots and the number of candidates for the several offices for which an elector is permitted to vote.

3. Whenever a question is required to be submitted at an annual or special school meeting, the ballots therefor shall conform as nearly as may be to the ballots required to be used, under the election law, for the submission of questions or propositions, at a general election.

4. The number of ballots to be used at an annual or special school meeting shall at least equal the number of qualified electors in the town, as appears from the list of qualified electors thereof. The clerk of the board shall cause to be delivered to the inspectors in each of such election districts, on the day of the meeting, a sufficient supply of such ballots for the use of the qualified electors thereof. Such ballots shall be printed at the expense of the town and the cost thereof shall be paid out of school funds, in the same manner as other school expenses. An election of a member of a board of education shall not be declared invalid or illegal because of the use of ballots which do not conform to the requirements of this section or to the provisions of the election law, provided the intent of the elector may be ascertained from the use of such irregular or defective ballot and such use was not fraudulent and did not substantially affect the result of the election. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 361. **Inspectors of election.**—The board of education shall designate three inspectors of election for each election district into which such town has been divided. The clerk of the board of education shall give written notice of appointment to the persons so appointed. If a person, appointed as inspector of election, refuses to accept such appointment, the board of education may appoint a qualified elector of the district to fill such vacancy. Such board of inspectors shall before opening the polls in the election district for which they are appointed, organize by electing one of their number as chairman and one as poll clerk. Each inspector shall receive for his services a compensation of three dollars, to be paid out of the school

funds of the town and in the same manner as other expenses are paid. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 362. **Conduct of school meetings; challenges.**—1. All elections, held as provided herein, shall be conducted, so far as may be, in accordance with the provisions of the election law relative to general elections, except as otherwise provided herein. Suitable ballot boxes shall be provided by the board of education, to be used at such school meetings. Such ballot boxes shall conform as nearly as may be to the provisions of the election law relative to ballot boxes at general elections. All persons, whose names appear upon the list of qualified electors, as residing in the town or election districts, shall be permitted to vote and shall be given ballots for such purpose. Persons whose names do not appear upon such list may be permitted to vote, upon satisfactory evidence being presented showing that they are qualified electors of the town or district and upon making the declaration hereinafter prescribed. The ballots when presented to the inspectors shall be folded so as to conceal the names of candidates for whom or the proposition or question for which the elector has voted. All electors entitled to vote, who are in the places where the election is held at or before the time of closing the polls, shall be allowed to vote. The poll clerk shall keep a poll list, containing the names of the qualified electors who vote at such election for the candidates or propositions or questions voted for thereat.

2. Any qualified elector may challenge the right of a person to vote, at the time when he requests a ballot. All persons, named upon the list of electors as having been challenged prior to the day of the meeting, shall also be challenged before ballots are given to them. The chairman of the board of inspectors shall require the person so challenged, or a person whose name does not appear upon the list of qualified electors, and who requests the privilege of voting, to make the following declaration: "I do declare and affirm that I have been for the thirty days last past an actual resident of this town and that I am qualified to vote at this meeting."

If such person makes such declaration, he shall be permitted to vote at the meeting but if he shall refuse to make such declaration he shall not be permitted to vote for candidates or upon any question or proposition at such meeting.

3. A person who wilfully makes a false declaration as to his right to vote at such meeting, is guilty of a misdemeanor. A person who is not qualified to vote at such meeting but who shall vote thereat, shall be subjected to a penalty of fifty dollars which may be recovered in a suit brought therefor by the board of education for the benefit of the schools of the town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 363. **Canvass of votes; declaration of result.**—1. Immediately upon the close of the polls, the board of inspectors shall count the ballots found in the ballot boxes, without unfolding them, except so far as is necessary

to ascertain that each ballot is single. They shall compare the number of ballots found in the ballot boxes with the number of persons recorded on the poll list as having voted for the candidates or the questions or propositions submitted at such meeting. If the number of ballots found in the ballot boxes shall exceed the number of names so recorded on such list, such ballots shall be replaced, without being unfolded, in the boxes from which they were taken and shall be thoroughly mingled in such boxes and one of the members of the board of inspectors designated by such board shall publicly draw out as many ballots as shall be equal to the number of excess ballots. The ballots so drawn out shall be inclosed, without unfolding, in an envelope which shall be sealed and indorsed with a statement of the number of such excess ballots withdrawn from the box and shall be signed by the inspector who withdrew such ballots. Such envelope shall be delivered to the clerk of the board of education and shall be preserved by him for a period of at least one year.

2. The ballots shall be counted or canvassed by the inspectors in the manner provided for the canvassing of ballots at a general election, except as otherwise provided herein. The votes cast for each question or proposition shall be tallied and counted by the inspectors and a statement shall be made, containing the number of votes cast for and against each question or proposition submitted at such meeting. Such statement shall also give the number of ballots which are declared void and describe the defects therein and shall also specify the number of wholly blank ballots cast. Such statement shall be signed by the inspectors. A ballot shall not be declared void unless the defects are such as to clearly indicate that the ballot was marked for identification or that the intent of the elector in voting such ballot can not be ascertained therefrom. The ballots which are declared void and not counted shall be inclosed in an envelope, which shall be sealed and indorsed as containing void ballots and shall be signed by the inspectors. Such envelope shall be filed with the clerk of the board of education and preserved by him for a period of at least one year. After the ballots are counted and the statements have been made as required herein, such ballots shall be replaced in the ballot boxes. Each box shall be securely locked and sealed and deposited with the clerk of the board of education. The unused ballots shall be placed in a sealed package and be returned to the clerk of the board of education, at the time when such ballot boxes are delivered to him.

3. The inspectors shall deliver the statement of the votes cast at such meeting, in each election district, to the clerk of the board of education on the day following such meeting. The board of education shall meet at the usual place of meeting, at eight o'clock in the evening of the day following such election and shall forthwith examine and tabulate the statement of the results of the election in the several election districts of such town. The board of education shall canvass the returns as contained in the statements of the inspectors and shall determine the number of votes cast for and

against each candidate at such election and for and against each question or proposition voted upon in the several election districts of the town. The board shall thereupon declare the result of the canvass of the votes in each election district.

4. The candidates receiving a plurality of the votes cast respectively for the several offices shall be declared elected. The clerk of the board of education shall record the result of the election as announced by the board of education, in the minutes of the meeting. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 364. Successful candidates to be notified of election.—The clerk of the board of education shall, within twenty-four hours after the result of the election has been declared, serve a written notice either personally or by mail upon each person declared to be elected as a member of the board of education. A person upon whom such notice has been served shall be deemed to have accepted the office unless within five days after the service of such notice he shall file his written refusal with the clerk. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

§ 365. Appeals to the commissioner of education.—An appeal may be taken to the commissioner of education from such election or from any of the acts or proceedings of a school meeting or the board of education, in the same manner and with the same effect as in the case of an appeal to him from the acts or proceedings of a school meeting or election or of a board of education, under the provisions of this chapter. The commissioner of education may, in his discretion, order a new election in any town. (*Added by L. 1917, ch. 328, in effect May 2, 1917.*)

L. 1917, ch. 328, § 2. Repeal of inconsistent provisions; effect of repeal. All acts or parts of acts, general or special, inconsistent with the provisions of this act are hereby repealed. The repeal of the acts hereinafter specified or of such inconsistent acts or parts of such acts shall not affect any right existing or accrued or any liability incurred prior to the passage of this act. This act shall not affect a pending action or proceeding brought by or against a trustee, trustees or a board of education of a school district but the same may be prosecuted or defended in the same manner and for the same purpose by the board of education of the town of which such district forms a part, as though this act had not been passed. All contracts entered into by a trustee, trustees or the board of education of a school district prior to the taking effect of this act, under and pursuant to the provisions of the education law, shall be carried into effect according to the terms thereof by the board of education of the town of which such school district forms a part, in the same manner and for the same purpose as though this act had not been passed. Any right, existing or accrued, or any liability incurred by a trustee, trustees or board of education of a school district, prior to the passage of this act, may be asserted and enforced by or against the board of education of the town of which such school district forms a part, in the same manner and to the same extent as though this act had not been passed.

ARTICLE XII.

(Art. 12 (§§ 340, 341), renumbered, Art. 12 (§§ 364, 365), by L. 1917, ch. 328, in effect May 2, 1917.)

TOWN CLERKS.

Section 364. Duties of town clerks.

365. Expenses of town clerks.

§ 364. Duties of town clerks.—It shall be the duty of the town clerk of each town:

1. To keep all books, maps, papers, and records of his office touching common schools, and forthwith to report to the school commissioner any loss or injury to the same.

2. To receive from the supervisors the certificates of apportionment of school moneys to the town, and to record them in a book to be kept for that purpose.

3. To notify forthwith the trustees of the several school districts of the filing of each such certificate.

4. To see that the trustees of the school districts make and deposit with him their annual reports within the time prescribed by law, and to deliver them to the school commissioner on demand.

5. To furnish the school commissioner of the school commissioner district in which his town is situated the names and post-office addresses of the school district officers reported to him by the district clerks.

6. To distribute to the trustees of the school districts all books, blanks and circulars which shall be delivered or forwarded to him by the commissioner of education or school commissioner for that purpose.

7. To receive from the supervisor and record in a book kept for that purpose, the annual account of the receipts and disbursements of school moneys required to be submitted to the town auditors, together with the action of the town auditors thereon, and to send a copy of the account and of the action thereon, by mail, to the commissioner of education whenever required by him, and to file and preserve the vouchers accompanying the account.

8. To receive and to record in the same book, the supervisor's final account of the school moneys received and disbursed by him, and deliver a copy thereof to such supervisor's successor in office.

9. To receive from the outgoing supervisor, and file and record in the same book, the county treasurer's certificate, that his successor's bond has been given and approved.

10. To receive, file and record the descriptions of the school districts, and all papers and proceedings delivered to him by the school commissioner pursuant to the provisions of this chapter.

11. To act, when thereto legally required, in the erection or alteration of a school district, as in article five of this chapter provided.

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12. To receive and preserve the books, papers and records of any dissolved school district, which shall be ordered, as hereinafter provided, to be deposited in his office.

13. To perform any other duty which may be devolved upon him by this chapter, or by any other act touching common schools. (*Former § 340; renumbered § 364, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 261, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 4, § 2; originally revised from L. 1864, ch. 555, tit. 5, § 2.

§ 365. Expenses of town clerks.—The necessary expenses and disbursements of the town clerk in the performance of his said duties, are a town charge, and shall be audited and paid as such. (*Former § 341; renumbered § 365, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 260, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 4, § 1; originally revised from L. 1864, ch. 555, tit. 5, § 1, as amended by L. 1865, ch. 647; L. 1888, ch. 331.

Reference.—Audit and payment of town charges, Town Law, § 133.

ARTICLE XIII.

(Art. 13 (§§ 360–365), renumbered Art. 13 (§§ 370–375), by L. 1917, ch. 328, in effect May 2, 1917.)

SUPERVISORS.

Section 370. Duties of supervisors.

- 371. Sale of gospel or school lots on division of town.
- 372. Payment of proceeds of sale of gospel or school lots.
- 373. Supervisor's bond for school moneys.
- 374. Refusal of supervisor to give bond.
- 375. Report by supervisors to district superintendents.

§ 370. Duties of supervisors.—It is the duty of every supervisor:

1. To disburse the school moneys in his hands applicable to the payment of teachers' wages, upon and only upon the written orders of a sole trustee or a majority of the trustees, in favor of qualified teachers. But whenever the collector in any school district shall have given bonds for the due and faithful performance of the duties of his office as disbursing agent, as required by section two hundred and fifty-three or whenever any school district shall elect a treasurer as provided in this chapter, the said supervisor shall, upon the receipt by him of a copy of the bond executed by said collector or treasurer as herein required, certified by the trustees, pay over to such collector or treasurer, all moneys in his hands applicable to the payment of teachers' wages in such district, and the said collector or treasurer shall disburse such moneys so received by him upon such orders as are specified herein to the teachers entitled to the same.

2. To pay over all the school money apportioned to a union free school district, to the treasurer of such district, upon the order of its board of education.

3. To keep a just and true account of all the school moneys received and disbursed by him during each year, and to lay the same, with proper vouchers, before the town board or board of town auditors at each annual meeting thereof.

4. To provide a bound blank book, the cost of which shall be a town charge, and to enter therein all his receipts and disbursements of school moneys, specifying from whom and for what purposes they were received, and to whom and for what purposes they were paid out; and to deliver the book to his successor in office.

5. To make out a just and true account of all school moneys received by him and of all disbursements thereof, within fifteen days after the termination of his office and to deliver the same to the town clerk to be filed and recorded, and to notify his successor in office that such account has been made and filed.

6. To deliver to his predecessor the county treasurer's certificate showing that he has given to such treasurer the bond required by section three hundred and sixty-three of this chapter and that such bond has been approved by such treasurer, and to procure from the town clerk a copy of his predecessor's account, and to demand and receive from him all school moneys remaining in his hands.

7. To pay to his successor upon receipt of such certificate all school moneys remaining in his hands, and to forthwith file the certificate in the town clerk's office.

8. To sue for and recover, in his name of office, when the duty is not elsewhere imposed by law, all penalties and forfeitures imposed by this chapter, and for any default or omission of any town officer or school district board or officer under this chapter; and after deducting his costs and expenses to report the balances to the school commissioner.

9. To act, when legally required, in the erection or alteration of a school district, as provided in article five of this chapter, and to perform any other duty which may be devolved upon him by this chapter, or any other act relating to common schools.

10. To take and hold possession of the gospel and school lots of their respective towns.

11. To lease the same for such time not exceeding twenty-one years, and upon such conditions as they shall deem expedient.

12. To sell the same with the advice and consent of the inhabitants of the town, in town-meeting assembled, for such price and upon such terms of credit as shall appear to them most advantageous.

13. To invest the proceeds of such sales in loans, secured by bond and mortgage upon unincumbered real property of the value of double the amount loaned.

14. To purchase the property so mortgaged upon a foreclosure, and to hold and convey the property so purchased whenever it shall become necessary.

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15. To re-loan the amount of such loans repaid to them, upon the like security.

16. To apply the rents and profits of such lots, and the interest of the money arising from the sale thereof, to the support of schools, as may be provided by law, in such manner as shall be thus provided.

17. To render a just and true account of the proceeds of the sales and the interest on the loans thereof, and of the rents and profits of such gospel and school lots, and of the expenditure and appropriation thereof, on the last Tuesday next preceding the annual town-meeting in each year, to the town board.

18. To deliver over to his successor in office, all boxes, papers and securities relating to the same, at the expiration of their respective offices.

19. To take therefor a receipt, which shall be filed in the clerk's office of the town; and,

20. To commence and prosecute in and by the name and style of the supervisor of the town any suits against any of his predecessors in office or against any other person to recover any debt, dues or demands, in any-wise arising from such public lot; and no such suit shall abate by the death, resignation or removal from office of the said supervisor but the same shall and may be prosecuted to judgment and execution by his successor in office. (*Former § 360; renumbered § 370, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 280, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 3, § 4, as amended by L. 1896, ch. 177; R. S., pt. 1, ch. 15, tit. 4, § 3; L. 1819, ch. 239; originally revised from L. 1864, ch. 555, tit. 4, § 6, as amended by L. 1875, ch. 167, L. 1890, ch. 175.

Consolidators' note.—New matter "supervisors" substituted for trustees for the reason that the powers and duties of trustees of gospel and school lots were transferred to the town superintendent of common schools by L. 1846, ch. 186, and by Consolidated School Law, tit. 3, § 1, transferred to the supervisors.

§ 371. **Sale of gospel or school lots on division of town.**—Whenever a town having lands assigned to it for the support of the gospel or of schools, shall be divided into two or more towns, or shall be altered in its limits by the annexing of a part of its territory to other towns, such lands shall be sold by the supervisor of the town, in which such lands were included immediately before such division or alteration; and the proceeds thereof shall be apportioned between the towns interested therein, in the same manner as the other public moneys of towns, so divided or altered, are apportioned. (*Former § 361; renumbered § 371, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 281, revised from R. S., pt. 1, ch. 15, tit. 4, § 5.

References.—Report of supervisor as to gospel or school lots, Education Law, § 523. Apportionment of gospel funds to school districts, Id. §§ 524–528.

§ 372. **Payment of proceeds of sale of gospel or school lots.**—The shares of such moneys, to which the towns shall be respectively entitled, shall be

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paid to the supervisors of the respective towns, and shall thereafter be subject to the provisions of this article. (*Former § 362; renumbered § 372, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 282, revised from R. S., pt. 1, ch. 15, tit. 4, § 6.

§ 373. Supervisor's bond for school moneys.—1. Immediately on receiving the school commissioner's certificates of apportionment the county treasurer shall require of each supervisor, and each supervisor shall give to the treasurer, in behalf of the town, his bond, with two or more sufficient sureties, approved by the treasurer, in the penalty of at least double the amount of the school moneys set apart or apportioned to the town, and of any such moneys unaccounted for by his predecessors, conditioned for the faithful disbursement, safe-keeping and accounting for such moneys, and of all other school moneys that may come into his hands from any other source.

2. If the condition shall be broken the county treasurer shall sue the bond in his own name, in behalf of the town, and the money recovered shall be paid over to the successor of the supervisor in default, such successor having first * giving security as aforesaid.

3. Whenever the office of a supervisor shall become vacant, the county treasurer shall require the person elected or appointed to fill such vacancy to execute a bond, with two or more sureties, to be approved by the treasurer, in the penalty of at least double the sum of the school moneys remaining in the hands of the old supervisor, when the office became vacant, conditioned for the faithful disbursement and safe-keeping of and accounting for such moneys. But the execution of this bond shall not relieve the supervisor from the duty of executing the bond first above mentioned. (*Former § 363; renumbered § 373, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 283, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 17; originally revised from L. 1864, ch. 555, tit. 3, § 31, as amended by L. 1875, ch. 567.

References.—Official bond of supervisors, Town Law, § 100. Official undertakings generally, Public Officers Law, §§ 10–13.

Action on a bond given by a supervisor under this section must be brought by the county treasurer, *Palmer v. Roods* (1906), 116 App. Div. 66, 101 N. Y. Supp. 188. And it is no defense to such an action that public school moneys placed in his hands for disbursement under the statute were lost without fault or negligence on his part. *Tillinghast v. Merrill* (1896), 151 N. Y. 135, 45 N. E. 375, 56 Am. St. Rep. 612, 34 L. R. A. 678, affg. (1894), 77 Hun 481, 38 N. Y. Supp. 1089.

§ 374. Refusal of supervisor to give bond.—The refusal of a supervisor to give such security shall be a misdemeanor, and any fine imposed on his conviction thereof shall be for the benefit of the common schools of the town. Upon such refusal, the moneys so set apart and apportioned to the town shall be paid to and disbursed by some other officer or person to be

* So in original.

designated by the county judge, under such regulations and with such safeguards as he may prescribe, and the reasonable compensation of such officer or person, to be adjusted by the board of supervisors, shall be a town charge. (*Former § 364; renumbered § 374, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 284, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 18; originally revised from L. 1864, ch. 555, tit. 3, § 32.

References.—Acting in official capacity without filing required security is a misdemeanor, Penal Law, § 1820; but does not invalidate official acts, Id. § 1821.

§ 375. Report by supervisors to district superintendents.—On the first Tuesday of February in each year, each supervisor shall make a return in writing to the district superintendent of schools of the supervisory district in which the town is situated, showing the amounts of school moneys in his hands not paid on the orders of trustees for teachers' salaries, and the districts to which they stand accredited, and if such moneys remain in his hands, he shall report that fact; and thereafter he shall not pay out any of said moneys until he shall have received the certificate of the next apportionment; and the moneys so returned by him shall be reapportioned as directed in article eighteen of this chapter. (*Former § 365, as amended by L. 1913, ch. 130, renumbered § 375, by L. 1917, ch. 328, in effect May 2, 1917.*)

Source.—Education L. 1909, § 285, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 3, § 3; originally revised from L. 1864, ch. 555, tit. 4, § 4.

ARTICLE XIV.

(Entire article amended by L. 1910, ch. 607.)

DISTRICT SUPERINTENDENT OF SCHOOLS; HIS ELECTION, POWERS AND DUTIES.

Section 380. Office of district superintendent of schools created.

381. Supervisory districts.
382. School directors.
383. Election of district superintendent.
384. Qualifications of district superintendents.
385. District superintendent must take oath of office.
386. Term of office of district superintendent.
387. Vacancies in the office of district superintendent.
388. Filling vacancy in the office of district superintendent.
389. Salary of district superintendent.
390. Expense of district superintendents.
391. Salary of district superintendent may be withheld.
392. Removal of district superintendent from office.
393. District superintendent not to be interested in certain business, or to accept rewards, etc.
394. District superintendent not to engage in other business.
395. General powers and duties of district superintendent.
396. District superintendent subject to rules of commissioner of education.
397. Other duties of a district superintendent.
398. Appeals from acts of district superintendent, etc.

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§ 380. Office of district superintendent of schools created.—The office of district superintendent of schools is hereby created to begin on the first day of January, nineteen hundred and twelve. (*Amended by L. 1910, ch. 607.*)

Source.—New; substitute for Education L. 1909, § 300.

§ 381. Supervisory districts.—1. The territory embraced in the school commissioner districts of the state outside of cities and of school districts of five thousand population or more, which employ a superintendent of schools, shall be organized and divided into supervisory districts. In the formation or division of such territory into such districts no town shall be divided. The territory of such districts must be contiguous and compact and towns shall be arranged in districts so that there shall be as equal a division of the territory and number of school districts as may be practicable.

2. In a county entitled to two or more supervisory districts the school commissioner of each school commissioner district in such county and the supervisor of each town in such county shall meet at the county seat of such county on the third Tuesday in April, nineteen hundred and eleven, at ten o'clock in the forenoon and divide such county into the number of supervisory districts to which it is entitled.

3. The county clerk of such county shall give ten days' notice, in writing, of such meeting, to each of such school commissioners and supervisors. The county clerk shall also call such meeting to order at the proper hour and the school commissioners and supervisors present shall elect from their number a chairman and a clerk.

4. A copy of the proceedings of such meeting showing the supervisory districts formed and naming the towns composing each of such districts, certified by the chairman and clerk, shall be deposited by the clerk of such meeting in the office of the clerk of the county immediately after the close of the meeting. The county clerk on receipt of the same shall forward a certified copy thereof to the commissioner of education.

5. The number of supervisory districts into which each county shall be organized or divided is as follows:

- a. Hamilton, Putnam, Rockland, Schenectady, each one;
- b. Chemung, Fulton, Genesee, Montgomery, Nassau, Schuyler, Seneca, Yates, each two;
- c. Albany, Clinton, Columbia, Cortland, Essex, Greene, Livingston, Niagara, Orange, Orleans, Rensselaer, Schoharie, Suffolk, Sullivan, Tioga, Tompkins, Warren, Wyoming, each three;
- d. Broome, Dutchess, Franklin, Herkimer, Lewis, Madison, Monroe, Ontario, Saratoga, Ulster, Washington, Wayne, Westchester, each four;
- e. Allegany, Cattaraugus, Cayuga, Chenango, Erie, Onondaga, Oswego, each five;
- f. Chautauqua, Delaware, Jefferson, Otsego, each six;

- g. Oneida, Steuben, each seven;
- h. Saint Lawrence, eight districts.

6. The district superintendents of two or more supervisory districts in a county may unite in a petition to the board of supervisors of the county for a change in the boundaries of such districts by including or excluding one or more towns, stating the reasons for such change, and if such change conforms to the territorial requirements of subdivision one of this section, the board of supervisors may, by resolution, change such districts in accordance with such petition. A copy of such resolution, certified by the chairman and clerk of the board of supervisors, shall be deposited by the clerk in the office of the clerk of the county. The county clerk on receipt of the same shall forward a certified copy thereof to the commissioner of education. (*Subd. 6 added by L. 1916, ch. 238.*) (*Section amended by L. 1910, ch. 607.*)

Source.—New; substitute for Education L. 1909, § 301.

Fees of county clerk, not to be charged for services under this section. *People ex rel. Hawley v. Howard* (1912), 152 App. Div. 621, 137 N. Y. Supp. 496.

§ 382. School directors.—1. Two school directors shall be elected for each town at the general election held in the year nineteen hundred and ten. One of such directors shall be elected to serve until January one, nineteen hundred and thirteen, and the other shall be elected to serve until January one, nineteen hundred and sixteen. A director shall be elected at the general election in nineteen hundred and twelve and every fifth year thereafter and one shall be elected in nineteen hundred and fifteen and every fifth year thereafter. The term of office of the directors elected in nineteen hundred and twelve and thereafter shall commence on the first day of January following their election and continue for five years. In towns, except those towns situated in the counties of Nassau and Suffolk, where biennial town meetings are held at a time other than the general election, directors shall be elected at the biennial town meeting held immediately prior to the expiration of the term of their predecessors. Such directors shall be elected in the same manner that town officers are elected at town meetings held at the time of a general election, and the provisions of the election law relating to the nomination and election of such town officers shall apply to the nomination and election of such directors.

2. A school director shall vacate his office by removal from the town or by filing a written resignation with the town clerk. A vacancy in the office of school director shall be filled by the town board of the town in which such vacancy exists, for the remainder of the unexpired term. If the town fails to elect a director a vacancy shall be deemed to exist in such office.

3. A school director before entering upon the discharge of the duties of his office, and not later than thirty days after the date on which he was elected to office, shall take the oath of office prescribed by the constitution.

Such oath may be taken before a justice of the peace or a notary public, and must be filed in the office of the clerk of the town.

4. A school director shall receive two dollars per day for each day's service and his necessary traveling expenses, and the town board of the town for which such director is chosen shall audit and allow the same. (*Amended by L. 1910, ch. 607, and L. 1916, ch. 168.*)

Source.—New.

Election of school directors, preparation of ballots, see Rept. of Atty. Genl. (1910) 415; Rept. of Atty. Genl. (1910), 962.

Women are not eligible to office of school director. Rept. of Atty. Genl. (1911) 199.

A school director is not entitled to traveling expenses incurred in going to and from the town where he was elected for the purpose of performing his duties. Rept. of Atty. Genl. (1911) 522.

Vacancy in office of school director must be filled at a meeting of the town board regularly called and held. Dec. of Com'r (1917), 10 St. Dep. Rep. 465. A school director vacates his office by removal from the town. Dec. of Com'r (1916), 10 St. Dep. Rep. 446.

A director who fails to file oath in the form required by the Constitution has a defeasible title to the office and a vacancy may be declared which may be filled by action of the town board. Dec. of Com'r (1916), 9 St. Dep. Rep. 559.

§ 383. Election of district superintendent.—1. The school directors of the several towns composing a supervisory district shall meet for organization at eleven o'clock in the forenoon on the third Tuesday in May following their election. Such meeting shall be held at a place in the supervisory district, designated by the county clerk, at least ten days previous to the date thereof. At the time the county clerk designates such place of meeting he shall also mail a notice of the time and place of such meeting to each school director of the district. The school directors present at such meeting shall organize by electing from their number a chairman, a clerk and two inspectors of election. The school directors at such meeting shall designate a place for holding future meetings.

2. The school directors of the several towns composing a supervisory district shall be a board of school directors, and such board of directors shall meet at eleven o'clock in the forenoon on the third Tuesday in August, nineteen hundred and eleven, and on the third Tuesday in June every fifth year thereafter, and elect a district superintendent of schools. The clerk of such board shall give each director at least ten days' notice in writing of the hour, date and place of such meeting.

3. If such directors fail to elect a district superintendent of schools before the first day of January following the date of such meeting, and a vacancy exists in such office, the county judge shall appoint such superintendent who shall serve until the board of directors shall fill such vacancy.

4. In the election of such district superintendent the vote shall be by ballot and the person receiving a majority of all votes cast shall be elected. Each school director shall be entitled to one vote in such election.

5. The clerk of such board shall file a copy of the proceedings of each

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meeting and each election, certified by himself and the chairman, in the office of the clerk of the county in which such meeting or election is held within three days after the close thereof.

6. The county clerk on receipt of notice of the election of a district superintendent of schools in any supervisory district of his county shall deliver to the person elected a certificate of such election attested by his signature with the seal of the county and shall also transmit to the commissioner of education a duplicate of such certificate of election. (*Amended by L. 1910, ch. 607.*)

Source.—New.

§ 384. Qualifications of district superintendents.—1. To be eligible to election to the office of district superintendent of schools a person must be at least twenty-one years of age, a citizen of the United States and a resident of the state, but he need not be a resident of the supervisory district for which he is elected at the time of his election. Such superintendent must, however, become a resident of the county containing the district for which he has been elected on or before the date on which his term of office begins. Failure to acquire such residence will be deemed a removal from the county. No person shall be ineligible on account of sex.

2. In addition thereto he must possess or be entitled to receive a certificate authorizing him to teach in any of the public schools of the state without further examination and he shall also pass an examination prescribed by the commissioner of education on the supervision of courses of study in agriculture and teaching the same.

3. A district superintendent who is removed from office shall not be eligible to election to such office in any supervisory district for a period of five years. (*Amended by L. 1910, ch. 607.*)

Source.—New. See Education L. 1909, § 302.

Constitutionality of subd. 2.—The provisions of subdivision 2, as amended in 1910, that, in addition to being twenty-one years of age and a citizen of the United States and a resident of the state, a person to be eligible to the office of district superintendent of schools must possess a teacher's certificate and "also pass an examination prescribed by the Commissioner of Education on the supervision of courses of study in agriculture and teaching the same," are remedial in their nature to the end that fit, proper and reasonably well qualified persons should be district superintendents of schools, do not impose any arbitrary or unreasonable qualifications, and do not in any way violate the provisions of section 1 of article I of the State Constitution forbidding any citizen to be deprived of his rights or privileges "unless by the law of the land, or the judgment of his peers"; or the provisions of section 2 of article X of the State Constitution providing that officers shall be elected by the people or appointed; or the provisions of section 1 of article XIII of the State Constitution prescribing an official oath and providing that "no other oath, declaration or test shall be required as a qualification for any office of public trust"; or the provisions of the 14th amendment of the Federal Constitution relating to the privileges and immunities of citizens and the equal protection of the laws. *People ex rel. Pintler v. Transue* (1911), 74 Misc. 504, 132 N. Y. Supp. 497.

Examination in agriculture for position of district superintendent of schools is

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under the control of the Commissioner of Education and is not subject to the Civil Service Law. Rept. of Atty. Genl. (1911) 5.

§ 385. District superintendent must take oath of office.—A district superintendent of schools before entering upon the discharge of the duties of his office, and not later than five days after the date on which his term of office is to commence, shall take the oath of office prescribed by the constitution. Such oath may be taken before a county clerk, a justice of the peace, or a notary public and must be filed in the office of the clerk of the county. (*Amended by L. 1910, ch. 607.*)

Source.—New. See Education L. 1909, § 303.

§ 386. Term of office of district superintendent.—The district superintendents elected in nineteen hundred and eleven shall hold office until the first day of August, nineteen hundred and sixteen. The full term of office of a district superintendent of schools elected in nineteen hundred and sixteen and thereafter shall be five years and shall commence on the first day of August next after his election. A district superintendent of schools unless removed shall hold office until his successor is chosen and qualified. (*Amended by L. 1910, ch. 607.*)

Source.—New. See Education L. 1909, § 303.

§ 387. Vacancies in the office of district superintendent.—The office of district superintendent of schools shall be vacant upon:

1. The death of an incumbent.
2. His removal from office by the commissioner of education.
3. His removal from the county.
4. His filing in the office of the clerk of the county his written resignation.
5. His acceptance of the office of supervisor, town clerk or trustee of a school district.
6. His failure to take and file the oath of office as provided in this article. (*Amended by L. 1910, ch. 607.*)

§ 388. Filling vacancy in the office of district superintendent.—Whenever a vacancy occurs it shall be filled for the remainder of the unexpired term by the board of school directors. Upon direction of the commissioner of education the clerk of the board in which the supervisory district having such vacancy is located shall immediately call a special meeting of such board for the purpose of electing a district superintendent. The provisions of this title relative to the election generally of a district superintendent of schools, including notices, filing of the proceedings and all other matters relating to such an election, shall apply to a special election to fill a vacancy in such office. (*Amended by L. 1910, ch. 607.*)

Source.—New. See Education L. 1909, § 305.

Vacancies in the office of school director may be filled by the Town Board, in accordance with section 130 of the Town Law. Atty. Genl. Opin. (1915), 6 State Dep. Rep. 425.

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§ 389. **Salary of district superintendent.**—1. Each district superintendent shall receive an annual salary from the state of fifteen hundred dollars, payable monthly by the commissioner of education from moneys appropriated therefor.

2. The supervisors of the towns composing any supervisory district may by adopting a resolution by a majority vote increase the salary to be paid by such district to its district superintendent. Such supervisors must thereupon file with the clerk of the board of supervisors a certificate showing the amount of such increase. The board of supervisors of each county shall levy such amount annually by tax on the towns composing such supervisory district within the county. (*Amended by L. 1910, ch. 607; subd. 1 amended by L. 1917, ch. 794, in effect July 1, 1917.*)

Source.—New. See Education L. 1909, §§ 306, 307.

Resolution increasing compensation.—Where the term of office of petitioner, duly appointed district superintendent of schools for a supervisory district including five certain towns in Schenectady county, began January 1, 1912, and expires August 1, 1916, and the supervisors of said towns, under this section, adopted and severally signed a resolution that in addition to petitioner's annual salary he be paid \$400 by the county treasurer in the same manner as other county charges, and said resolution was filed with the clerk of the board of supervisors and a duplicate thereof filed with the county treasurer, there is a substantial compliance with the section; and upon the failure and refusal of the board of supervisors to take proper action petitioner is entitled to a peremptory writ of mandamus directing said board, within a reasonable time, to convene and levy \$400 against said towns. *People ex rel. Wingate v. Supervisors of Schenectady* (1913), 79 Misc. 641, 141 N. Y. Supp. 257.

§ 390. **Expense of district superintendents.**—The commissioner of education shall quarterly audit and allow the actual sworn expense incurred by each district superintendent of schools in the performance of his official duties, but the amount of such expense allowed shall not exceed in any year three hundred dollars. Such expenses shall be paid by the commissioner of education from moneys appropriated therefor. (*Amended by L. 1910, ch. 607.*)

Source.—New. Substitute for Education L. 1909, § 308.

§ 391. **Salary of district superintendent may be withheld.**—The commissioner of education may, whenever he is satisfied that a district superintendent of schools has persistently neglected to perform an official duty, withhold payment of the whole or any part of such superintendent's salary as it shall become due and he may also withhold any sum to which such superintendent shall be entitled for expenses and the amount thus withheld shall be forfeited; but said commissioner may in his discretion remit such forfeiture in whole or in part. (*Amended by L. 1910, ch. 607.*)

Source.—Substitute for Education L. 1909, § 309.

§ 392. **Removal of district superintendent from office.**—The commissioner of education may, by an order under the seal of the education depart-

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ment, remove a district superintendent of schools from office whenever he is satisfied that such superintendent:

1. Has been guilty of immoral conduct;
2. Is incompetent to perform any official duty; or
3. Has persistently neglected or wilfully refused to perform any lawful duty imposed upon him. (*Amended by L. 1910, ch. 607.*)

Source.—New. See Education L. 1909, § 338.

Reference.—Removal of school officers by commissioner for misconduct, Education Law, § 95.

Removal for failure to perform duties.—Commissioner of education may remove a district superintendent without notice of charges and a trial, in the absence of provision therefor in the statute. The commissioner may base his determination not only upon the evidence at the hearing, but also upon records in his office, consisting of letters sent and received, even though they were not called to the attention of the respondent. *People ex rel. Woodward v. Draper* (1911), 142 App. Div. 102, 127 N. Y. Supp. 14, *affd.* (1911), 202 N. Y. 612, 96 N. E. 1122. This case was decided under the former statute, and the proceedings were taken under what is now § 94 of Education Law.

• § 393. District superintendent not to be interested in certain business or to accept rewards, et cetera.—A district superintendent of schools shall not:

1. Be directly or indirectly interested otherwise than as author in the sale, publication, or manufacture of school books, maps, charts, or school apparatus or in the sale or manufacture of school furniture or any school or library supplies.
2. Be directly or indirectly interested in any contract made by the trustees of a school district.
3. Be directly or indirectly interested in any agency or bureau maintained to obtain or aid in obtaining positions for teachers or superintendents.
4. Directly or indirectly receive any emolument, gift, pay, reward or promise of pay or reward for recommending or procuring the sale, use or adoption or aiding in procuring the sale, use or adoption of any book, map, chart, school apparatus or furniture or other supplies for any school or library or for recommending a teacher or aiding a teacher in obtaining appointment to teach. (*Amended by L. 1910, ch. 607.*)

Source.—Substitute for Education L. 1909, § 315.

§ 394. District superintendents not to engage in other business.—A district superintendent of schools shall devote his whole time to the performance of the duties of his office and shall not engage in any other occupation or profession. Such time as shall not necessarily be devoted by a district superintendent of schools to the performance of the clerical and administrative work of his office shall be devoted to the visitation and inspection of the schools maintained in his supervisory district. (*Amended by L. 1910, ch. 607.*)

Source.—New.

§ 395. General powers and duties of district superintendent.—A district superintendent of schools shall have power and it shall be his duty:

1. To inquire from time to time into and ascertain whether the boundaries of the school districts within his supervisory district are definitely and plainly described in the records of the office of the proper town clerk; and in case the record of the boundaries of any school district shall be found indefinite or defective, or if the same shall be in dispute, then to cause the same to be amended or an amended record of the boundaries to be made. All necessary expenses incurred in establishing such amended records shall be a charge on the district or districts affected, to be audited and allowed by the trustees thereof, on the certificate of the district superintendent.

2. To assemble all the teachers of his district by towns or otherwise, for the purpose of conference on the course of study, for reports of and advice and counsel in relation to discipline, school management and other school work, and for promoting the general good of all the schools of the district. Teachers shall be entitled to compensation for days actually in attendance upon such conference. (*Subd. 2 amended by L. 1913, ch. 511.*)

3. To frequently and thoroughly inspect the work done in the training classes maintained in his district and to report to the commissioner of education on the efficiency of the instruction given and the observation and practice work done by the members thereof.

4. To hold meetings of trustees and other school officers and to advise with and counsel them in relation to their powers and duties and particularly in relation to the repair, construction, heating, ventilating and lighting of schoolhouses and improving and adorning the school grounds. To especially advise trustees relative to the employment of teachers, the adoption of textbooks and the purchase of library books, school apparatus, furniture and supplies.

5. To direct the trustees of any district to make any alterations or repairs to the schoolhouses or outbuildings which shall, in his opinion, be necessary for the health or comfort of the pupils, but the amount which trustees shall be directed to expend in such alteration or repairs shall not exceed two hundred dollars in any one year.

6. To direct the trustees of any district to make any repairs or alterations to school furniture, or where in his opinion any furniture is unfit for use and not worth repairing, or when sufficient furniture is not provided, to direct that such new furniture shall be provided as he deems necessary, but the amount thus directed to be expended shall not exceed in any one year one hundred dollars.

7. To direct the trustees of any district to abate any nuisance in or on the school grounds.

8. To condemn a schoolhouse as provided elsewhere in this chapter.

9. To examine and license teachers pursuant to the provisions of this

chapter. He shall also conduct such other examinations as the commissioner of education shall direct.

10. To examine any charge affecting the moral character of any teacher residing or employed within his district, and to revoke such teacher's certificate as elsewhere provided by this chapter.

11. To take affidavits and administer oaths in all matters pertaining to the public school system, but without charge or fee.

12. To take and report to the commissioner of education under the direction of such commissioner testimony in a case on appeal. In such a case or in any matter or proceeding to be heard or determined by the district superintendent, he may issue a subpoena to compel the attendance of a witness. Service of such subpoena shall be made a reasonable time before the date named therein for the hearing, by exhibiting the same to the person so served, with the signature of the district superintendent of schools attached, and by leaving a copy thereof with such person. The witness shall be entitled to receive at the time of service, the same fees as provided by law for witnesses in a court of record. Disobedience to such subpoena shall subject the delinquent to a penalty of twenty-five dollars, which shall be recovered by the county treasurer in his name of office for the benefit of the county.

13. To exercise in his discretion any of the powers and perform any of the duties of another district superintendent on the written request of such other superintendent, and he must exercise such powers and perform such duties when directed to do so by the commissioner of education.

14. To make such investigations and to make such reports to the commissioner of education upon any matter or act as said commissioner shall from time to time request. He shall make an annual report on the first day of September in such form and giving such information as the commissioner of education shall require. For this purpose he shall procure the reports of trustees of school districts from the town clerks' offices and after abstracting the necessary contents thereof shall indorse and deposit them with a copy of his abstract in the office of the county clerk. (*Section amended by L. 1910, ch. 607.*)

Source.—Substitute for Education L. 1909, § 313.

References.—Condemnation of school houses as unfit for use, Education Law, § 456. Enforcement of provisions as to water closets and out houses, Id. § 457. Qualifications of teachers, Id. §§ 550–554. Revocation of teachers certificate for immorality, Id. § 556.

The duties of district superintendent of schools are important. He is in constant touch with the teachers and pupils in the rural schools. He advises and in a large measure controls the teachers in their professional work and directs how the schools shall be conducted. People *ex rel. Pintler v. Transue* (1911), 74 Misc. 504, 132 N. Y. Supp. 497.

Boundary lines.—Duty of superintendent to locate boundary line where there is no record. Dec. of Com'r (1914), 2 St. Dep. Rep. 623. District superintendent has no discretion in establishing boundary line. It must be established according to

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the proof. Dec. of Com'r (1914), 1 St. Dep. Rep. 565. Public records are decisive on questions of boundary. Dec. of Supt. (1891), Jud. Dec. 687.

A district superintendent is not authorized to change a boundary line under a proceeding to establish a disputed boundary. Dec. of Com'r (1914), 2 St. Dep. Rep. 593; Dec. of Supt. (1894), Jud. Dec. 676; Dec. of Supt. (1888), Jud. Dec. 682; Dec. of Supt. (1891), Jud. Dec. 684; Dec. of Supt. (1888), Jud. Dec. 685; Dec. of Com'r (1904), Jud. Dec. 691; Dec. of Supt. (1895), Jud. Dec. 679. Presumption as to correctness of boundary line by reason of long acquiescence. Dec. of Supt. (1890), Jud. Dec. 686; Dec. of Supt. (1889), Jud. Dec. 688. Presumption in favor of correctness of order. Dec. of Supt. (1889), Jud. Dec. 690.

District superintendents directed to execute order establishing boundary lines in accordance with decision on appeal. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 390. Surveyor's bill ordered paid. Dec. of Com'r (1906), Jud. Dec. 692.

Repairs of school house ordered.—It is the duty of the trustee to make the repairs ordered and levy a tax therefor. Dec. of Supt. (1885), Jud. Dec. 1261. An order that a furnace be purchased upheld. Dec. of Supt. (1888), Jud. Dec. 796.

Orders for furniture.—Order of district superintendent requiring new furniture affirmed. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 393; Dec. of Supt. (1893), Jud. Dec. 788; Dec. of Supt. (1889), Jud. Dec. 791; Dec. of Com'r (1917), No. 365, 11 St. Dep. Rep. —. The order may designate the kind of furniture to be provided and that it shall be new and of modern style. Dec. of Supt. (1898), Jud. Dec. 786.

A county clerk is not entitled to a filing fee for the deposit in his office of school trustee's reports. Opinion of State Comptroller (1916), 9 State Dep. Rep. 541.

§ 396. District superintendent subject to the rules of commissioner of education.—A district superintendent shall be subject to such rules and directions as the commissioner of education shall from time to time prescribe. (*Amended by L. 1910, ch. 607.*)

Source.—New.

§ 397. Other duties of a district superintendent.—A district superintendent of schools shall, in addition to the duties especially conferred upon him by this title, possess and be subject to all the powers, duties and responsibilities with which a school commissioner is charged by law. (*Amended by L. 1910, ch. 607.*)

Source.—New.

§ 398. Appeals from acts of district superintendent, et cetera.—Appeals from the official acts of a district superintendent of schools or from his refusal or failure to act in any matter in which he may legally act, may be taken to the commissioner of education. All questions in controversy relating to the election of such district superintendent or to the formation of supervisory district shall be determined by the commissioner of education on proper appeal. The provisions of article fourteen of this chapter shall apply to and govern such appeals and decisions therein. (*Amended by L. 1910, ch. 607.*)

Source.—New.

L. 1910, ch. 607, § 2.—Sections three hundred and eighty-one and three hundred and eighty-two of this article hereby amended shall take effect on the first day of July, nineteen hundred and ten. Section three hundred and eighty-three of

such article shall take effect on the first day of April, nineteen hundred and eleven. All other provisions of such article shall take effect on the first day of January, nineteen hundred and twelve.

The action of a town board in declaring the office of a school director vacant and in appointing a successor constitutes a controversy relating to the election of a district superintendent within the meaning of this section. Com. of Educ. Decisions (1916), 9 State Dept. Rep. 559.

ARTICLE XV.

ASSESSMENT AND COLLECTION OF TAXES.

Section 410. Assessment of taxes.

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440. Assessment for school purposes of certain state lands.

§ 410. **Assessment of taxes.**—Immediately after a tax shall have been voted by a district meeting, for a purpose arising during the current school year the trustees shall assess it, and make out the tax-list therefor, and annex thereto their warrant for its collection. Where a tax is voted

at an annual school meeting for school purposes during the following school year the said trustees shall prepare their tax-list therefor and annex thereto their warrant for its collection within thirty days after August first. But they may at the same time assess two or more taxes so voted, and any taxes they are authorized to raise without such vote, and make out one tax-list and one warrant for the collection of the whole. They shall prefix to their tax-list a heading showing for what purpose the different items of the tax are levied. (*Amended by L. 1911, ch. 830.*)

Source.—Education L. 1909, § 380, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 62; originally revised from L. 1864, ch. 555, tit. 7, § 65.

References.—Tax budgets in towns, Education Law, § 345. Levy and assessment of town school tax, *Id.* § 346, subd. 1.

Time for making tax-list, prescribed by this section, is merely directory. *Rawson v. Van Riper* (1873), 1 T. & C. 370.

A tax must be voted at a district meeting before a valid assessment can be made. *Mead v. Gale* (1845), 2 Den. 232. And the trustees are liable if a tax is levied without such a vote being taken. *Enos v. Hulett* (1852), 13 Barb. 111.

All the trustees must be associated in making a tax-list and issuing a warrant, although a majority may act. *Harding v. Head* (1860), 35 Barb. 35; *Doolittle v. Doolittle* (1860), 31 Barb. 312; *Porter v. Robinson* (1881), 12 Wk. Dig. 209; *Hallock v. Rumsey* (1880), 22 Hun 89.

One of three trustees cannot delegate his authority to the other two, to make an assessment. Trustees issuing a warrant and seizing property under such an assessment are trespassers. *Keeler v. Frost* (1856), 22 Barb. 400.

Trustees must meet and act as a board in making the assessment. *Dec. of Supt.* (1888), *Jud. Dec.* 1015.

Tax-list issued by a de facto trustee valid. Eligibility to office cannot be determined collaterally. *Dec. of Supt.* (1889), *Jud. Dec.* 1243.

Tax-list issued by one who is neither a de jure nor a de facto trustee is void. *Dec. of Supt.* (1891), *Jud. Dec.* 1292.

Headings of tax list.—The provision requiring headings showing purposes for which the tax is to be raised is merely directory. *Porter v. Robinson* (1881), 12 Wk. Dig. 209.

The trustees must prefix a heading to the tax-list showing items. *Dec. of Supt.* (1889), *Jud. Dec.* 793; *Dec. of Supt.* (1890), *Jud. Dec.* 996; *Dec. of Supt.* (1891), *Jud. Dec.* 997; *Dec. of Supt.* (1895), *Jud. Dec.* 1009.

Sufficiency of tax list.—Trustees may not include in tax-list item for personal services. *Dec. of Supt.* (1891), *Jud. Dec.* 1270. Tax-list set aside for irregularities. *Dec. of Supt.* (1888), *Jud. Dec.* 1015.

Unless appeal from tax-list is promptly taken same will not be considered. *Dec. of Supt.* (1890), *Jud. Dec.* 998; *Dec. of Supt.* (1891), *Jud. Dec.* 999; *Dec. of Supt.* (1889), *Jud. Dec.* 1012; *Dec. of Supt.* (1888), *Jud. Dec.* 1019.

A failure to comply with the provisions of this article in the preparation of a tax list renders the tax list void, and invalidates all subsequent proceedings thereunder including the action of the board of supervisors in transferring an unpaid tax to the town assessment roll. *Matter of Chadwick* (1901), 59 App. Div. 334, 69 N. Y. Supp. 853.

§ 411. Property to be assessed.—1. School district taxes shall be apportioned by the trustees upon all real estate within the boundaries of the district which shall not be by law exempt from taxation, except as herein-

after provided, and such property shall be assessed to the person or corporation owning or possessing the same at the time such tax-list shall be made out.

2. The trustees shall also apportion the district taxes upon all persons residing in the district, and upon all corporations liable to taxation therein, for the personal estate owned by them and liable to taxation.

3. Land lying in one body and occupied by the same person, either as owner or agent for the same principal, or as tenant under the same landlord, if assessed as one lot on the last assessment-roll of the town after revision by the assessors, shall though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides. This rule shall not apply to land owned by non-residents of the district, and which shall not be occupied by an agent, servant or tenant residing in the district. Such unoccupied real estate shall be assessed as non-resident, and a description thereof shall be entered in the tax-list.

Source.—Education L. 1909, § 381, as amended by L. 1909, ch. 415, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 63; originally revised from L. 1864, ch. 555, tit. 7, § 66, as amended by L. 1865, ch. 647; L. 1867, ch. 406; L. 1875, ch. 567; L. 1889, ch. 328.

References.—Exemptions of property from taxation, Tax Law, § 4. Real property to be taxed in town where situated, Id. § 9. Ascertaining facts for assessment generally, Id. §§ 20, 21. Assessment of banks for school purposes, Id. § 24. Assessment of real property of non-residents, Id. §§ 30, 31. Assessment of omitted property, Id. § 34. Abandonment of lot divisions, Id. § 42.

All the trustees must be present when a tax is apportioned, although a majority may act. *Harding v. Head* (1860), 35 Barb. 35. And see *Whitford v. Scott* (1857), 14 How. Pr. 302. But if one is notified to attend, and refuses, it is the same as if he had attended and dissented to the act of the majority. *Horton v. Garrison* (1856), 23 Barb. 176.

Liability of trustees for erroneous assessments.—In apportioning a tax trustees act judicially, and are not criminally or civilly liable if their motives are pure. *Easton v. Calendar* (1883), 11 Wend. 90; *Folsom v. Streeter* (1840), 24 Wend. 266; *Hill v. Sellick* (1845), 21 Barb. 207. But in *Palmer v. Lawrence* (1872), 6 Lana 282 it was held that trustees do not act judicially in determining whether a person assessed is a taxable inhabitant of the school district, and they are personally liable for the seizure and sale of his property under the tax warrant.

If there is a want of jurisdiction to impose the tax, as for a failure to give the required notice, the trustees are liable. *Jewell v. Van Steenburgh* (1874), 58 N. Y. 85, 91.

Lands in two districts.—A tract of land, occupied by the owner assessed as one lot on the last assessment roll of the town, though situated partly in two school districts, is taxable in that district in which the owner resides. *Budd v. Allen* (1893), 69 Hun 535, 537, 24 N. Y. Supp. 5; *Ward v. Aylesworth* (1832), 9 Wend. 231.

Liability for tax levied after order has been issued transferring property to another district but before such order takes effect. Dec. of Supt. (1857), Jud. Dec. 79.

Lands in three districts.—A person who occupies as a single parcel, a continuous tract of land, acquired by him through different conveyances, which is located in one town and in a single tax district, but in three school districts, is not entitled as a matter of right, under section 10 of the Tax Law and this section, to have the assessors of the town assess the tract as one parcel, in order that he may have

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the tract assessed for school purposes by the school trustee in the school district in which he resides, and be excluded from assessment in the other school districts. *People ex rel. Bourne v. Howell* (1905), 106 App. Div. 140, 94 N. Y. Supp. 488.

Application to corporation.—The words "person" and "corporation" are used in different senses. Land lying in one body is only to be assessed in the district where the occupant resides, where it is occupied by the same person; not where it is occupied by the same person or corporation. The reason for omitting the word corporation in referring to the occupancy of such land is reasonably plain. The occupant is to be a person,—some one who may have children to send to school. So a corporation having land in two or more districts although such land lies in one body, is taxable not only in the district where the office of the corporation is situated, but in the districts in which such property lies. *People v. ex. rel. Fleischmann Mfg. Co. v. Marenus* (1909), 134 App. Div. 170, 118 N. Y. Supp. 838, *affd.* (1909), 196 N. Y. 569, 90 N. E. 1164.

Railroad corporations.—Act of 1867 in relation to valuation of railroad property in school districts, for purpose of taxation, has no relation to general taxation for town purposes. *People ex rel. W. S. R. R. Co. v. Adams* (1891), 125 N. Y. 471, 26 N. E. 746.

Assessment generally.—See *People ex rel. Burbank v. Robinson* (1879), 76 N. Y. 422, 424.

No land can be assessed as land lying in one body which does not meet fully the following conditions: (1) such lands must lie in one body; (2) they must be owned by one person; (3) they must be occupied by one person and this person must be either the owner of such lands or the agent or tenant of such owner; (4) such lands must have been assessed as one lot on the last assessment roll of the town, after the revision by the assessors. *Com. of Educ. Decision* (1915), 5 *State Dep. Rep.* 616.

Assessment as one body of land in district where owner or agent resides, determined. *Dec. of Supt.* (1890), *Jud. Dec.* 57; *Dec. of Supt.* (1895), *Jud. Dec.* 65; *Dec. of Supt.* (1895), *Jud. Dec.* 67. Each of conditions must be met in order to authorize assessment as one body of land. *Dec. of Com'r* (1905), *Jud. Dec.* 54.

Lands not occupied by the owner or his tenant or agent cannot be wholly assessed in one district when lying in two or more districts. *Dec. of Com'r* (1916), 7 *St. Dep. Rep.* 577; *Dec. of Supt.* (1894), *Jud. Dec.* 72.

Assessment as one parcel on town assessment roll must be shown to authorize assessment in district where occupant resides. *Dec. of Com'r* (1915), 5 *St. Dep. Rep.* 616; *Dec. of Supt.* (1891), *Jud. Dec.* 53; *Dec. of Supt.* (1890), *Jud. Dec.* 56; *Dec. of Supt.* (1889), *Jud. Dec.* 63; *Dec. of Supt.* (1888), *Jud. Dec.* 71; *Dec. of Supt.* (1889), *Jud. Dec.* 74.

Land separated by the Erie canal and a public roadway cannot be assessed as one parcel, if in two districts. *Dec. of Supt.* (1888), *Jud. Dec.* 70. **Lands separated by railroad having title to roadbed must be assessed separately.** *Dec. of Supt.* (1895), *Jud. Dec.* 75.

Presumption as to location.—There is a presumption that land taxed in a certain district for a number of years without objection is properly taxed therein. *Dec. of Supt.* (1891), *Jud. Dec.* 1001.

Personal property under the control of an executor or administrator must be assessed in the district in which such executor or administrator resides. *Dec. of Supt.* (1884), *Jud. Dec.* 46.

Exemption.—Where supreme court has held that certain property used for educational purposes is exempt for town and county taxes the commissioner of education will also declare it exempt for school taxes. *Dec. of Com'r* (1908), *Jud. Dec.* 52. **Exemption of minister of the gospel.** *Dec. of Supt.* (1891), *Jud. Dec.* 81.

§ 412. **Ascertainment of valuations.**—The valuations of taxable property shall be ascertained, so far as possible, from the last assessment-roll of the town, after revision by the assessors; and no person shall be entitled to any reduction in the valuation of such property, as so ascertained, unless he shall give notice of his claim to such reduction in writing to the trustees of the district before the tax-list shall be made out.

Source.—Education L. 1909, § 382, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 64; originally revised from L. 1864, ch. 555, tit. 7, § 67.

References.—Ascertainment of valuations for assessments generally, Tax Law, §§ 20, 21. Assessors to apportion valuation of railroad, telegraph, telephone and pipe line companies between school districts, Tax Law, § 40.

Last assessment-roll of the town means last completed assessment-roll. *Alexander v. Hoyt* (1831), 7 Wend. 89, overruled in *Hill v. Sellick* (1855), 21 Barb. 307. And see *Ryder v. Cudderback* (1815), 12 Johns. 412.

Trustees are required to take their assessments from the town rolls. Dec. of Com'r (1916), 7 St. Dep. Rep. 613; Dec. of Supt. (1890), Jud. Dec. 81; Dec. of Supt. (1887), Jud. Dec. 82; Dec. of Supt. (1886), Jud. Dec. 289. The last revised assessment roll must be used. Dec. of Supt. (1891), Jud. Dec. 1002; Dec. of Supt. (1893), Jud. Dec. 1006; Dec. of Supt. (1890), Jud. Dec. 1018.

Omissions in making out the roll for school taxes, but not errors in judgment by the town assessors, may be supplied by the trustees. Rept. of Atty. Genl. (1900) 243.

Property used in connection with a special franchise which has come into existence since the last town assessment roll cannot be placed upon school district tax lists. Rept. of Atty. Genl. (1913), Vol. 2 p. 520.

Assessments by town assessors.—The provisions of the statute do not authorize the trustees of a school district to substitute their judgment as to the descriptions and valuations of taxable real property for that of the town assessors. Omissions or errors by the town assessors may be supplied or corrected by trustees of school districts, but the statute does not contemplate that the power of the trustees to assess property shall be equal or superior to that of the town assessors. Decision of Com. of Educ. (1916), 7 State Dep. Rep. 613 Ad.

§ 413. **Power of trustees to determine values.**—The trustees of a district shall ascertain the true value of the property to be taxed from the best evidence in their power, giving notice to the persons interested, and proceeding in the same manner as the town assessors are required by law to proceed in the valuation of taxable property, the hearing of grievances, and the revision of the town assessment-roll in the following cases:

1. When a reduction shall be duly claimed and where the valuation of taxable property cannot be ascertained from the last completed assessment-roll of the town;

2. When the valuation of such property shall have increased or diminished since the last assessment-roll of the town was completed;

3. When an error, mistake, or omission on the part of the town assessors shall have been made in the description or valuation of taxable property.

Source.—Education L. 1909, § 383, as amended by L. 1909, ch. 415, revised from former on Sch. L. (L. 1894, ch. 556) tit. 7, § 65; originally revised from L. 1864, ch. 555, tit. 7, § 68.

References.—Preparation of assessment-roll, Tax Law, § 20. Notice of completion of assessment-roll, and hearing of grievances, Id. §§ 36, 37; correction and verification of assessment-roll, Id. §§ 38, 39.

Notice of assessment by the trustees is not necessary unless property not on the last assessment-roll of the town is assessed or a change is made in such roll. A failure to give notice in such case is jurisdictional. *Jewell v. Van Steenburgh* (1874), 58 N. Y. 85, 89.

Original assessments.—The power of the trustees to make original assessments is restricted to the cases specified in the statute. Dec. of Com'r (1906), Jud. Dec. 47; Dec. of Supt. (1888), Jud. Dec. 61. When original assessment is made notice must be given. Dec. of Supt. (1887), Jud. Dec. 82; Dec. of Supt. (1890), Jud. Dec. 84.

§ 414. **Equalization within joint districts.**—When a district embraces parts of two or more towns, the supervisors of such towns shall, upon receiving a written notice from the trustees of such district, or from three or more persons liable to pay taxes upon real estate therein, meet at a time and place to be named in such notice, which time shall not be less than five or more than ten days from the service thereof, and a place within the bounds of the towns so in part embraced, and proceed to inquire and determine whether the valuation of real property upon the several assessment-rolls of said towns is substantially just as compared with each other.

2. If it is ascertained that such assessments are not relatively equal such supervisor shall determine the relative proportion of taxes that ought to be assessed upon the real property of the parts of such district lying in different towns, and the trustees of such district shall thereupon assess the proportion of any tax thereafter to be raised, according to the determination of such supervisors, until new assessment-rolls of the town shall be perfected and filed, using the assessment-rolls of the several towns to distribute the said proportion among the persons liable to be assessed for the same.

3. If such supervisors shall be unable to agree, they shall summon a supervisor from some adjoining town who shall meet with them and unite in such inquiry and the finding of a majority shall be the determination of such meeting.

4. Such supervisors shall receive for their services three dollars per day for each day actually employed which shall be a town charge upon their respective towns.

Source.—Education L. 1909, § 384, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 66; originally revised from L. 1864, ch. 555, tit. 7, § 69, as amended by L. 1875, ch. 567, § 21.

Reference.—Equalization of valuation of real property in school districts in one town extending into another town, Education Law, § 346, sub. 6.

A petition on appeal from an equalization of valuation for assessment in joint school districts must contain specific and detailed allegations of unequal valuations, so that at least a *prima facie* case of erroneous determination is presented. Copies of the petition must be served upon the supervisors comprising the board of equalization. Com. of Educ. Decisions (1916), 7 State Dept. Reports 611.

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Order of supervisor.—Trustees are not bound by a defective order made by the supervisors under this section. Dec. of Com'r (1910), 3 Jud. Dec. 287; supervisors have no power to change values fixed in the assessment rolls. Dec. of Supt. (1886), Jud. Dec. 289.

Equalization set aside as being made upon insufficient evidence. Dec. of Supt. (1889), Jud. Dec. 290. **Tax-list made prior to equalization upheld.** Dec. of Supt. (1889), Jud. Dec. 1014.

Method of levying tax after equalization defined. Dec. of Com'r (1910), Jud. Dec. 43. An equalization made in 1888 is not controlling upon the trustee in 1912. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 395.

§ 415. Assessment of vacant land.—When any real estate within a district so liable to taxation shall not be occupied and improved by the owner, his servant or agent, and shall not be possessed by any tenant, the trustees of any district, at the time of making out any tax-list by which any tax shall be imposed thereon, shall make and insert in such tax-list a statement and description of every such lot, piece or parcel of land so owned by nonresidents therein, in the same manner as required by law from town assessors in making out the assessment-roll of their towns; and if any such lot is known to belong to an incorporated company liable to taxation in such district, the name of such company shall be specified, and the value of such lot or piece of land shall be set down opposite to such description, which value shall be the same that was affixed to such lot or piece of land in the last assessment-roll of the town; and if the same was not separately valued in such roll, then it shall be valued in proportion to the valuation which was affixed in the said assessment-roll to the whole tract of which such lot or piece shall be part.

Source.—Education L. 1909, § 385, revised from former Cons. Sch. L. (L. 1894, ch. 556) tit. 7, § 71; originally revised from L. 1864, ch. 555, tit. 7, § 74.

Reference.—Assessment of real property of non-resident by town assessor, Tax Law, § 30.

See generally. *People ex rel. Burbank v. Robinson* (1879), 76 N. Y. 422, 424.

§ 416. Persons working land on shares and vendees in possession liable to taxation.—Any person working land under a contract for a share of the produce of such land, shall be deemed the possessor, so far as to render him liable to taxation therefor, in the district where such land is situate, and any person in possession of real property under a contract for the purchase thereof shall be liable to taxation therefor in the district where such real property is situated.

Source.—Education L. 1909, § 388, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 67; originally revised from L. 1864, ch. 555, tit. 7, § 70.

§ 417. Liability of property of certain absentee owners.—Every person owning or holding any real property within any school district, who shall improve and occupy the same by his agent or servant, shall, in respect to the liability of such property to taxation, be considered a taxable inhabitant of such district, in the same manner as if he actually resided therein.

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Source.—Education L. 1909, § 389, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 68; originally revised from L. 1864, ch. 555, tit. 7, § 71.

The application of this section is limited to land belonging to an owner who does not occupy it, and does not apply where the land is occupied by the owner himself, although the owner's hired man lives upon it, while the owner lives upon an adjoining parcel of land in another school district, used and worked with it as one farm under the owner's direction. *Budd v. Allen* (1893), 69 Hun 535, 24 N. Y. Supp. 5.

§ 418. Certain exemptions from tax for building school-house.—Every taxable inhabitant of a district who shall have been, within four years, set off from any other district, without his consent, and shall within that period, have actually paid in such other district, under a lawful assessment therein, a district tax for building a school-house, shall be exempted by the trustees of the district where he shall reside, from the payment of any tax for building a school-house therein.

Source.—Education L. 1909, § 390, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 70; originally revised from L. 1864, ch. 555, tit. 7, § 73.

§ 419. Right of certain tenants to charge tax to landlord.—Where any district tax, for the purpose of purchasing a site for a school-house, or for purchasing or building, keeping in repair, or furnishing such school-house with necessary fuel and appurtenances, shall be lawfully assessed, and paid by any person on account of any real property whereof he is only a tenant at will, or for three years, or for a less period of time, such tenant may charge the owner of such real estate with the amount of the tax so paid by him, unless some agreement to the contrary shall have been made by such tenant.

Source.—Education L. 1909, § 391, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 69; originally revised from L. 1864, ch. 555, tit. 7, § 72.

§ 420. Requisites and authority of collector's warrant.—The * warrant for the collection of a district tax shall be under the hands of the trustees, or a majority of them, with or without their seals; and it shall have the like force and effect as a warrant issued by a board of supervisors to a collector of taxes in the town; and the collector to whom it may be delivered for collection shall be thereby authorized and required to collect from every person in such tax-list named the sum set opposite to his name, or the amount due from any person specified therein, in the same manner that collectors are authorized to collect town and county taxes.

Source.—Education L. 1909, § 392, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 78; originally revised from L. 1864, ch. 555, tit. 7, § 81, as amended by L. 1867, ch. 406, § 18.

Warrant; issuance by trustees.—All the trustees must be associated in issuing a warrant. *Harding v. Head* (1860), 35 Barb. 35. But two of three trustees may issue a warrant, and the presence of the third will be presumed. *Doolittle v. Doolittle* (1860), 31 Barb. 312.

All the trustees having acted together and concurred in the levy and assessment

* So in original.

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of a tax, it is immaterial that they were not all present when it was signed, the signing being a ministerial act. *Thomas v. Clapp* (1855), 20 Barb. 165. Trustees are confined strictly to the authority conferred upon them by statute. *Clark v. Hallock* (1837), 16 Wend. 607.

Where one of three trustees did not sign warrant and was not consulted, tax-list void. Dec. of Supt. (1888), Jud. Dec. 1015.

Where the term of trustee and collector has expired and the tax warrant has run out, the successor trustees may renew warrant and deliver it to the successor collector. Dec. of Supt. (1836), Jud. Dec. 427.

Time for return not specified in statute; time prescribed must be reasonable, permitting voluntary payment for thirty days and a reasonable time thereafter for enforcement of collection. *Frederick v. Dorn* (1901), 66 App. Div. 97, 72 N. Y. Supp. 673; *Stroud v. Baker*, 18 Barb. 327.

Liability of collector.—The collector is generally liable for excessive levies, and is always liable for excessive sales. *Denton v. Carroll* (1896), 4 App. Div. 532, 537, 40 N. Y. Supp. 19; *Pangburn v. Smith* (1848), 4 Barb. 246; *Thorn v. Nott* (1873), 1 T. & C. Adden 22.

If a warrant is sufficient on its face, it is the duty of the collector to execute it. *Norris v. Jones* (1894), 81 Hun 304, 27 N. Y. Supp. 209, 30 N. Y. Supp. 1134; *Alexander v. Hoyt* (1831), 7 Wend. 89. But if it is void, the collector is not protected. *Hallock v. Rumsey* (1880), 22 Hun 89.

A school district tax warrant which directs the collector to receive such taxes "as may be voluntarily paid to you for two successive weeks after the delivery to you of this warrant, together with one cent on each dollar thereof for your fees," instead of permitting voluntary payments at one per centum to be made for "thirty days from the posting of said notice" as required by section 425 is void and offers no protection to the collector. *Frederick v. Dorn* (1901), 66 App. Div. 97, 72 N. Y. Supp. 673.

If the trustees assess the property of a person not taxable, the collector is a trespasser in executing their warrant. *Suydam v. Keyes* (1816), 13 Johns. 444.

§ 421. Time for delivery of warrant to collector.—1. A warrant for the collection of a tax voted by the district shall not be delivered to the collector until the thirty-first day after the tax was voted.

2. A warrant for the collection of a tax authorized by law without a vote of the district may be delivered to the collector whenever the same is completed.

Source.—Education L. 1909, § 393, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 79; originally revised from L. 1864, ch. 555, tit. 7, § 82, as amended by L. 1867, ch. 406, § 19.

§ 422. Jurisdiction of collector.—Any collector to whom any tax-list and warrant may be delivered for collection may execute the same in any other district or town in the same county, or in any other county where the district is a joint district and composed of territory from adjoining counties, in the same manner and with the like authority as in the district in which the trustees issuing the said warrant may reside, and for the benefit of which said tax is intended to be collected; and the bond or sureties of any collector, given for the faithful performance of his official duties, are hereby declared and made liable for any moneys received or collected on any such tax-list and warrant.

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Source.—Education L. 1909, § 394, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 82; originally revised from L. 1864, ch. 555, tit. 7, § 85, as amended by L. 1867, ch. 406, § 20.

§ 423. **Renewals of warrants.**—If the sum of money, payable by any person named in such tax-lists, shall not be paid by him or collected by such warrant within the time therein limited, it shall be lawful for the trustees to renew such warrant in respect to such delinquent person; and whenever more than one renewal of a warrant for the collection of any tax-list may become necessary in any district, the trustees may make such further renewal, with the written approval of the supervisor of any town in which a school-house of said district may be located, to be indorsed upon such warrant.

Source.—Education L. 1909, § 395, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 83; originally revised from L. 1864, ch. 555, tit. 7, § 86, as amended by L. 1867, ch. 406, § 21; L. 1875, ch. 567, § 25.

Signing renewal.—A trustee who does not sign a renewal of a warrant is not liable for its execution. *Thomas v. Clapp* (1855), 20 Barb. 165. If signed by a majority of the trustees it is valid. *Folsom v. Streeter* (1840), 24 Wend. 266.

Renewal of a warrant is equivalent to a new warrant. *Thomas v. Clapp* (1855), 20 Barb. 165; *Smith v. Randall* (1842), 3 Hill 495, 498; *Baker v. Lee* (1886), 41 Hun 591, 592.

The approval of the supervisor is not required for the first renewal of a warrant. *Seaman v. Benson* (1848), 4 Barb. 444.

The trustee not required to renew warrant. Dec. of Supt. (1889), Jud. Dec. 1012.

A new warrant may be issued in place of a renewal of the old one. *Seaman v. Benson* (1848), 4 Barb. 444.

§ 424. **Amendment of tax-lists.**—Whenever the trustees of any school district shall discover any error in a tax-list made out by them, they may, with the approval and consent of the commissioner of education, after refunding any amount that may have been improperly collected on such tax-list, if the same shall be required by him, amend and correct such tax-list, as directed by the commissioner, in conformity to law.

Source.—Education L. 1909, § 396, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 84; originally revised from L. 1864, ch. 555, tit. 7, § 87, as amended by L. 1867, ch. 406, § 22.

Correction of tax-list.—The only way in which the tax-list of a school district can be corrected is by the trustees with the consent of the commissioner of education; and this must be done, if at all, before any certificate is made by the trustees to be presented to the county treasurer, for such certificate must follow the tax-list in all respects and be a true transcript thereof. *Matter of Chadwick* (1901), 59 App. Div. 334, 69 N. Y. Supp. 853.

Mere irregularity in the assessment, such as making it for a sum larger than authorized by law does not invalidate the whole assessment. Such irregularity may be corrected. *Norris v. Jones* (1894), 81 Hun 304, 310, 27 N. Y. Supp. 209, 30 N. Y. Supp. 1134.

Correction by board of supervisors.—School taxes do not come before the board of supervisors, "for its action, confirmation or review," and a school tax-list may not be corrected and an erroneous tax refunded under § 16 of the County Law. *Matter of Reid* (1900), 52 App. Div. 243, 65 N. Y. Supp. 373.

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Illegally changing tax-list.—Changes made in a tax-list by reducing assessments after a warrant had been issued and a considerable portion of the tax had been paid, which changes were apparent on the face of the warrant and were known to the collector, render the warrant void. *Frederick v. Dorn* (1901), 66 App. Div. 97, 72 N. Y. Supp. 673.

Tax-list ordered withdrawn and corrected. Dec. of Com'r (1915), 4 St. Dep. Rep. 640. **Repayment of taxes wrongfully assessed.** Dec. of Com'r (1916), 7 St. Dep. Rep. 579.

§ 425. **Collector's notice.**—1. The collector, on the receipt of a warrant for the collection of taxes, shall give notice to the taxpayers of the district by publicly posting written or printed, or partly written and partly printed, notices in at least three public places in such district, one of which shall be on the outside of the front door of the school-house, stating that he has received such warrant and will receive all such taxes as may be voluntarily paid to him within thirty days from the time of posting said notice.

2. Such collector shall also give a like notice, either personally or by mail, at least twenty days previous to the expiration of the thirty days aforesaid, to the president, secretary, general or division superintendent, or manager of any canal or pipe line, assessed for taxes upon the tax-list delivered to him with the aforesaid warrant.

3. Such collector shall also give a like notice to all nonresident taxpayers on said list whose tax amounts to one dollar or more and whose residence or post-office address may be known to such collector, or may be ascertained by him upon inquiry of the trustees and clerk of his district.

4. No school collector shall be entitled to recover from any railroad corporation, canal company or pipe line, or nonresident taxpayer more than one per centum fees on the taxes assessed against such corporation or nonresident, unless such notice shall have been given as aforesaid; and in case the whole amount of taxes shall not be so paid in, the collector shall forthwith proceed to collect the same.

Source.—Education L. 1909, § 397, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 81, in part, as amended by L. 1896, ch. 575; L. 1899, ch. 440; originally revised from L. 1864, ch. 555, tit. 7, § 84, as amended by L. 1877, ch. 33; L. 1890, ch. 526.

Thirty days for voluntary payment of tax must be permitted; warrant may not legally direct that taxes be voluntarily paid for a period of two weeks. *Frederick v. Dorn* (1901), 66 App. Div. 97, 72 N. Y. Supp. 673.

Neglect of collector in posting notice on door of schoolhouse will not invalidate tax proceedings. Dec. of Com'r (1910), Jud. Dec. 43.

§ 426. **Collector's fees.**—The collector shall receive for his services on all sums paid in as aforesaid, one per centum, and upon all sums collected by him, after the expiration of the time mentioned, five per centum, except as hereinbefore provided; and in case a levy and sale shall be necessarily made by such collector, he shall be entitled to traveling fees, at the rate of ten cents per mile, to be computed for the school-house in such district.

Source.—Education L. 1909, § 398, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 81, in part, as amended by L. 1896, ch. 575; L. 1899, ch. 440; orig-

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inally revised from L. 1864, ch. 555, tit. 7, § 84, as amended by L. 1877, ch. 33; L. 1890, ch. 526.

§ 427. Notice to railroad companies and certain other corporations of assessment and tax.—1. It shall be the duty of the school collector in each school district in this state, within five days after the receipt by such collector of any and every tax or assessment roll of his district, to prepare and deliver to the county treasurer of the county in which such district, or the greater part thereof, is situated, a statement showing the name of each railroad, telegraph, telephone, electric light or gas company, including a company engaged in the business of supplying natural gas, appearing in said roll, the assessment against each of said companies for real and personal property respectively, and the tax against each of said companies.

2. It shall thereupon be the duty of such county treasurer, immediately after the receipt by him of such statement from such school collector, to notify the ticket agent or manager of any such railroad, telegraph, telephone, electric light or gas company, including a company engaged in the business of supplying natural gas assessed for taxes at the station or office nearest to the office of such county treasurer or to notify the company at its principal office within this state personally or by mail, of the fact that such statement has been filed with him by such collector, at the same time specifying the amount of tax to be paid by such company. (*Amended by L. 1913, ch. 216.*)

Source.—Education L. 1909, § 399, revised from L. 1881, ch. 675, as amended by L. 1882, ch. 319; L. 1885, ch. 533.

§ 428. Payment of tax by railroad and certain other corporations to county treasurer.—Any railroad company heretofore organized, or which may hereafter be organized, under the laws of this state and any telegraph, telephone, electric light or gas company including a company engaged in the business of supplying natural gas may within thirty days after the receipt of such statement by such county treasurer, pay the amount of tax so levied or assessed against it in such a district and in such statement mentioned and contained with one per centum fees thereon, to such county treasurer, who is hereby authorized and directed to receive such amount and to give proper receipt therefor. (*Amended by L. 1913, ch. 216.*)

Source.—Education L. 1909, § 400, revised from L. 1881, ch. 675.

§ 429. Duty of collector after failure of railroad and certain other corporations to pay within thirty days.—In case any railroad company and any telegraph, telephone, electric light or gas company including a company engaged in the business of supplying natural gas shall fail to pay such tax within said thirty days, it shall be the duty of such county treasurer to notify the collector of the school district in which such delinquent railroad company is assessed, of its failure to pay said tax,

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and upon receipt of such notice it shall be the duty of such collector to collect such unpaid tax in the manner now provided by law together with five per centum fees thereon; but no school collector shall collect by distress and sale any tax levied or assessed in his district upon the property of any such company until the receipt by him of such notice from the county treasurer. (*Amended by L. 1913, ch. 216.*)

Source.—Education L. 1909, § 401, revised from L. 1881, ch. 675, § 3.

§ 430. **Payment of tax by county treasurer to collector.**—The several amounts of tax received by any county treasurer in this state, under the provisions of the last three sections, of and from such companies, shall be by such county treasurer placed to the credit of the school district for or on account of which the same was levied or assessed, and on demand paid over to the school collector thereof, and the one per centum fees received therewith shall be placed to the credit of, and on demand paid to, the school collector of such school district. (*Amended by L. 1913, ch. 216.*)

Source.—Education L. 1909, § 402, revised from L. 1881, ch. 675, § 4.

§ 431. **Such companies may pay collector.**—Nothing in the last four sections contained shall be construed to hinder, prevent or prohibit any railroad company or telegraph, telephone, electric light or gas company including a company engaged in the business of supplying natural gas from paying its school tax to the school collector direct, as provided by law. (*Amended by L. 1913, ch. 216.*)

Source.—Education L. 1909, § 403, revised from L. 1881, ch. 675, § 1.

§ 432. **Trustees' right of action to recover tax.**—Whenever any sum of money payable by any person named in such tax-list, shall not be paid by such person, or collected by such warrant within the time therein limited, or the time limited by any renewal of such warrant; or in case the property assessed be real estate belonging to an incorporated company, and no goods or chattels can be found whereon to levy the tax, the trustees may sue for and recover the same in their name of office.

Source.—Education L. 1909, § 404, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 85; originally revised from L. 1864, ch. 555, tit. 7, § 86, as amended by L. 1867, ch. 406, § 21; L. 1875, ch. 567, § 25.

An action cannot be brought against resident of the district who has sufficient personal property therein to satisfy the tax assessed. *Chrigstrom v. McGregor* (1893), 74 Hun 343, 26 N. Y. Supp. 517.

§ 433. **Collector's return of unpaid taxes.**—If any tax on real estate placed upon the tax-list and duly delivered to the collector, or the taxes upon nonresident stockholders in banking associations organized under the laws of congress, shall be unpaid at the time the collector is required by law to return his warrant, he shall deliver to the trustees of the district an account of the taxes remaining due, containing a description of the lands upon which such taxes were unpaid as the same were placed

upon the tax-list, together with the amount of the tax so assessed, and upon making oath before any justice of the peace or judge of a court of record, notary public or any other officer authorized to administer oaths, that the taxes mentioned in any such account remain unpaid, and that, after diligent efforts, he has been unable to collect the same, he shall be credited by said trustees with the amount thereof.

Source.—Education L. 1909, § 405, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 72; originally revised from L. 1864, ch. 555, tit. 7, § 75, as amended by L. 1865, ch. 647; L. 1875, ch. 567; L. 1883, ch. 250; L. 1890, ch. 74.

Erroneous return.—Where a school tax collector, having collected all taxes on the the tax roll delivered to him, makes an erroneous return to the county treasurer, stating that all the taxes remain unpaid, and the county treasurer advanced the amount of such taxes to the district, and the board of supervisors again levied the same, the board of supervisors may under section 16 of the County Law make a refund to the taxpayers. *Opinion of Comptroller (1916), 8 State Dept. Rep. 560.*

§ 434. Certification by trustees of collector's return.—Upon receiving any such account from the collector, the trustees shall compare it with the original tax-list, and if they find it to be a true transcript they shall add to such account their certificate to the effect that they have compared it with the original tax-list and found it to be correct, and shall immediately transmit the account, affidavit and certificate to the treasurer of the county.

Source.—Education L. 1909, § 406, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 73; originally revised from L. 1864, ch. 555, tit. 7, § 76.

§ 435. Payment of unpaid taxes from county treasury.—Out of any moneys in the county treasury, raised for contingent expenses, or for the purpose of paying the amount of the taxes so returned unpaid, the treasurer shall pay to the district treasurer, if there be such an officer, otherwise to the collector, the amount of the taxes so returned as unpaid, and if there are no moneys in the treasury applicable to such purpose, the board of supervisors, at the time of levying said unpaid taxes, as provided in the next section, shall pay to the district treasurer, if there be such an officer, otherwise to the collector of the school district the amount thereof which has been relieved, by voucher or draft on the county treasurer, in the same manner as other county charges are paid, and the collector shall be charged by the trustees with the amount so relieved. (*Amended by L. 1910, ch. 284, and L. 1915, ch. 136.*)

Source.—Education L. 1909, § 407, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 74, as amended by L. 1895, ch. 769; L. 1897, ch. 512; originally revised from L. 1864, ch. 555, tit. 7, § 77, as amended by L. 1887 ch. 333.

The duty of the treasurer imposed by this section is qualified and conditional. *People ex rel. Burbank v. Robinson (1879), 76 N. Y. 422, 424.*

§ 436. Levy by supervisors of unpaid taxes.—Such account, affidavit and certificate shall be laid by the county treasurer before the board of supervisors of the county, who shall cause the amount of such unpaid taxes, with seven per centum of the amount in addition thereto, to be levied upon the lands upon which the same were imposed; and if imposed upon the lands

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of any incorporated company, then upon such company; and when collected the same shall be returned to the county treasurer to reimburse the amount so advanced, with the expenses of collection.

Source.—Education L. 1909, § 408, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 75; originally revised from L. 1864, ch. 555, tit. 7, § 78, as amended by L. 1865, ch. 647; L. 1867, ch. 567; L. 1883, ch. 250.

The statutory penalty of seven per centum cannot be added to school taxes assessed against wild forest lands owned by the State. Rept. of Atty. Genl. (1913), Vol. 2, 698.

§ 437. **Payment before levy.**—Any person whose lands are included in any such account may pay the tax assessed thereon, with five per centum added thereto, to the county treasurer, at any time before the board of supervisors shall have directed the same to be levied.

Source.—Education L. 1909, § 409, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 76, as amended by L. 1895, ch. 769; originally revised from L. 1864, ch. 555, tit. 7, § 79.

§ 438. **Proceedings for collection same as of county taxes.**—The same proceedings in all respects shall be had for the collection of the amount so directed to be raised by the board of supervisors as are provided by law in relation to the county taxes; and, upon a similar account, as in the case of county taxes of the arrears thereof uncollected, being transmitted by the county treasurer to the comptroller, the same shall be paid on his warrant to the treasurer of the county advancing the same; and the amount so assumed by the state shall be collected for its benefit, in the manner prescribed by law in respect to the arrears of county taxes upon land of nonresidents; or if any part of the amount so assumed consisted of a tax upon any incorporated company, the same proceedings may also be had for the collection thereof as provided by law in respect to the county taxes assessed upon such company.

Source.—Education L. 1909, § 410, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 77; originally revised from L. 1864, ch. 555, tit. 7, § 80.

§ 439. **Filing tax-list and warrant with town clerk.**—Within fifteen days after any tax-list and warrant shall have been returned by a collector to the trustees of any school district, the trustees shall deliver the same to the town clerk of the town in which the collector resides, and said town clerk shall file the same in his office.

Source.—Education L. 1909, § 411, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 89; originally revised from L. 1864, ch. 555, tit. 7, § 91, as added by L. 1887, ch. 334.

§ 440. **Assessment for school purposes of certain state lands.**—1. The board of education of union free school district number one, town of Dannemora, in the county of Clinton, shall hereafter assess the property owned by the state and situate within the boundaries of said district, exclusive of the improvements erected thereon by the state at the same valuation as other lands in said district are assessed, and the comptroller

shall hereafter pay to the school authorities of such district the amount of taxes levied upon the land of the state for school purposes in such district by virtue of this section, out of any moneys hereafter appropriated by the legislature for the payment of assessments for local improvements on property owned by the state.

2. The local school authorities of union free school district number two of the town of Wawarsing, Ulster county, districts number six and eight of the town of Dover and districts number one and two of the town of Beekman, Dutchess county, all the school districts in the towns of Hyde Park and Poughkeepsie, Dutchess county, all the school districts in the towns of Highlands, Woodbury and Tuxedo, Orange county, union free school district number one of the town of Ossining in the county of Westchester, and of school districts in the county of Rockland shall hereafter assess the lands owned by the state of New York and situate within the boundaries of said districts, exclusive of the improvements, if any, erected thereon by the state, at the same valuation as similar lands of individuals in said districts are assessed and the comptroller shall hereafter credit to the treasurer of the county wherein such lands are situated the amount of taxes levied upon the lands of the state therein for school purposes from taxes payable by said county treasurer each year to the state for state taxes levied and assessed upon the taxable property of the towns in which such districts are located and upon the adjustment of such taxes so made, the said county treasurer shall pay to the collector of taxes of the school districts in which such lands are situated the amount of such taxes as allowed and so paid by the state. (*Subd. 2, as amended by L. 1911, ch. 593, L. 1915, ch. 125, and L. 1916, ch. 407, amended by L. 1917, ch. 46, in effect March 12, 1917.*)

3. After a tax has been voted by a district meeting in a district specified in the preceding subdivision, in which there is land owned by the state and the trustees have made the assessment and their tax-list therefor, such trustees shall immediately file in the office of the comptroller a duly verified copy of such tax list, which in addition to the other matters now required by law shall state which are lands belonging to the state. The comptroller shall within thirty days after the receipt of such list and after hearing the trustees, if they or any of them so desire, correct or reduce any assessment of state lands which may be in his judgment an unfair proportion to the remaining assessment of land within the district, and shall in other respects approve the assessment and communicate such approval to the trustees. No such assessment of state lands shall be valid for any purpose until the amount of the assessment is approved by the comptroller.

Source.—Subdivision 1, Education L. 1909, § 386, revised from L. 1905, ch. 563, § 1; subdivisions 2 and 3, Education L. 1909, § 387, revised from L. 1905, ch. 562, as amended by L. 1906, ch. 200, and § 387-a.

Other acts relative to assessment for school purposes of state lands in certain counties, see L. 1907, ch. 263 (Clinton Co.); L. 1907, ch. 265 (Livingston Co.); L. 1907, ch. 689 (Suffolk Co.); L. 1907, ch. 690 (Broome Co.).

ARTICLE XVI.

SCHOOL BUILDINGS AND SITES.

Section 450. No school-house shall be built on town line.

451. Plans and specifications of * new school buildings must be approved by commissioner of education.

452. Halls, doors, stairways, staircases, etc.

453. Fire escapes.

454. Use of school buildings for examinations and institutes.

455. Use of school-house and grounds out of school hours.

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§ 450. No school-house shall be built on town line.—No school-house shall be built so as to stand on the division line of any two towns.

Source.—Education L. 1909, § 110, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 16; originally revised from L. 1864, ch. 555, tit. 7, § 17.

§ 451. Plans and specifications of school buildings must be approved by commissioner of education.—1. No school-house shall hereafter be erected, repaired, enlarged or remodeled in a city of the third class or in a school district, at an expense which shall exceed five hundred dollars, until the plans and specifications thereof shall have been submitted to the commissioner of education and his approval indorsed thereon. Such plans and specifications shall show in detail the ventilation, heating and lighting of such buildings.

2. The commissioner of education shall not approve the plans for the erection of any school building or addition thereto or remodeling thereof unless the same shall provide

a. At least fifteen square feet of floor space and two hundred cubic feet of air space for each pupil to be accommodated in each study or recitation room therein.

b. For assuring at least thirty cubic feet of pure air every minute per pupil, and

c. The facilities for exhausting the foul or vitiated air therein shall be positive and independent of atmospheric changes.

3. No tax voted by a district meeting or other competent authority in

* So in original.

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any such city, or school district exceeding the sum of five hundred dollars, shall be levied by the trustees until the commissioner of education shall certify that the plans and specifications for the same comply with the provisions of this section.

Source.—Education L. 1909, § 11, subd. 1-3, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 17, as amended by L. 1904, ch. 281; originally revised from L. 1864, ch. 555, tit. 7, § 18, as amended by L. 1883, ch. 294.

Approval of plans.—Law does not require plans of heating and ventilating system to be approved where it is installed in an old building without other repairs. Dec. of Com'r (1908), Jud. Dec. 818.

Tax cannot be levied until plans approved. Dec. of Supt. (1887), Jud. Dec. 830.

Filing lien for materials.—A school building is a public improvement, and a notice of lien may be filed under § 12 of the Lien Law for materials furnished for the erection of such building. *Terwilliger v. Wheeler* (1903), 81 App. Div. 460, 81 N. Y. Supp. 173. See *Goodrich v. Board of Education* (1910), 137 App. Div. 499, 122 N. Y. Supp. 50, as to mechanics liens against a board of education.

§ 452. **Halls, doors, stairways, staircases, etc.**—1. All school-houses for which plans and detailed statements shall be filed and approved, as required by the preceding section shall have all halls, doors, stairways, seats, passage-ways and aisles and all lighting and heating appliances and apparatus arranged to facilitate egress and afford adequate protection in cases of fire or accident.

2. All exit doors shall open outwardly, and shall, if double doors be used, be fastened with movable bolts operated simultaneously by one handle from the inner face of the door.

3. No staircase shall be constructed with winder steps in lieu of a platform but shall be constructed with straight runs, changes in direction being made by platforms. No door shall open immediately upon a flight of stairs, but a landing at least the width of the door shall be provided between such stairs and such doorway.

Source.—Education L. 1909, § 111, subd. 4, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 17, as amended by L. 1904, ch. 281; originally revised from L. 1864, ch. 555, tit. 7, § 18, as amended by L. 1883, ch. 294.

§ 453. **Fire escapes.**—1. All school buildings in the state, except in the city of New York, which are more than two stories high, shall have properly constructed stairways on the outside thereof, with suitable doorways leading thereto, from each story above the first, for use in case of fire. Such stairways shall be kept in good order and free from obstruction, and shall not be bolted or locked during school hours.

2. It shall be the duty of the trustee or board of education having charge of said school buildings to cause such stairways to be constructed and maintained, and the reasonable and proper cost thereof shall in each case be a legal charge upon the district or city, and shall be raised by tax, as other moneys are raised for school purposes.

Source.—Education L. 1909, § 112, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 49; tit. 8, § 15, subd. 15; originally revised from L. 1890, ch. 431.

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Consolidators' note.—In some districts the governing body is a "board of trustees" and in others a "board of education." The insertion makes the distinction clearer in all districts.

§ 454. Use of school buildings for examinations and institutes.—1. The use of a school building shall be granted for any examination or teachers institute appointed by the commissioner of education upon the request of the school commissioner in whose school commissioner district or the superintendent of the city in which such building is located or upon the direction or order of such commissioner of education.

2. No charge shall be made therefor except when such building is used for a teachers institute, in which case a reasonable allowance may be made to said district or city for lighting, heating and janitor service, provided always that due and proper care shall be maintained and the school building be left in such condition as found in relation to cleanliness and neatness.

Source.—Education L. 1909, § 622, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 10, § 3; and Education L. 1909, § 113, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 5, § 16.

§ 455. Use of schoolhouse and grounds out of school hours.—Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, when not in use for school purposes, for such other public purposes as are herein provided. Such regulations shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

1. By persons assembling therein for the purpose of giving and receiving instruction in any branch of education, learning or the arts.

2. For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

3. For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be nonexclusive and shall be open to the general public.

4. For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, associa-

tion or organization of a religious sect or denomination, or of a fraternal, secret or other exclusive society or organization.

5. For polling places for holding primaries and elections, and for the registration of voters, and for holding political meetings. But no such use shall be permitted unless authorized by a vote of a district meeting, held as provided by law. It shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. If such authority be granted by a district meeting it shall be the duty of such trustees or board of education to permit such use, under reasonable regulations to be adopted by such trustees or board until another meeting held in like manner shall have revoked such authority.

6. For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanization among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be nonexclusive and open to the general public. (*Amended by L. 1913, ch. 221, and L. 1917, ch. 214, in effect April 19, 1917.*)

Source.—Education L. 1909, § 114, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 52; originally revised from L. 1864, ch. 555, tit. 7, § 52.

Use generally.—Where objection is made to the use of the schoolhouse for religious, fraternal or other unauthorized purposes, such use must be discontinued. Dec. of Supt. (1887), Jud. Dec. 878; Dec. of Supt. (1898), Jud. Dec. 880; Dec. of Supt. (1896), Jud. Dec. 882; Dec. of Supt. (1896), Jud. Dec. 883; Dec. of Supt. (1887), Jud. Dec. 890; Dec. of Supt. (1895), Jud. Dec. 894; Dec. of Supt. (1901), Jud. Dec. 899; Dec. of Supt. (1896), Jud. Dec. 887. Use not restrained if majority of district are in favor, and no injury is shown. Dec. of Supt. (1891), Jud. Dec. 879; Dec. of Supt. (1888), Jud. Dec. 880; Dec. of Supt. (1893), Jud. Dec. 892; Dec. of Supt. (1891), Jud. Dec. 903. Horse sheds may not be erected upon the school grounds. Dec. of Com'r (1905), Jud. Dec. 904.

Discretion of board of education. Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.), 337.

Religious meetings.—Use of school building for holding of religious meetings against objection of taxpayers not sustained. Trustee personally liable for damage done. Dec. of Com'r (1914), 2 St. Dep. Rep. 625. Use of building by religious organization for entertainments. Dec. of Com'r (1915), 5 St. Dep. Rep. 618.

§ 456. Condemnation of school-house and erection of new school-house in place thereof.—1. A school commissioner may make an order condemning a school-house, if he finds upon examination that such school-house is wholly unfit for use and not worth repairing. He shall deliver such order to a trustee of the district and transmit a copy thereof to the commissioner of education. He shall also state in such order the date on which it shall take effect and the sum which in his opinion will be necessary to erect a school building suitable to the needs of the district.

2. Immediately upon the receipt of said order, the trustees of such district shall call a special meeting of the voters of said district, to consider the question of building a new school-house therein. Such meeting shall have power to determine the size of said school-house, the material to be used in its erection, and to vote a tax to build the same. But such meeting shall have no power to reduce the estimate made by the commissioner aforesaid by more than twenty-five per centum of such estimate.

3. And where no tax for building such school-house shall have been voted by such district within thirty days from the time of holding the first meeting to consider the question, it shall be the duty of the trustees of such district to contract for the building of a school-house capable of accommodating the children of the district, and to levy a tax to pay for the same, which tax shall not exceed the sum estimated as necessary by the commissioner aforesaid, and which shall not be less than such estimated sum by more than twenty-five per centum thereof. But such estimated sum may be increased at any subsequent school meeting legally held in the district.

Source.—Education L. 1909, § 115, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 5, § 13, subd. 4, as amended by L. 1897, ch. 512; originally revised from L. 1864, ch. 555, tit. 2, § 13, as amended by L. 1867, ch. 406, § 2; L. 1875, ch. 567, § 7; L. 1887, ch. 592; L. 1888, ch. 331.

References.—District superintendent of schools to condemn school houses, Education Law, § 395, subd. 8, § 397.

Power to condemn school buildings.—See Rept. of Atty. Genl. (1904) 379.

A presumption exists in favor of the validity of an order for the condemnation of a schoolhouse which may only be overcome by a preponderance of proof. Com. of Educ. Decision (1915), 6 State Dep. Rep. 577.

Wholly unfit for use and not worth repairing.—The order must recite that the building is wholly unfit for use and not worth repairing. Dec. of Supt. (1902), Jud. Dec. 850.

Where building is in such condition that it will cost nearly as much to repair as to build new it is "not worth repairing." Dec. of Com'r (1915), 6 St. Dep. Rep. 577. The order of condemnation must depend for its validity upon the conditions existing at the time of its execution. Dec. of Com'r (1914), 4 St. Dep. Rep. 588.

Repair of condemned building.—Meeting may not lawfully vote to repair building which has been condemned. Although building is repaired condemnation order will be effective. Dec. of Com'r (1914), 2 St. Dep. Rep. 596; Dec. of Com'r (1904), Jud. Dec. 296.

Appeal from order.—Order set aside where discretion of school commissioner was unwisely exercised. Dec. of Supt. (1894), Jud. Dec. 852. Order of condemna-

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tion sustained. Dec. of Com'r (1914), 1 St. Dep. Rep. 537; Dec. of Supt. (1888), Jud. Dec. 848; Dec. of Supt. (1890), Jud. Dec. 849.

Action of trustee in constructing new building pursuant to condemnation order sustained. Dec. of Supt. (1890), Jud. Dec. 829.

Site may not be condemned.—District superintendent has no authority to condemn a schoolhouse site. Dec. of Com'r (1914), 2 St. Dep. Rep. 610.

§ 457. Provision for outbuildings.—1. The trustees in the several school districts shall provide at least two suitable and convenient water-closets or privies for each of the schools under their charge, which shall be entirely separated each from the other, and have separate means of access, and approaches thereto separated by a substantial close fence not less than seven feet in height. It shall also be the duty of trustees to keep such out buildings in a clean and wholesome condition.

2. The board of education of each union free school district and of a city shall provide and maintain at least two suitable and convenient water-closets or privies for each of the schools under their charge, and in conformity with the provisions of this section.

3. Any expense incurred by the trustees of a common school district in carrying out the requirements of this section shall be a charge upon the district, when such expense shall have been authorized by the school commissioner within whose district the school house is located, and a tax may be levied therefor without a vote of the school district. Any expense incurred by the board of education in carrying out the foregoing provisions shall be a charge upon the district or city and payable out of any of the contingent funds thereof; and a tax may be levied therefor without a vote of the district.

4. A failure on the part of the trustees or a board of education to comply with the provisions of this section shall be sufficient grounds for their removal from office and for withholding from the district or city its share of the public moneys of the state.

Source.—Education L. 1909, § 116, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 48, and tit. 8, § 15, subd. 14; originally revised from L. 1887, ch. 538; L. 1864, ch. 555, tit. 9, § 13, subd. 14, as added by L. 1887, ch. 538.

Expense incurred by trustee in erecting new toilets must be paid by district notwithstanding school commissioner refused to approve such expense. Dec. of Supt. (1889), Jud. Dec. 490.

§ 458. When board of education may designate site without vote of district.—A board of education in a union free school containing a population of five thousand or more may, without a vote of the qualified voters of said district, designate sites or additions thereto for school-houses.

Source.—Education L. 1909, § 117, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 15, subd. 16, as added by L. 1903, ch. 112.

Reference.—Town board of education may designate school house site, Education Law, § 343.

§ 459. Change of site.—No site of a school-house shall be changed unless

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a majority of the legal voters present and voting at a district meeting shall adopt a resolution designating a new site and describing such site by metes and bounds. Such resolution shall be adopted either by ballot or taking and recording the ayes and noes.

Source.—Education L. 1909, § 118, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 19; originally revised from L. 1864, ch. 555, tit. 7, § 20, as amended by L. 1865, ch. 647, § 8; L. 1888, ch. 331, § 4.

Dangerous location.—Where the site selected is dangerous to health, action of meeting will be set aside. Dec. of Supt. (1894), Jud. Dec. 907. Where the site selected is such that children going to and from school will be subjected to serious dangers the action of the meeting will be set aside. Dec. of Com'r (1917), 11 St. Dep. Rep.

Selection of site sustained.—Dec. of Com'r (1914), 3 St. Dep. Rep. 524. Action of meeting will not be set aside upon ground that price of site is excessive. Dec. of Com'r (1905), Jud. Dec. 911; Dec. of Com'r (1905), Jud. Dec. 316.

§ 460. **Site, how designated.**—The designation of a site by any school district meeting shall be by written resolution containing a description thereof by metes and bounds, and such resolution must receive the assent of a majority of the qualified voters present and voting at said meeting, to be ascertained by taking and recording the ayes and noes, or by ballot.

Source.—Education L. 1909, § 119, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 10, in part, as amended by L. 1895, ch. 273; L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 9, § 10, as amended by L. 1884, ch. 49; L. 1886, ch. 595; L. 1888, ch. 27; L. 1890, ch. 548, § 2.

Resolution to describe boundaries by metes and bounds and it is not sufficient that an entry is made in the minutes of the meeting. Matter of Hemenway (1909), 134 App. Div. 86, 118 N. Y. Supp. 931.

The resolution must describe site or addition to site by metes and bounds. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 380; Dec. of Com'r (1909), Jud. Dec. 197; Dec. of Com'r (1905), Jud. Dec. 914; Dec. of Supt. (1900), Jud. Dec. 964.

§ 461. **Sale of former school-house or site.**—1. Whenever the site of a school-house shall have been changed, as herein provided, the inhabitants of a district entitled to vote, lawfully assembled at any district meeting, shall have power, by a majority of the votes of those present, to direct the sale of the former site or lot, and the buildings thereon and appurtenances or any part thereof, at such price and upon such terms as they shall deem proper; and any deed duly executed by the trustees of such district, or a majority of them, in pursuance of such direction, shall be valid and effectual to pass all the estate or interest of such school district in the premises.

2. When a credit shall be directed to be given upon such sale for the consideration money, or any part thereof, the trustees are hereby authorized to take in their corporate name such security by bond and mortgage, or otherwise, for the payment thereof, as they shall deem best, and shall hold the same as a corporation, and account therefor to their successors in office and to the district, in the manner they are now required by law to account for moneys received by them; and the trustees of any such district

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and their successors may, in their name of office, sue for and recover the moneys due and unpaid upon any security so taken by them or their predecessors.

Source.—Education L. 1909, § 120, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 20; originally revised from L. 1864, ch. 555, tit. 7, § 21.

Reference.—Sale of school-house site and buildings thereon by board of education when authorized by district meeting, Education Law, § 310, subd. 10.

Sale of old building.—The law permits but does not require the sale of an old school building. Dec. of Supt. (1888), Jud. Dec. 847. Resolution directing conveyance of old building and site to the village set aside. Dec. of Com'r (1914), 3 St. Dep. Rep. 535.

§ 462. **Application of proceeds of sale.**—All moneys arising from any sale made in pursuance of the last preceding section, shall be applied to the expenses incurred in procuring a new site, and in removing or erecting thereon a school-house, and improving and furnishing such site and house, and their appurtenances, so far as such application shall be necessary; and the surplus, if any, shall be devoted to the purchase of school apparatus and the support of the school, as the voters of the district at any meeting shall direct.

Source.—Education L. 1909, § 121, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 21; originally revised from L. 1864, ch. 555, tit. 7, § 22.

§ 463. **Acquisition of real property.**—Real property may be acquired in any school district and in any city except a city of the first or second class, for school purposes and for any other purpose for which such property may be acquired as provided in this chapter, as follows:

1. By gift, grant, devise or purchase.

2. By condemnation, if an agreement cannot be made with the owner for the purchase thereof. Such proceedings shall be instituted and conducted by the trustee or board of education, in the name of the district under the provisions of the condemnation law.

3. This section does not permit the acquisition by condemnation of less than the whole of a city or village lot with the erections and improvements thereon. (*Amended by L. 1913, ch. 221.*)

Source.—Education L. 1909, § 122, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 9, § 1, as amended by L. 1901, ch. 480; originally revised from L. 1866, ch. 800, § 1, as amended by L. 1867, ch. 819, § 1.

Deed which conveys lands for use of district for purpose of erection of school building without covenant preventing use for other purpose or provision for forfeiture or a right of re-entry, conveys title in fee simple absolute. Board of Education v. Reilly (1902), 71 App. Div. 468, 75 N. Y. Supp. 876.

Condemnation of land.—Where there is a failure to comply with the provisions of law as to the selection of a site, as the description of the boundaries, in a resolution, the court will not entertain a proceeding for condemnation. Matter of Hemenway (1909), 134 App. Div. 86, 118 N. Y. Supp. 981.

§ 464. **When owner's consent necessary.**—The following property cannot be acquired without the consent of the owner:

1. A homestead occupied as such by the owner, except such portion thereof as may appear to the court to be unnecessary for the reasonable use and enjoyment of the homestead.

2. A garden, orchard or any part thereof, not within a city, which has existed for a period of one year prior to the beginning of the condemnation proceedings.

3. A yard or inclosure, or any part thereof, necessary to the use or enjoyment of buildings.

4. Fixtures or erections for the purpose of trade or manufacture, which have existed for a period of one year prior to the beginning of the condemnation proceedings. (*Amended by L. 1911, ch. 782.*)

Source.—Education L. 1909, § 123, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 9, § 2, as amended by L. 1904, ch. 305; originally revised from L. 1866, ch. 800, § 12, as amended by L. 1871, ch. 329, § 1.

§ 465. Vesting of title of lands in certain cases.—Boards of education in cities of the third class are hereby clothed with all the powers of trustees, and the title to any and all lands acquired in any city under the provisions of section four hundred and sixty-three of this chapter shall vest in the board of education thereof, or such other corporate body as is by law vested with the title to the school lands in such city. But nothing herein contained shall be construed to limit or circumscribe the powers and duties heretofore lodged in such board of education by law.

Source.—Education L. 1909, § 124, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 9, § 3; originally revised from L. 1886, ch. 800, § 13, as amended by L. 1871, ch. 329, § 2.

§ 466. Application to certain districts.—The provision of section four hundred and sixty-three of this article shall apply to union free school districts and to districts organized under special laws; and the trustees of such districts and the boards of education organized under special laws shall be and are hereby clothed with all the powers vested in trustees in the three preceding sections.

Source.—Education L. 1909, § 125, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 9, § 5; originally revised from L. 1867, ch. 819, § 2.

§ 467. School taxes and school bonds.—1. A majority of the voters of any school district, present at any annual or special district meeting, duly convened, may authorize such acts and vote such taxes as they shall deem expedient for making additions, alterations, repairs or improvements, to the sites or buildings belonging to the district, or for the purchase of other sites, or buildings, or for a change of sites, or for the purchase of land and buildings for agricultural, athletic, playground or social center purposes, or for the erection of new buildings, or for buying apparatus, implements, or fixtures, or for paying the wages of teachers, and the necessary expenses of the school, or for such other purposes relating to the sup-

port and welfare of the school as they may, by resolution, approve. (*Subd. 1, amended by L. 1913, ch. 221.*)

2. On all propositions arising at said meetings involving the expenditure of money, or authorizing the levy of a tax in one sum or by instalments, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meetings; and they may direct the moneys so voted to be levied in one sum, or by instalments.

3. No addition to or change of site or purchase of a new site or tax for the purchase of any new site or structure, or for the purchase of an addition to the site of any schoolhouse, or for the purchase of land and buildings for agricultural, athletic, playground or social center purposes, or for building any new schoolhouse or for the erection of an addition to any schoolhouse already built, shall be voted at any such meeting of a union free school district unless a notice by the board of education stating that such tax will be proposed, and specifying the object thereof and the amount to be expended therefor, shall have been given in the manner provided herein for the notice of an annual meeting. In a common school district the notice of a special meeting to authorize any of the improvements enumerated in this section shall be given as provided in section one hundred and ninety-seven. (*Subd. 3, amended by L. 1913, ch. 221.*)

4. And whenever a tax for any of the objects hereinbefore specified shall be legally voted the board of trustees or board of education shall make out their tax list, and attach their warrant thereto, in the manner provided in article fifteen of this chapter, for the collection of school district taxes, and shall cause such taxes or such instalments to be collected at such times as they shall become due.

5. No vote to raise money shall be rescinded, nor the amount thereof be reduced at any subsequent meeting, unless it be an adjourned meeting or a meeting called by regular and legal notice, which shall specify the proposed action, and at which the vote upon said proposed reduction or rescinding shall be taken by ballot or by taking and recording the ayes and noes of the qualified voters attending and voting thereat.

Source.—Education L. 1909, § 126, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 10, in part, as amended by L. 1895, ch. 273; L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 9, § 10, as amended by L. 1884, ch. 49; L. 1886, ch. 595; L. 1888, ch. 27, L. 1890, ch. 548, § 2. For remainder of § 10, as so amended, see Education Law, §§ 119, 430.

Consolidators' note.—That part of this section relating to the issuance of bonds is transferred to section 480 in a separate article on school district bonds. This one section confers upon any school district authority to vote taxes for buildings, sites, betterments, improvements, etc., instead of conferring the same power upon each class of school districts by separate sections. See Consolidated School Law, L. 1894, ch. 556, tit. 8, § 10, as amended by L. 1895, ch. 273, § 1, and L. 1896, ch. 264, § 15; also same, tit. 7, §§ 17 and 18 as amended by L. 1895, ch. 274, § 1, and L. 1904, ch. 281, § 1.

Part relating to school sites is in section 460, Article 16, "School buildings and sites."

Notice of meeting for erection of school buildings.—The provision that the notice required to be published by the board of education of a union free school district, of a special meeting of the inhabitants of the school district, for the purpose of authorizing the purchase of sites and the erection of school buildings, and the raising of money to pay for the same, shall state the amount and object of the sum to be raised, do not require that the amounts to be expended for the various items be separately stated. *Lawson v. Lincoln* (1903), 86 App. Div. 217, 83 N. Y. Supp. 667, *affd.* (1904), 178 N. Y. 636, 71 N. E. 1133.

Form of notice and resolutions adopted at special meeting called to vote appropriations approved. Dec. of Com'r (1914), 2 St. Dep. Rep. 620. Amount of tax to be raised and number of installments to be collected must be stated in resolution. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 380. Insufficient notice; amount of tax not specified. Dec. of Supt. (1890), Jud. Dec. 828.

Voting on question.—In the case of *Smith v. Proctor* (1892), 130 N. Y. 319, 27 N. E. 312, 14 L. R. A. 403, the court had under consideration a resolution submitted to and adopted by a district meeting for the meeting for the erection of a new school building. There were present at the meeting 115 voters. The resolution was adopted by a vote of 34 to 33, the other voters present not voting. It was held that the resolution was legally adopted. The court said: "So, as we think, it would be unreasonable to hold, in the absence of an express provision to that effect, that a majority is required of all who were present at the meeting, whether they voted or not, as this might leave the result uncertain and invite controversy. By following the plain language of the statute and ascertaining a majority by comparing the affirmative and negative votes as actually given and recorded, these difficulties are avoided and the beneficent aim of the legislature is accomplished. This is the construction which has been uniformly given to the section under review by the department of public instruction, and is in accordance with the general usage that has followed its rulings. It does not permit the absent or indifferent to neutralize the efforts of the public-spirited and enterprising, but compels every one, who would make his influence effective to attend the meeting and vote in the manner provided by law."

A resolution granting further compensation to contractors is made illegal by an award previously made. *Burhans v. Union Free School District* (1897), 24 App. Div. 429, 48 N. Y. Supp. 702, *affd.* (1901), 165 N. Y. 661, 59 N. E. 1119.

General powers of district meeting. Dec. of Supt. (1895), Jud. Dec. 839. District meeting may authorize trustee to dig well on premises outside of school site. Dec. of Supt. (1900), Jud. Dec. 1252.

A majority of the district voters may not lawfully assume on behalf of the district the payment of an unlawful or improper claim. Dec. of Com'r (1905), Jud. Dec. 311; Dec. of Supt. (1884), Jud. Dec. 313.

The voters of the district may adopt a resolution not to defend an action brought against the district. Dec. of Supt. (1900), Jud. Dec. 360.

Request for meeting to consider school improvements referred to board of education to determine as to propriety of submitting question. Dec. of Com'r (1915), 6 St. Dep. Rep. 574.

Rescinding resolution.—An appropriation voted at a special meeting may be rescinded at an adjourned meeting. Dec. of Supt. (1858), Jud. Dec. 46.

Discretion of meeting.—The judgment of the district voters as to the necessity for expending district moneys for the purpose of making certain repairs to the school property or premises will not be disturbed. Dec. of Com'r (1906), Jud. Dec. 310.

Where community is growing the district meeting is justified in voting to erect

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a larger building than immediate necessity requires. Dec. of Supt. (1887), Jud. Dec. 832.

Determination on appeal.—Where district has fairly expressed its wishes as to location of new building and bonds have been authorized and sold covering cost of such building action of meeting will not be disturbed. Dec. of Com'r (1915), 6 St. Dep. Rep. 582.

Application of funds voted.—Moneys voted by district meeting to build an addition cannot be diverted by board to repair building. Dec. of Com'r (1908), Jud. Dec. 823.

An extra allowance cannot be granted to contractor by district meeting unless due notice has been given, specifying the amount and object. Dec. of Supt. (1888), Jud. Dec. 807.

ARTICLE XVII.

SCHOOL DISTRICT BONDS.

§ 480. **Issuance of school district bonds.**—1. For the purpose of giving effect to the provisions of section four hundred and sixty-seven of this chapter, trustees or boards of education are hereby authorized, whenever a tax shall have been voted to be collected in instalments, for the purpose of building a new schoolhouse, or building an addition to a schoolhouse, or making additions, alterations or improvements to buildings or structures belonging to the district or city, or for the purchase of a new site or for an addition to a site, or for the purchase of land or buildings for agricultural, athletic, playground, or social center purposes, to borrow so much of the sum voted as may be necessary, at a rate of interest not exceeding six per centum, and to issue bonds or other evidences of indebtedness therefor, which shall be a charge upon the district, and be paid at maturity, and which shall not be sold below par. (*Subd. 1, amended by L. 1913, ch. 221.*)

2. Notice of the time and place of the sale of such bonds shall be given by the trustees or board of education at least ten days prior thereto by publication twice in two newspapers, if there be two, or in one newspaper if there be but one published in such district. But if no newspaper shall then be published therein, the said notice shall be posted in at least ten of the most public places in said district ten days before the sale.

3. It shall be the duty of the trustees or the persons having charge of the issue or payment of such indebtedness, to transmit a statement thereof to the clerk of the board of supervisors of the county in which such indebtedness is created, annually, on or before the first day of November.

4. When such bonds are sold by a union free school district whose boundaries are the same as the boundaries of an incorporated village or city, such bonds shall be signed by the president and clerk of the board of education and delivered to the treasurer of such village or city who shall countersign them and give notice of the sale thereof in like manner as is provided for the notice of sale of bonds in subdivision two of this section. The proceeds of the sale of such bonds shall be paid into the

treasury of said incorporated village or city, to the credit of the board of education.

5. When such bonds are sold by a common school district the payment or collection of the last instalment shall not be extended beyond twenty years from the time such vote was taken.

6. All of the provisions of the general municipal law relative to the method of the registry of municipal bonds and the conversion of coupon into registered bonds shall apply to bonds issued pursuant to the provisions of this section, except that the duties therein required to be performed by the clerk of a municipal corporation shall be performed by the clerk of the school district. (*Subd. 6, added by L. 1914, ch. 31.*)

7. A trustee, board of education, qualified elector or taxpayer of a school district, a purchaser of school district bonds or other evidences of indebtedness issued and sold as provided in this section, or a person holding any of such bonds or evidences of indebtedness may institute a proceeding before the commissioner of education, in accordance with rules and regulations to be prescribed by him, for the purpose of ratifying and confirming the proceedings of a district meeting authorizing the levy and collection of a tax payable in instalments as provided in section four hundred and sixty-seven of this chapter, and the proceedings and official acts of a trustee, board of trustees or board of education of such district under this section, and for the purpose of legalizing and validating the bonds or other evidences of indebtedness of such district issued and sold under this section. If it appear to the satisfaction of the commissioner that the acts and proceedings of district officers and meetings pertaining to the levy and collection of taxes payable in instalments for the objects specified in such section four hundred and sixty-seven of this chapter, and of the trustees and boards of education and other district officers pertaining to the issuance and sale of such bonds, substantially complied with the provisions of this chapter, he shall render a decision ratifying and confirming such acts and proceedings, and may in a proper case issue an order directing that a tax be levied for the payment of the principal and interest of such bonds or other evidences of indebtedness. If there has been a fair expression of the will of the qualified electors of the district and it appears that the action taken was not affected or prejudiced by defects in, or failure to give, the notice required by statute, or if it appears that the failure to take, or a defect in, any step in the acts or proceedings of district officers or meetings did not influence materially the result of such meetings, the commissioner may disregard such defects or failure and determine that there has been a substantial compliance with the statute. The decision of the commissioner of education in such proceeding shall have the same force and effect as a decision rendered by him in an appeal brought as provided in section eight hundred and eighty of this chapter. (*Subd. 7, added by L. 1917, ch. 413, in effect May 8, 1917.*)

Source.—Education L. 1909, § 430, revised from former Con. Sch. L. (L. 1894, ch.

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556) tit. 8, § 10, in part, as amended by L. 1895, ch. 273; L. 1896, ch. 264, tit. 8, § 9, tit. 7, § 18, as amended by L. 1895, ch. 274; originally revised from L. 1864, ch. 555, tit. 9, § 10, as amended by L. 1884, ch. 49; L. 1886, ch. 595; L. 1888, ch. 27; L. 1890, ch. 548; L. 1864, ch. 555, tit. 9, § 8, as amended by L. 1890, ch. 548; L. 1864, ch. 555, tit. 9, § 19, as amended by L. 1881, ch. 528. Balance of § 10 is re-enacted in Education Law, §§ 119, 126. Subd. 4 is derived from Former Cons. Sch. Law (L. 1894, ch. 556) tit. 8, § 9, in part. Subd. 5 is derived from Id. tit. 7, § 18, in part, as amended by L. 1895, ch. 274.

Consolidators' note.—This is a separate article relating to the issuance of school district bonds. In the Consolidated School Law there are three separate provision governing the issuance of bonds. Title 7, §§ 17 and 18, provide for the issuance of bonds in common school districts. Title 8, § 9, provides for the issuance of bonds in union free school districts whose boundaries are the same as the boundaries of an incorporated village or city. Title 8, § 10, provides for the issuance of bonds in union free school districts whose boundaries are *not* the same as those of an incorporated village or city.

The law is rearranged and collected in this article in one section, without change in present provisions. This section requires the same procedure and the same conditions as the provisions above cited require for each of the three classes of school districts.

References.—As to designation of new site, Education Law, § 460. As to vote of appropriations for certain purposes to be raised by tax on bonds, Id. § 467.

Resolution for levy of tax in instalments is legally adopted by a majority of the qualified voters in attendance, who actually vote upon such resolution by answering "aye" or "no" as the names of those present are called. *Smith v. Proctor* (1891), 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403.

Conveyance of land may be accepted by trustees upon condition that the district will build and maintain division fences. *Albright v. Riker* (1884), 22 Hun 267.

Bonds for improvement of school buildings, issue and sale of.—See Rept. of Atty. Genl. (1905), 288.

Validity of bonds for purchase of school site.—A union free school district may, under this section, lawfully issue bonds to buy a site for a school and a school-house already erected thereon, and the fact that a very small part of the purchase price represents property, not properly school property, will not invalidate the entire issue of the bonds in the hands of a bona fide purchaser. *Oswego City Sav. Bank v. Board of Education* (1901), 35 Misc. 540, 72 N. Y. Supp. 15, *affd.* (1902), 70 App. Div. 538, 75 N. Y. Supp. 417, *affd.* (1903), 174 N. Y. 515, 66 N. E. 1113.

ARTICLE XVIII.

SCHOOL MONEYS.

Section 490. When apportioned and how applied.

491. Apportionment of moneys appropriated for the support of common schools.

492. Conditions under which cities and districts are entitled to an apportionment from the appropriation for the support of common schools.

493. Apportionment of moneys appropriated to cities, academies, academic departments and school libraries.

494. Manner of certifying and paying apportionment provided for in preceding section.

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- 496. Certificate of apportionment by commissioner of education.
- 497. Moneys apportioned, when and how payable.
- 498. Apportionment of school moneys by district superintendents.
- 499. Duty of and payment to supervisor.
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- 501. Union free school district and city, a school district.
- 502. Apportionment for support of training classes.

§ 490. **When apportioned and how applied.**—The amount annually appropriated by the legislature for the support of common schools shall be apportioned by the commissioner of education on or before the twentieth day of January in each year as hereinafter provided; and all moneys so apportioned shall be applied exclusively to the payment of teachers' salaries.

Source.—Education L. 1909, § 450, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 4; originally revised from L. 1864, ch. 555, tit. 3, § 5.

References.—Withholding public money for wilful disobedience of order or decision, Education Law, § 95. For failure to provide water closets, Id. § 116. Apportionment of public money under township system, Id. § 350. For neglect to enforce compulsory attendance, Id. § 636. For wilful failure of trustees to close school for teachers' institute, Id. § 773. For failure to comply with requirements as to teaching nature of alcoholic liquors and narcotics, Id. § 691. Withholding school moneys from city or district for improperly using school library moneys, Id. § 1041.

High schools are a part of the common school system of the State, and money appropriated for the support of common schools may be legally used for the support of high schools. Hence, the Board of Education of the city of New York is not required to apply all public moneys for the support of common schools in the city to the payment of salaries of teachers in the elementary schools. Com. of Educ. Decision (1916), 7 State Dept. Reports 617.

§ 491. **Apportionment of moneys appropriated for the support of common schools.**—After setting apart therefrom for a contingent fund not more than ten thousand dollars, the commissioner of education shall apportion the money appropriated for the support of common schools:

1. To each city and to each union school district which has a population of five thousand and which employs a superintendent of schools, eight hundred dollars. This shall be known as a supervision quota.

2. To each district having an assessed valuation of twenty thousand dollars or less, two hundred dollars.

3. To each district having an assessed valuation of forty thousand dollars or less, but exceeding twenty thousand dollars, one hundred and seventy-five dollars.

4. To each district having an assessed valuation of sixty thousand dollars or less, but exceeding forty thousand dollars, and to each Indian reservation for each teacher employed therein for a period of one hundred and eighty days or more, one hundred fifty dollars. (*Subd. 4, amended by L. 1917, ch. 74, in effect March 20, 1917.*)

5. To each of the orphan asylums which meet the conditions men-

tioned in article thirty-five of this chapter, one hundred and twenty-five dollars.

6. To each of the remaining districts and to each of the cities in the state one hundred twenty-five dollars. The apportionment provided for by subdivisions two, three, four, five and six shall be known as district quotas.

7. To each such districts, city and orphan asylum for each additional qualified teacher and his successors by whom the common schools have been taught during the period of time required by law, one hundred dollars. The apportionment provided for by this subdivision shall be known as the teachers' quota.

8. To a school district or a city which has failed to maintain school for one hundred eighty days or which has employed an extra teacher for a shorter period than one hundred eighty days such part of a district or teacher's quota as seems to him equitable when the reason for such failure is in his judgment sufficient to warrant such action; but in case such failure to maintain a school in such district or city for a period of one hundred eighty days was caused by the prevalence of an infectious or contagious disease in the community, the commissioner may in his discretion apportion to such district or city full district and teachers' quotas. (*Subd. 8, amended by L. 1917, ch. 74, in effect March 20, 1917.*)

9. To each separate neighborhood such sum as in his opinion it is equitably entitled to receive upon the basis of distribution established by this article.

10. All errors or omissions in the apportionment whether made by the commissioner of education or by the school commissioner shall be corrected by the commissioner of education. Whenever a school district has been apportioned less money than that to which it is entitled the commissioner of education may allot to such district the balance to which it is in his judgment entitled and the same shall be paid from the contingent fund. Whenever a school district has been apportioned more money than that to which it is entitled the commissioner of education may, by an order under his hand, direct such moneys to be paid back into the hands of the county treasurer by him to be credited to the school fund, or he may deduct such amount from the next apportionment to be made to said district.

11. The commissioner of education may also in his discretion excuse the default of a trustee or a board of education in employing a teacher not legally qualified, legalize the time so taught and authorize the payment of the salary of such teacher.

Source.—Education L. 1909, § 451, revised from former appropriation acts.

Reference.—Distribution of public moneys to orphan schools, Education Law, § 900.

§ 492. Conditions under which cities and districts are entitled to an apportionment from the appropriation for the support of common schools.—

1. The commissioner of education shall make no allotment of a supervision quota to any city or district unless satisfied that such city or dis-

trict employs a competent superintendent whose time is exclusively devoted to the supervision of the public schools of such city or district; nor shall he make any allotment to any district in the first instance without first causing an enumeration of the inhabitants to be made which shall show the population thereof to be at least five thousand, the expense of such enumeration, as certified by said commissioner, shall be paid by the district in whose interest it is made. The population shown by the last state or federal census or village enumeration may be accepted by said commissioner whenever the village and school district boundaries coincide.

2. No district shall be entitled to any portion of such school moneys on such apportionment unless the report of the trustees for the preceding school year shall show that a common school was supported in the district and taught by a qualified teacher or by successive qualified teachers for at least one hundred and eighty days, inclusive of legal holidays that may have occurred during the term of said school and exclusive of Saturdays. (*Subd. 2, amended by L. 1913, ch. 511.*)

3. No Saturday shall be counted as part of said one hundred and eighty days of school and no school shall be in session on a legal holiday, except general election day, Washington's birthday and Lincoln's birthday. A deficiency not exceeding six days during any school year caused by a teacher's attendance upon teachers' conference held by district superintendents of schools within a county, shall be excused by the commissioner of education. In common school districts the term of school shall begin each year on the first Tuesday of September. (*Former subd. 4; renumbered subd. 3, and amended by L. 1913, ch. 511.*)

Source.—Education L. 1909, § 452, revised from former appropriation acts.

§ 493. Apportionment of moneys appropriated to cities, academies, academic departments and school libraries.—The commissioner of education shall apportion the money annually appropriated for the support of cities, academies, academic departments and school libraries in accordance with regulations established or to be established by him as follows:

1. To each city, union school district and nonsectarian academy maintaining an academic department, a quota of one hundred dollars for each such academic department maintained therein. This apportionment shall be known as the academic quota.

2. To each nonsectarian private academy an allowance equal to the amount raised from local sources but not to exceed two hundred fifty dollars annually for approved books, reproductions of standard works of art, and apparatus. (*Subd. 2, amended by L. 1914, ch. 216.*)

3. To each city an allowance equal to the amount raised from local sources but not to exceed eighteen dollars and two dollars additional for each duly licensed teacher employed therein for the legal term, and two hundred fifty dollars for each academic department maintained by it for

approved books, reproductions of standard works of art and apparatus. (*Subd. 3, amended by L. 1914, ch. 216.*)

4. To each union free school district maintaining an academic department an allowance equal to the amount raised from local sources, but not to exceed two hundred sixty-eight dollars annually and two dollars additional for each teacher employed in said district for the legal term for approved books, reproductions of standard works of art and apparatus. (*Subd. 4, amended by L. 1914, ch. 216.*)

5. To all other school districts an allowance equal to the amount raised from local sources but not to exceed eighteen dollars annually and two dollars additional for each duly licensed teacher employed in said district for the legal term for approved books, reproductions of standard works of art, geographical maps, a globe and school apparatus. (*Subd. 5, amended by L. 1914, ch. 216.*)

6. To each city and union school district maintaining an academic department, twenty dollars per year for at least thirty-two weeks' instruction or a proportionate amount if for eight weeks or more for each non-resident pupil attending the academic department of such school from districts not maintaining such academic departments and who shall be admitted to such academic departments without other expense for tuition than that provided herein. But pupils residing in districts not maintaining a four-year curriculum may be included in this apportionment after having completed the course of study prescribed for the school in the district in which they reside. In the apportionment to cities and union school districts whose customary charge for nonresident pupils is greater than the sum provided by this subdivision, the commissioner of education may permit the sum so apportioned to be applied upon such customary charge for such nonresident pupils, provided the balance of such customary charge shall be assumed by the school district in which such nonresident pupil is resident, and the payment thereof shall have been provided for at a school district meeting held in such district or the said balance shall have been paid by the parents or guardians of such pupils to the proper officer of the city or district maintaining the high school or academic department attended by such pupils. (*Subd. 6, amended by L. 1912, ch. 276, L. 1913, ch. 399, and by L. 1915, ch. 214.*)

7. After the payment of the allowances herein provided for the balance shall be divided among the several cities, school districts and academies maintaining academic departments on the basis of aggregate days' attendance of academic pupils therein.

8. The commissioner shall set aside at the beginning of the fiscal year a sum which in his opinion will be sufficient to pay the allowances for books and apparatus herein provided before making the other apportionments as directed by this article. The allowance for books and apparatus shall be apportioned and paid as often during each year as the commissioner

may determine. All other apportionments above provided for shall be made so far as possible during the month of October each year on the basis of the reports of the previous year.

9. To entitle a city, academy, academic department or school library to an apportionment from this fund the school authorities having control must render a satisfactory report for the preceding year to the commissioner of education before the twentieth day of September in each year unless such neglect is excused by the commissioner for sufficient reason. They must also have complied with all regents' laws and ordinances during the preceding academic year.

Source.—Education L. 1909, § 453, revised from former appropriation acts.

High schools are common schools within the meaning of the Constitution, Article 9, section 1. Dec. of Com'r (1916), 7 St. Dep. Rep. 617.

§ 494. Manner of certifying and paying apportionment provided for in preceding section.—Payment from this fund shall be made to the county treasurer of each county for all schools located in such county, by the state treasurer on the warrant of the comptroller or the certificate of the commissioner of education. The commissioner of education immediately after making an apportionment shall certify, or cause to be certified, to the county treasurer of every county included in such apportionment, excepting those counties included within the territory of the city of New York, with respect to his county, the name of each academy, the number of each school district and the town in which it is situated and the name of each city to which money has been allotted and the amount allotted to each. The county treasurer shall, upon the receipt of such certificate and payment from the state treasurer, pay to the treasurer, if there be one, otherwise to the disbursing officer or collector of each school district, academy and city named in the certificate of the commissioner of education, the amount to which said district, academy or city is entitled as shown by such certificate. Any apportionment which shall be made to the city of New York shall be certified and paid to the chamberlain of the city of New York, and any apportionment which shall be made to any private academy situated with the territory of the city of New York, shall be certified and paid directly to the disbursing officer of the academy to which the apportionment is made. (*Amended by L. 1912, ch. 77.*)

Source.—Education L. 1909, § 454, revised from former appropriation acts.

§ 495. County treasurers to render annual report.—The county treasurers of the state shall, upon the first day of October of each year and at such other times as the commissioner of education may require, make a report for the preceding year to the commissioner of education, showing the amount of money received by them from this fund and the school districts, cities or academies to which such money has been paid and the amount paid to each, and the amount, if any, remaining in their hands unclaimed by any school district, city or academy together with any other

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fact relative to the disbursement of this fund which said commissioner may require.

Source.—Education L. 1909, § 455, revised from former appropriation acts.

§ 496. **Certificate of apportionment by commissioner of education.**—As soon as possible after the making of any annual or general apportionment, the commissioner of education shall certify it, or cause it to be certified, to the county clerk, county treasurer, district superintendents, and city treasurer or chamberlain, in every county in the state; and if it be a supplemental apportionment, then to the county clerk, county treasurer and district superintendents of the county in which the school-house of the district concerned is situated. (*Amended by L. 1912, ch. 77.*)

Source.—Education L. 1909, § 456, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 11; originally revised from L. 1864, ch. 555, tit. 3, § 13.

§ 497. **Moneys apportioned, when and how payable.**—At least one-half of the moneys so annually apportioned by the commissioner of education shall be payable on or before the first day of March and the remaining part of such moneys on or before the fifteenth day of May, in each year, next after such apportionment, to the treasurers of the several counties and the chamberlain of the city of New York, respectively; and the said treasurers and the chamberlain shall apply for and receive the same as soon as payable. The county treasurer shall pay to the city treasurer of each city and the treasurer of each union free school district having a population of five thousand or more inhabitants and in which a superintendent of schools has been appointed, situated within his county, all school moneys apportioned to such city or district as provided by sections four hundred and ninety-one, four hundred and ninety-two and six hundred and four of this chapter. (*Amended by L. 1914, ch. 52.*)

Source.—Education L. 1909, § 457, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 12; as amended by L. 1904, ch. 166; L. 1908, ch. 365; originally revised from L. 1864, ch. 555, tit. 3, § 14, as amended by L. 1865, ch. 647, § 3; L. 1875, ch. 567.

§ 498. **Apportionment of school moneys by district superintendents.**—The district superintendent of schools shall, on or before the fifteenth day of February in each year, apportion the supervision, district and teachers' quotas to the several districts entitled thereto, within his supervisory district, as shown by the certificate of the commissioner of education to the said district superintendent. He shall procure from the supervisors of the towns in his district a transcript showing the unexpended moneys in their hands applicable to the payment of teachers' salaries. The amounts in each supervisor's hands shall be charged as a partial payment of the sums apportioned to the town teachers' salaries.

He shall procure from the county treasurer a full list and statement of all payments to him of moneys for or on account of fines and penalties, or accruing from any other source, for the benefit of schools and of the

towns or districts for whose benefit the same were received. Such of said moneys as belong to a particular district, he shall set apart and credit to it; and such as belong to the schools of a town he shall set apart and credit to the schools in that town, and shall apportion them together with such as belong to the schools of the county as hereinafter provided for the payment of teachers' salaries.

He shall sign, in duplicate, a certificate, showing the amounts apportioned and set apart to each school district and part of a district, and the towns in which they were situated, and shall forthwith deliver one of said duplicates to the treasurer of the county and transmit the other to the commissioner of education.

He shall certify to the supervisor of each town, in his supervisory district the amount of school moneys apportioned to each district or part of a district of his town for teachers' wages. (*Amended by L. 1913, ch. 130.*)

Source.—Education L. 1909, § 458, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 13, as amended by L. 1896, ch. 264; L. 1908, ch. 365; originally revised from L. 1864, ch. 555, tit. 3, § 27, as amended by L. 1881, ch. 492; L. 1887, ch. 602.

§ 499. Duty of and payment to supervisor.—On receiving the certificate of the school commissioners, each supervisor shall forthwith make a copy thereof for his own use, and deposit the original in the office of the clerk of his town; and the moneys so apportioned to his town shall be paid to him immediately on his compliance with the requirements of section three hundred and sixty-three of this chapter.

Source.—Education L. 1909, § 459, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 16; originally revised from L. 1864, ch. 555, tit. 3, § 50.

§ 500. Power of comptroller to withhold payment of school moneys.—The comptroller may withhold the payment of any moneys to which any county may be entitled from the appropriation of the incomes of the school fund and the United States deposit fund for the support of common schools, until satisfactory evidence shall be furnished to him that all moneys required by law to be raised by taxation upon such county, for the support of schools throughout the state, have been collected and paid or accounted for to the state treasurer.

Source.—Education L. 1909, § 460, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 3, as amended by L. 1902, ch. 393; originally revised from L. 1864, ch. 555, tit. 3, § 3, as amended by L. 1875, ch. 567, § 8.

§ 501. Union free school district and city, a school district.—Every union free school district and every city having an organized city system of schools shall, for all the purposes of the apportionment, distribution, payment and withholding of school moneys, be regarded and recognized as a school district.

Source.—Education L. 1909, § 461, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 2; originally revised from L. 1864, ch. 555, tit. 9, § 12.

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Trusts for schools; gospel and school lots.

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§ 502. **Apportionment for support of training classes.**—The commissioner of education shall apportion the money annually appropriated for the support of training of teachers as follows:

1. To each academy and union free school district which has maintained a training class in accordance with the provisions of article thirty-one of this chapter and with the regulations prescribed by the commissioner of education, the sum of seven hundred dollars.

2. The balance of the money appropriated for such purpose shall be apportioned to the cities of the state which maintain training schools in accordance with the provisions of articles twenty and thirty-one of this chapter and with the regulations prescribed by the commissioner of education, ratably according to the aggregate attendance of the pupils regularly admitted to such training schools.

Source.—Education Law, 1909, § 462, as added by L. 1909, ch. 406.

ARTICLE XIX.

TRUSTS FOR SCHOOLS; GOSPEL AND SCHOOL LOTS.

Section 520. Property to be held in trust for common schools.

521. Control and supervision of trusts for common schools.

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§ 520. **Property to be held in trust for common schools.**—Real and personal estate may be granted, conveyed, devised, bequeathed and given in trust and in perpetuity or otherwise, to the state, or to the regents or to the commissioner of education for the support or benefit of the common schools, within the state, or within any part or portion of it, or of any particular common schools within it; and to any county, or the school commissioners of any county, or to any city or any board of officers thereof, or to any school commissioner district or its commissioner, or to any town, or supervisor of a town, or to any school district or its trustees, for the support and benefit of common schools within such county, city, school commissioner district, town or school district, or within any part or portion thereof respectively, or for the support and benefit of any particular common schools therein. No such grant, conveyance, devise or bequest shall be held void for the want of a named or competent trustee or donee, but where no trustee or donee, or an incompetent one is named, the title and trust shall vest in the people of the state, subject to its acceptance by the legislature, but such acceptance shall be presumed.

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Source.—Education L. 1909, § 480, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 19; originally revised from L. 1864, ch. 555, tit. 3, §§ 15, 16.

Bequest to a school district, to be managed by three trustees to be elected by the inhabitants of such district, is a bequest to the school district itself, and not to the trustees to be elected, as the custodian of the fund. *Matter of Bogart* (1899), 43 App. Div. 582, 587, 60 N. Y. Supp. 496. Bequest to "school district No. 1 of the town of Columbia" is valid. *Iseman v. Myers* (1882), 26 Hun 651, 654.

Funds donated for purpose of erecting school-house, before the act for the organization of school districts, after such act belong to the districts formed in such neighborhood. *Potter v. Chapin* (1837), 6 Paige 639.

§ 521. Control and supervision of trusts for common schools.—The legislature may control and regulate the execution of all such trusts; and the commissioner of education shall supervise and advise the trustees, and hold them to a regular accounting for the trust property and its income and interest at such times, in such forms, and with such authentications, as he shall, from time to time, prescribe.

Source.—Education L. 1909, § 481, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 20; originally revised from L. 1864, ch. 555, tit. 3, § 17.

§ 522. Report of trusts to commissioner of education.—The common council of every city, the board of supervisors of every county, the trustees of every village, the supervisor of every town, the trustees of every school district, and every other officer or person who shall be thereto required by the commissioner of education shall report to him whether any, and if any, what trusts are held by them respectively, or by any other body, officer or person to their information or belief for school purposes, and shall transmit, therewith, an authenticated copy of every will, conveyance, instrument or paper embodying or creating the trust; and shall, in like manner, forthwith report to him the creation and terms of every such trust subsequently created.

Source.—Education L. 1909, § 482, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 21; originally revised from L. 1864, ch. 555, tit. 3, § 18.

§ 523. Report of supervisor regarding gospel or school lots.—Every supervisor of a town shall report to the commissioner of education whether there be, within the town, any gospel or school lot, and, if any, shall describe the same, and state to what use, if any, it is put by the town; and whether it be leased, and if so, to whom, for what term and upon what rents; and whether the town holds or is entitled to any land, moneys or securities arising from any sale of such gospel or school lot, and the investment of the proceeds thereof, or of the rents and income of such lots and investments, and shall report a full statement and account of such lands, moneys and securities.

Source.—Education L. 1909, § 483, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 22; originally revised from L. 1864, ch. 555, tit. 3, § 19.

References.—Sale of gospel or school lots on division of town by supervisor, Education Law, § 361. Payment of proceeds of sale of gospel or school lots, *Id.* § 362.

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§ 524. **Apportionment of gospel funds.**—It shall be lawful for the supervisor of any town having money arising from the sale of gospel lands, and known as gospel funds, to apportion such funds among the several school districts of his respective town as hereinafter provided.

Source.—Education L. 1909, § 484, revised from L. 1895, ch. 232, § 1.

§ 525. **Authorization of apportionment of gospel funds.**—1. The town board of any town having a gospel fund of five hundred dollars or less may authorize the supervisor of the town to apportion such fund among the several school districts of the town.

2. The voters of any town having a gospel fund of more than five hundred dollars may at any regular or special town meeting authorize the supervisor of the town to apportion such fund among the several school districts of the town.

Source.—Education L. 1909, § 485, revised from L. 1895, ch. 232, §§ 2, 3.

§ 526. **Payment of apportionment of gospel funds.**—When such apportionment is authorized the supervisor shall pay to the collector, or if the district has a treasurer to the treasurer, of the several school districts of his town its pro rata share according to the aggregate school attendance of each school district in the preceding year.

Source.—Education L. 1909, § 486, revised from L. 1895, ch. 232, § 4.

§ 527. **Bond required of collector or treasurer.**—The collector or the treasurer if the district has a treasurer, of each of such school districts shall execute and file with the supervisor of such town a bond of twice the amount of such apportionment with sufficient sureties, to be approved by such supervisor.

Source.—Education L. 1909, § 487, revised from L. 1895, ch. 232, § 5.

§ 528. **Application of moneys.**—Such moneys shall be held by such collector or treasurer and paid upon the written order of the trustee of the district for such purposes as the annual or a special meeting of the district shall direct.

Source.—Education L. 1909, § 488, revised from L. 1895, ch. 232, § 6.

ARTICLE XX.

TEACHERS AND PUPILS.

Section 550. Qualification of teachers.

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- 552. Regulations governing certification of teachers.
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- 558. Penalty for payment of unqualified teacher.
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- 563. Contract when teacher is related to trustee or member of board.
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- 565. Dismissal of teacher.
- 566. Teacher's salary payable as often as monthly.
- 567. Common schools free to resident pupils; tuition from nonresident pupils.
- 568. Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.

§ 550. **Qualification of teachers.**—No person shall be employed or authorized to teach in the public schools of the state who is:

1. Under the age of eighteen years; and,
2. Not in possession of a teacher's certificate issued under the authority of this chapter or a diploma issued on the completion of a course in a state normal school of this state or in the state normal college.

Source.—Education L. 1909, § 550, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 38, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 7, § 11, as amended by L. 1885, ch. 340, § 7.

Consolidators' note.—This section defines a legally qualified teacher and under other provisions of the law city superintendents are authorized to issue certificates.

References.—Register of qualified teachers in department, Education Law, § 94. Commissioner of education may annul certificates, Id. § 94. Proceedings before district superintendent for annulment for immoral conduct, Id. § 395, subd. 10.

The indorsement of an invalid certificate by the school commissioner does not affect the contractual relations between teacher and trustees. *O'Connor v. Francis* (1899), 42 App. Div. 375, 59 N. Y. Supp. 28.

Unlicensed teachers.—Teachers who are not duly licensed may not lawfully be employed. Dec. of Com'r (1915), 7 St. Dep. Rep 552; Dec. of Supt. (1888), Jud. Dec. 1196. It is against sound policy to continue an unlicensed teacher in school, even though she teaches without compensation. Dec. of Supt. (1890), Jud. Dec. 1195.

§ 551. **Minimum qualifications of teachers in primary and grammar schools.**—No person shall hereafter be employed or licensed to teach in the primary and grammar schools of any city or school district authorized by law to employ a superintendent of schools who has not had successful experience in teaching for at least three years, or in lieu thereof has not completed:

1. A course in one of the state normal schools of this state prescribed by the commissioner of education.
2. An examination for and received a life state certificate issued in this state by a superintendent of public instruction or the commissioner of education.
3. A course of study in a high school or academy of not less than three

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years approved by the commissioner of education or from some institution of learning of equal or higher rank approved by the same authority, and who subsequently to the completion of such course has not graduated from a school for the professional training of teachers having a course of not less than two years approved by the commissioner of education or its equivalent.

Source.—Education L. 1909, § 551, revised from L. 1895, ch. 1031.

Additional examinations.—In absence of special statute boards of education do not possess power to require further examinations. Dec. of Supt. (1902), Jud. Dec. 1075. Under New York City Charter, board of education may exact further examinations. Dec. of Supt. (1890), Jud. Dec. 1058.

§ 552. Regulations governing certification of teachers.—The commissioner of education shall prescribe, subject to approval by the regents, regulations governing the examination and certification of teachers employed in all public schools of the state.

Source.—New.

Indorsement of certificate.—A district superintendent may withhold indorsement of certificate for sufficient reason. Dec. of Supt. (1889), Jud. Dec. 1059; Dec. of Supt. (1887), Jud. Dec. 1065; Dec. of Supt. (1898), Jud. Dec. 1066; Dec. of Supt. (1899), Jud. Dec. 1067; Dec. of Supt. (1893), Jud. Dec. 1070; Dec. of Supt. (1891), Jud. Dec. 1071; Dec. of Supt. (1889), Jud. Dec. 1072.

§ 553. Commissioner of education to issue certificates.—The commissioner of education may issue:

1. A life state certificate upon examinations only which shall entitle its holder to teach for life in the public schools of the state without further examination.
2. Such other certificates as regents general rules shall prescribe.
3. A temporary license limited to a school district, school commissioner district or city for a period not to exceed one year.

Source.—Education L. 1909, § 552, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 1, § 10; originally revised from L. 1864, ch. 555, tit. 1, § 15, as amended by L. 1875, ch. 567, L. 1888, ch. 331.

Life state certificate does not entitle a New York City teacher to exemption from examination for appointment to a position in a city school; he may be exempted from such examination by the city superintendent under the city charter. *Stetson v. Board of Education* (1914), 165 App. Div. 476, 150 N. Y. Supp. 847.

Eligible lists in N. Y. City.—Legislature may impose additional qualifications for teaching. Right to be placed upon eligible list for principal of elementary school in New York City by virtue of State Life certificate denied. Dec. of Com'r (1916), 7 St. Dep. Rep. 584.

Effect of certificate.—A state certificate is conclusive evidence of competency of teacher. Dec. of Act. Supt. (1886), Jud. Dec. 1046. A first grade certificate entitles holder to enter into contract of employment in any commissioner district in state. Dec. of Supt. (1896), Jud. Dec. 1211.

§ 554. Endorsement of foreign certificates and diplomas.—The commissioner of education may in his discretion endorse:

1. A diploma issued by a normal school of another state.

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2. A certificate issued by the chief educational officer or state board of another state.

Such endorsement confers on the holder of such diploma or certificate the privileges conferred by law on the holder of a normal school diploma or state certificate issued in this state.

Source.—Same as § 553, *ante*.

§ 555. **Certification of teachers by local authorities.**—A school commissioner, a city superintendent of schools or such other authority of a city as may be designated by a special act or the city charter may issue such certificate as may be authorized by the regents general rules or by such special act or city charter.

Source.—Education L. 1909, § 554, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 5, § 13, subd. 5; originally revised from L. 1864, ch. 555, tit. 2, § 13, as amended by L. 1867, ch. 406; L. 1875, ch. 567; L. 1887, ch. 592; L. 1888, ch. 331.

Reference.—Requirement as to passing examination regarding nature of intoxicating liquors and narcotics, Education Law, § 691.

Determination as to licenses in New York City.—Commissioner of education will not intervene to reverse the decision of board of examiners of New York City in marking examination papers unless the rights of the candidate have been materially prejudiced. Dec. of Com'r (1916), 7 St. Dep. Rep. 581.

The issuance of permanent licenses is discretionary with New York City Superintendent of Schools. Neither the board of education nor the commissioner of education may properly interfere with the exercise of such discretion in the absence of evidence of malice or caprice. Dec. of Com'r (1916), 9 St. Dep. Rep. 571.

Power of board of examiners of New York City is not restricted to written examinations. The commissioner will not substitute his judgment as to the fitness of an applicant for the judgment of such board. Dec. of Com'r (1916), 9 St. Dep. Rep. 575.

Transfer of kindergarten and special teachers to regular positions in the elementary grades of the New York City schools invalid. Dec. of Com'r (1916), 7 St. Dep. Rep. 593.

Practice of temporary assignments to vacancies in the seventh and eighth grades in the New York City schools condemned. Dec. of Com'r (1916), 7 St. Dep. Rep. 617.

§ 556. **Revocation of certificate by school commissioner.**—A school commissioner shall examine any charge affecting the moral character of any teacher within his district, first giving such teacher reasonable notice of the charge, and an opportunity to defend himself therefrom; and if he find the charge sustained, he shall annul the teacher's certificate, by whomsoever granted, and declare him unfit to teach; and if the teacher holds a certificate of the commissioner of education or of a former superintendent of public instruction or a diploma of a state normal school, he shall notify the commissioner of education forthwith of such annulment and declaration.

Source.—Education L. 1909, § 554, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 5, § 13, subd. 6; originally revised from L. 1864, ch. 555, tit. 2, § 13, subd. 7.

Charges against teachers.—The school commissioner is the proper officer to re-

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ceive information relating to the moral character and habits of each teacher in his district. *Decker v. Gaylord* (1885), 35 Hun 584, 585.

General charge of immoral character is not sufficient. Dec. of Supt. (1886), Jud. Dec. 1073. Order revoking teacher's license vacated. Dec. of Com'r (1915), 5 St. Dep. Rep. 594.

§ 557. Unqualified teachers shall not be paid from school moneys.—No part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary, or any part thereof, be collected by a district tax except as provided in section four hundred and ninety-one of this chapter.

Source.—Education L. 1909, § 555, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 39; originally revised from L. 1864, ch. 555, tit. 7, § 42, as amended by L. 1867, ch. 406.

Effect.—This section does not prohibit the employment of an unlicensed teacher, but merely prevents payment in the money apportioned to the district, and declares that such wages cannot be collected by tax. *Ellis v. Sharp* (1886), 42 Hun 179, 180.

Presumption.—It must be assumed that a teacher who has been employed by trustees is legally qualified to teach. *Ellis v. Sharp* (1886), 42 Hun 179, 180.

Enforcement of contract.—An executory contract engaging the services of an unlicensed teacher cannot be enforced. *Gillis v. Space* (1872), 63 Barb. 177; *Blandon v. Moses* (1883), 29 Hun 606.

§ 558. Penalty for payment of unqualified teacher.—Any trustee who applies or directs, or consents to the application of any district money to the payment of an unqualified teacher's salary, thereby commits a misdemeanor; and any fine imposed upon him therefor shall be for the benefit of the common schools of the district.

Source.—Education L. 1909, § 556, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 40; originally revised from L. 1864, ch. 555, tit. 7, § 43.

§ 559. Teachers responsible for record books.—Teachers shall keep, prepare and enter in the books provided for that purpose, the school lists and accounts of attendance herein mentioned, and shall be responsible for their safekeeping and delivery to the clerk of the district at the close of their engagements or terms.

Source.—Education L. 1909, § 557, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 36; originally revised from L. 1864, ch. 555, tit. 7, § 44.

§ 560. Verification of school register.—1. Each teacher shall, by his oath or affirmation, verify his entries in the school register provided by the education department, and the entries shall constitute the school lists from which the average daily attendance shall be determined. Such oath or affirmation may be taken by the district clerk or trustee, but without charge.

2. A teacher shall not be entitled to his salary for the last month of a term until he shall have so made and verified such entries and the trustees shall not draw on the supervisor, collector or treasurer for any portion of his salary for such month until such oath or affirmation shall have been made.

Source.—Education L. 1909, § 558, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 53, in part; originally revised from L. 1864, ch. 555, tit. 7, § 53, as amended by L. 1867, ch. 406. Balance of § 53 re-enacted in Education Law, § 197.

Consolidators' note.—New matter in regard to the school register added for the reason that the department now furnishes the register in order to have a uniform system of keeping the record.

New matter "for the last month of a term" added for the reason that Consolidated School Law, tit. 8, § 15 (§ 567 hereof), requires that teachers shall be paid monthly.

Provision inserted allowing verification before the trustee, as well as the clerk, because school commissioners and trustees possess the general power to administer oaths.

Presumption.—In an action by a teacher for wages verification of the register is presumed. *Ellis v. Sharp* (1886), 42 Hun 179.

Verification of register.—Teacher cannot collect balance of wages until register is verified and filed. Dec. of Supt. (1889), Jud. Dec. 1166.

§ 561. **Contract with teacher.**—1. All trustees of school districts or boards of education who shall employ any teacher to teach shall, at the time of such employment, make and deliver to such teacher, or cause to be made and delivered, a contract in writing, signed by them, or by some person duly authorized to represent them in the premises, in which the details of the agreement between the parties, and particularly the length of the term of employment, the amount of compensation and the time when such compensation shall be due and payable shall be clearly and definitely set forth.

2. No contract for the employment of a teacher in a district having three or more trustees shall be made for more than one year in advance or for a shorter time than ten weeks unless for the purpose of filling out an unexpired term of school.

3. No contract for the employment of a teacher in a district having a sole trustee shall be made to extend beyond the date of the expiration of the term of office of such trustee. A sole trustee of a school district shall have full power and authority to contract with teachers for the term for which he has been elected any time after the date of the annual meeting at which such trustee was elected.

4. Nor shall any trustees contract with any teacher whose certificate of qualification shall not cover a period at least as long as that covered by the contract of service. (*Amended by L. 1910, ch. 442.*)

Source.—Education L. 1909, § 562, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 47, subds. 9 and 10, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 7, § 49, as amended by L. 1865, ch. 467; L. 1867, ch. 466; L. 1879, ch. 264; L. 1888, ch. 331; L. 1890, chs. 73, 175; L. 1884, ch. 30; L. 1887, ch. 335.

Consolidators' note.—The Consolidated School Law contains separate provisions defining the powers of a board of trustees in a common school district, in relation to contracting with and employing teachers (tit. 7, § 47, subds. 9, 10), and in relation to boards of education performing the same duties. (Tit. 8, § 15, subd. 11.) There is much unnecessary repetition of language involving the same pro-

visions, and sections 562-568 are a rearrangement and simplification of this matter with no change of substance.

Contract with teacher beyond the term of the trustee is valid and binding upon the trustee's successor, if in good faith, without fraud or collusion. *Wait v. Ray* (1876), 67 N. Y. 36.

This provision imposes upon a trustee the duty of executing and delivering a written contract to teach where he has employed or agreed to employ a teacher. *Com. of Educ. Decision* (1916), 9 State Dept. Rep. 586. District is bound by written contract. *Dec. of Com'r* (1904), *Jud. Dec.* 1083; *Dec. of Com'r* (1887), *Jud. Dec.* 1177. Construction of contract. *Dec. of Supt.* (1896), *Jud. Dec.* 1178; *Dec. of Supt.* (1891), *Jud. Dec.* 1180.

Oral evidence is not admissible to contradict or vary written contract. *Dec. of Supt.* (1899), *Jud. Dec.* 1087.

An offer of employment made by the board and accepted by the teacher cannot be thereafter withdrawn. *Dec. of Supt.* (1899), *Jud. Dec.* 1162.

A verbal agreement to employ a teacher is enforceable on appeal, but must be proven by competent testimony, and it is incumbent upon the teacher who asserts that such an agreement was made to show by a preponderance of proof that it was specific as to compensation and duration of term, and was definite and unconditional. *Com. of Educ. Decision* (1916), 9 State Dept. Rep. 586.

Oral contract for services of teacher to be performed within one year from date of making valid. *Dec. of Supt.* (1894), *Jud. Dec.* 1153.

Term of contract.—Contract "for one day only" void. *Dec. of Supt.* (1887), *Jud. Dec.* 1112; *Dec. of Supt.* (1887), *Jud. Dec.* 1183. Contract "for such time as she suited" void. *Dec. of Supt.* (1888), *Jud. Dec.* 1185. Contract terminable by either party at any time void as against public policy. *Dec. of Supt.* (1888), *Jud. Dec.* 1188.

Where teacher contracted for 13 weeks and for the balance of the year if service was satisfactory and no notice of dissatisfaction given contract can not be abrogated and teacher discharged. *Dec. of Supt.* (1902), *Jud. Dec.* 1163.

Where both parties understood the word "month" to mean calendar month and not school month, contract was so construed. *Dec. of Com'r* (1905), *Jud. Dec.* 1101.

In district having three trustees teacher may be hired in advance of annual meeting. *Dec. of Supt.* (1887), *Jud. Dec.* 1144.

Power of trustees to contract.—Two members of a board of three trustees may employ a teacher at a meeting at which all three are present or are notified to attend. *Dec. of Com'r* (1912), 1 St. Dep. Rep. (Unof.), 406.

A person elected member of a board of trustees at the annual meeting in May does not take office until August 1st following and may not take part in employing teacher until after the latter date. Contract invalid. *Dec. of Com'r* (1916), 8 St. Dep. Rep. 596.

The trustee, not the district meeting, is authorized to employ teachers. *Dec. of Supt.* (1849), *Jud. Dec.* 1117; *Dec. of Supt.* (1888), *Jud. Dec.* 1120.

Where two members of board sign contract without action of board, district is not bound if teacher had knowledge of the facts. *Dec. of Com'r* (1904), *Jud. Dec.* 1099; *Dec. of Supt.* (1889), *Jud. Dec.* 1137.

The newly elected trustee and not the retiring trustee, is entitled to hire teacher for the ensuing year. *Dec. of Supt.* (1891), *Jud. Dec.* 1181. Contract with a de facto trustee sustained. *Dec. of Supt.* (1887), *Jud. Dec.* 1146.

Contract to board with trustee void. *Dec. of Supt.* (1887), *Jud. Dec.* 1293. Agreement that teacher shall board with trustee void. *Dec. of Supt.* (1887), *Jud. Dec.* 1142.

Conditional acceptance.—Where teacher attaches a condition to her acceptance of contract, board is not bound. *Dec. of Com'r* (1915), 6 St. Dep. Rep. 536. In the

absence of an unconditional offer of employment at an agreed price there is no contract. Dec. of Com'r (1916), 9 St. Dep. Rep. 566.

Teacher cannot bind board without contract while she looks for another position at higher pay. Dec. of Com'r (1904), Jud. Dec. 1086.

Failure to begin term.—When teacher notifies trustee that she will not be able to begin work in accordance with contract another teacher may be employed. Dec. of Com'r (1914), 2 St. Dep. Rep. 602.

Agreement as to subsequent term.—Contract for 18 weeks with agreement for subsequent term if work successful. Held, trustee may refuse to continue employment if he finds work is not successful. Dec. of Com'r (1915), 5 St. Dep. Rep. 601.

Licensed teacher.—Cannot enforce contract where license is not endorsed. Dec. of Com'r Jud. Dec. 1056. Nor lawfully make or renew a contract. Dec. of Supt. (1891), Jud. Dec. 1145.

Contract not binding when district superintendent refused to endorse certificate of teacher to enable her to teach in his district. Dec. of Com'r (1915), 6 St. Dep. Rep. 538.

Religious belief of teacher.—Inspector may not inquire as to religious opinions of teacher. Dec. of Supt. (1830), Jud. Dec. 1036.

Local authorities have not the right to limit class of persons who may be employed as teachers, in this case to sisters of a certain faith. Dec. of Act. Supt. (1886), Jud. Dec. 1210.

Transfer of teacher.—Authority of board to transfer teacher from one position to another upheld. Dec. of Supt. (1890), Jud. Dec. 1110. Board cannot discipline teacher by transfer without assigning reason therefor. Dec. of Com'r (1910), Jud. Dec. 1106.

Substitute.—The trustee, not the teacher, has the power to select substitute. Dec. of Supt. (1891), Jud. Dec. 1035.

Vacations.—If no provision is made in contract for vacation teacher may insist on teaching continuously without vacation or upon payment for vacation periods not agreed to. Dec. of Com'r (1914), 2 St. Dep. Rep. 651.

Teacher not entitled to pay for vacation declared pursuant to agreement. Dec. of Supt. (1888), Jud. Dec. 1167. Nor for vacation which teacher knew was customary in the district. Dec. of Supt. (1888), Jud. Dec. 1193.

Contract which provides teacher may take 6 weeks' vacation whenever desired is improper as against interest of the district. Dec. of Com'r (1905), Jud. Dec. 1098.

School closed by health officer for six weeks of which period teacher was quarantined for 3 weeks. Teacher allowed compensation for 3 weeks. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 388. When school is closed by trustee teacher must be paid. Dec. of Supt. (1888), Jud. Dec. 592; Dec. of Act. Supt. (1886), Jud. Dec. 1114; Dec. of Supt. (1889), Jud. Dec. 1169; Dec. of Supt. (1889), Jud. Dec. 1090; Dec. of Supt. (1899), Jud. Dec. 1197; Dec. of Supt. (1888), Jud. Dec. 1173; Dec. of Supt. (1890), Jud. Dec. 1174. Teacher entitled to pay although school-house destroyed. Dec. of Supt. 1890), Jud. Dec. 1168; Dec. of Supt. (1889), Jud. Dec. 1194.

Termination of contract.—Trustee may terminate teacher's contract on notice that teacher's certificate has expired. Dec. of Com'r (1914), 3 St. Dep. Rep. 509. Appellant's conduct amounted to resignation. Dec. of Com'r (1915), 6 St. Dep. Rep. 599. Contract illegal as to terms of dismissal. Dec. of Com'r (1908), Jud. Dec. 1081.

Breach of contract.—Where damages for breach of contract uncertain, action should be brought in court instead of before commissioner. Dec. of Supt. (1889), Jud. Dec. 1090; Dec. of Supt. (1889), Jud. Dec. 1197; Dec. of Supt. (1888), Jud. Dec. 1199; Dec. of Supt. (1898), Jud. Dec. 1200.

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Conducting regents examinations is a part of regular teacher's work—not entitled to extra pay therefor. Dec. of Com'r (1907), Jud. Dec. 1032.

Janitor work.—Teacher may not be required to perform janitor work. Dec. of Supt. (1894), Jud. Dec. 1158.

Increase of compensation.—Agreement for extra compensation for additional time sustained. Dec. of Com'r (1915), 5 St. Dep. Rep. 599. Board of education may not arbitrarily increase salaries of teachers during term of employment. Dec. of Com'r (1915), 7 St. Dep. Rep. 560.

§ 562. Penalty for teacher's failure to complete contract.—Any failure on the part of a teacher to complete an agreement to teach a term of school without good reason therefor shall be deemed sufficient ground for the revocation of the teacher's certificate.

Source.—Education L. 1909, § 563, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 47, subd. 9, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 7, § 49, as amended by L. 1865, ch. 467; L. 1867, ch. 466; L. 1879, ch. 264; L. 1888, ch. 331; L. 1890, chs. 73, 175; L. 1884, ch. 30; L. 1887, ch. 335.

Teacher may resign because of ill health. Dec. of Com'r (1907), Jud. Dec. 1031. Teacher did wrong in accepting more desirable position before being released from position she then held. License not revoked. Dec. of Com'r (1905), Jud. Dec. 1220.

§ 563. Contract when teacher is related to trustee or member of board.—

1. No person who is related to any trustee by blood or marriage shall be employed as a teacher, except with the approval of two-thirds of the voters of such district present and voting upon the question at an annual or special meeting of the district.

2. No person who is related by blood or marriage to any member of a board of education shall be employed as a teacher by such board, except upon the consent of two-thirds of the members thereof to be determined at a board meeting and to be entered upon the proceedings of the board.

Source.—Education L. 1909, § 564, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 47, subd. 9, as amended by L. 1896, ch. 264, tit. 8, § 15, subd. 11, as amended by L. 1896, ch. 264.

Relationship of teacher to trustee.—Since the law does not specify any degree of relationship, a contract is not binding upon the district without the required approval, although the relationship of the teacher to the trustee is remote. Com. of Educ. Decision (1915), 6 State Dep. Rep. 513.

There is a presumption in favor of the accuracy of the minutes of a school meeting, showing consent to the employment of the daughter of a trustee as teacher. Com. of Educ. Decision (1915), 5 State Dep. Rep. 583.

Notice given by posting of a meeting called pursuant to this section held sufficient, although the notices were subsequently changed by inserting therein a different date. Com. of Educ. Decision (1915), 5 State Dep. Rep. 583.

Employment without vote where teacher has married trustee's second cousin invalid. Dec. of Com'r (1914), 1 St. Dep. Rep. 560.

Vote of district.—Employment of relative pursuant to vote of district sustained. Dec. of Com'r (1915), 5 St. Dep. Rep. 633. District meeting may ratify employment. Dec. of Supt. (1889), Jud. Dec. 1141.

Where meeting has once voted to authorize employment the trustees then in office may continue to employ teacher so long as they remain in office. Dec. of Supt. (1897), Jud. Dec. 1138.

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There must be action of meeting on question of employment. Signatures of voters not enough. Dec. of Com'r (1904), Jud. Dec. 1103.

§ 564. **Individual liability of trustee.**—Any person employed in disregard of section five hundred and sixty-one or of section five hundred and sixty-three shall have no claim for wages against the district, but may enforce the specific contract made against the trustees or board of education consenting to such employment as individuals.

Source.—Education L. 1909, § 565, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 47, subd. 9, as amended by L. 1896, ch. 264; originally revised from L. 1864, ch. 555, tit. 7, § 49, as amended by L. 1865, ch. 467; L. 1867, ch. 466; L. 1879, ch. 264; L. 1888, ch. 331; L. 1890, chs. 73, 175; L. 1884, ch. 30; L. 1887, ch. 335.

§ 565. **Dismissal of teacher.**—No teacher shall be removed during a term of employment unless for neglect of duty, incapacity to teach, immoral conduct, or other reason which, when appealed to the commissioner of education, shall be held by him sufficient cause for such dismissal.

Source.—Education L. 1909, § 566, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 15, subd. 11, as amended by L. 1896, ch. 264; tit. 7, § 47, subd. 9, as amended by L. 1896, ch. 264.

Charges against teachers.—The school commissioner is the proper person to receive information relating to the moral character and habits of each teacher in his district. *Decker v. Gaylord* (1885), 35 Hun 584, 585.

Trial of charges.—The removal of a teacher after fair trial before a board of education upon charges of inefficiency sustained. Dec. of Com'r (1917), 10 St. Dep. Rep. 459. Where trial before board of education is unfair teacher will be reinstated. Rec. of Com'r (1906), Jud. Dec. 1026; Dec. of Supt. (1893), Jud. Dec. 1132. When teacher dismissed without opportunity to be heard and for insufficient reason, dismissal is void. Dec. of Supt. (1894), Jud. Dec. 1201.

Proof of immoral conduct.—Accusations of immoral conduct not proven to be true cannot justify board in dismissing teacher. Dec. of Com'r (1913), 3 St. Dep. Rep. (Unof.), 330.

Grounds for dismissal generally.—Dismissal of school to conduct litigation against trustee and excessive corporal punishment are grounds for dismissal. Dec. of Com'r (1915), 6 St. Rep. Dec. Rep. 604. No cause for dismissal being shown teacher was ordered reinstated. Dec. of Com'r (1915), 5 St. Dep. Rep. 590.

Teacher may be dismissed for acts done prior to beginning of term. Dec. of Com'r (1906), Jud. Dec. 1091. But not for delinquencies during previous employment. Dec. of Com'r (1906), Jud. Dec. 1103.

Presumption as to competency.—Where teacher has taught in the schools of a district satisfactorily for two years and is re-engaged he is presumed to be competent. Dec. of Com'r (1916), 7 St. Dep. Rep. 589.

Where teacher was retained until near the end of the school term, and statements as to incompetency are conflicting, dismissal will not be sustained. Dec. of Com'r (1915), 6 St. Dep. Rep. 531.

Lack of discipline.—Failure to maintain discipline is ground for dismissal. Dec. of Act. Supt. (1886), Jud. Dec. 1118; Dec. of Supt. (1895), Jud. Dec. 1129; Dec. of Supt. (1895), Jud. Dec. 1147; Dec. of Supt. (1890), Jud. Dec. 1189.

The continued failure of a teacher to maintain good order in a school room, showing such a lack of discipline as to materially lessen the efficiency of the school, constitutes sufficient cause for dismissal. Com. of Educ. Decision (1915), 6 State Dep. Rep. 531.

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Tardiness on one occasion satisfactorily explained not sufficient ground to dismiss teacher. Dec. of Com'r (1913), 1 St. Dep. Rep. 522. Dismissing school without consent of trustee is ground for discharge. Dec. of Com'r (1905), Jud. Dec. 1096; Dec. of Supt. (1860), Jud. Dec. 1118; Lack of punctuality. Dec. of Com'r (1910), Jud. Dec. 1127.

Failure to perform duties.—Dismissal of teacher dismissed for failure to report cases of non-attendance of pupils and failure to comply with direction of trustee as to closing hour. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 433.

Physical defects.—When state of health such that teacher cannot properly perform duties she may be dismissed. Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 389. Where in judgment of trustee teacher is unable to perform her duties she is obligated to the district to make other provision. Teacher dismissed after return to school after illness from child birth. Dec. of Com'r (1914), 3 St. Dep. Rep. 519.

Marriage of teacher; motherhood.—Under Buffalo Charter and ordinance adopted thereunder dismissal of teacher for marriage during term of employment sustained. Dec. of Com'r (1916), 8 St. Dep. Rep. 616.

Under section 1093 of the New York City Charter and under the by-laws of the board charges were preferred against the appellant and she was suspended without pay for general inefficiency. Appeal dismissed. Dec. of Com'r (1915), 6 St. Dep. Rep. 611.

Under the charter and rules of the board of education of the city of New York necessary absence of a teacher occasioned by maternity does not justify dismissal on ground of neglect of duty. Dec. of Com'r (1915), 4 St. Dep. Rep. 596; Dec. of Com'r (1915), 4 St. Dep. Rep. 605; Dec. of Com'r (1915), 4 St. Dep. Rep. 654; Dec. of Com'r (1916), 9 St. Dep. Rep. 567.

Dismissal for insubordination not sustained. Dec. of Com'r (1910), Jud. Dec. 1125.

Mandamus will not lie to review the action of a board of education of New York City in dismissing a teacher from the public schools for absence from school without leave, when it appears that it has proceeded within its jurisdiction and in substantial compliance with the forms of law. *People ex rel. Peixotto v. Board of Education* (1914), 212 N. Y. 463, 106 N. E. 307, affg. (1914), 160 App. Div. 557, 145 N. Y. Supp. 853. In this case the Appellate Division stated: "We are of the opinion that the question with respect to the right of the defendant to remove a teacher for *necessary* absence owing to such illness (a married woman giving birth to a child) is not presented for decision, and it would not be proper to express an opinion on that question at this time, for the relator had a legal remedy under the statute by an appeal to the State Commissioner of Education, who was authorized to reverse the determination of the defendant in dismissing her, if in his judgment the facts did not warrant it."

§ 566. **Teacher's salary payable as often as monthly.**—The salary of any teacher employed in the public schools of this state shall be due and payable at least as often as at the end of each calendar month of the term of employment.

Source.—Education L. 1909, § 567, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 18; originally revised from L. 1887, ch. 335, § 2.

§ 567. **Common schools free to resident pupils; tuition from nonresident pupils.**—1. A person over five and under twenty-one years of age is entitled to attend the public schools maintained in the district or city in which such person resides without the payment of tuition.

2. Nonresidents of a district, if otherwise competent, may be admitted

into the school of a district or city, upon the consent of the trustees, or the board of education, upon terms prescribed by such trustees or board.

3. The school authorities of a district or city must deduct from the tuition of a nonresident pupil whose parent or guardian owns property in such district or city and pays a tax thereon for the support of the schools maintained in such district or city the amount of such tax.

Source.—Education L. 1909, § 568, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 36; originally revised from L. 1864, ch. 555, tit. 7, § 30, as amended by L. 1881, ch. 528, § 3.

Reference.—Schools for colored children, Education Law, §§ 920-922.

Residence in district.—An orphan placed with a family by an aid society is a resident of the school district where such family resides and is entitled to free tuition. *People ex rel. Brooklyn Children's Society v. Hendrickson* (1908), 196 N. Y. 551, 90 N. E. 1163, affg. (1908), 125 App. Div. 256, 109 N. Y. Supp. 403, affg. (1907), 57 Misc. 337, 104 N. Y. Supp. 122.

In an action by a board of education of a school district to recover tuition for the defendant's children on the ground that they were non-residents of the district, it appeared that the defendant, who had previously lived in another town and paid tuition for his children as non-residents, had during the period in question rented a house within the school district where he lived through the winter, returning to his house in the other town during the summer. It further appeared that he was assessed in the other town as a resident taxpayer, registered and voted there and held the office of supervisor. On all the evidence it was held that he was not a resident of the school district to which he moved during the winter and was liable for tuition. *It seems*, that there may be cases where the voting residence of the father and the school residence of his children are not the same. *Board of Education v. Crill* (1912), 149 App. Div. 407, 134 N. Y. Supp. 311, revg. (1911), 73 Misc. 472, 133 N. Y. Supp. 394.

Residence of parents is ordinarily the residence of child for purpose of school attendance. Dec. of Supt. (1890), Jud. Dec. 1298; Dec. of Supt. (1888), Jud. Dec. 1302; Dec. of Supt. (1894), Jud. Dec. 1308; Dec. of Supt. (1893), Jud. Dec. 1311; Dec. of Supt. (1887), Jud. Dec. 1313; Dec. of Supt. (1897), Jud. Dec. 1320; Dec. of Supt. (1896), Jud. Dec. 1329; Dec. of Com'r (1915), 5 St. Dep. Rep. 639.

Residence of child not always that of guardian. Dec. of Supt. (1890), Jud. Dec. 1300.

The absence of the father on business does not forfeit residence of child for school attendance. Dec. of Supt. (1894), Jud. Dec. 578.

Residence retained.—Entering employ of U. S. Government does not change residence. Dec. of Supt. (1894), Jud. Dec. 577.

Residence where children are domiciled.—A child placed by the poor authorities of a city with a family to board is entitled to school privileges in the district where such family resides. Dec. of Com'r (1916), 7 St. Dep. Rep. 606.

Where home is broken up and children are cared for by friends they become residents of district where they come to live. Dec. of Supt. (1892), Jud. Dec. 581.

Where child has gone to live permanently in another district with persons who now stand in parental relation to him, he is to be regarded as resident of such district. Dec. of Supt. (1889), Jud. Dec. 1301; Dec. of Supt. (1889), Jud. Dec. 1302; Dec. of Supt. (1895), Jud. Dec. 1304; Dec. of Supt. (1889), Jud. Dec. 1317; Dec. of Supt. (1900), Jud. Dec. 1317; Dec. of Supt. (1891), Jud. Dec. 1319; Dec. of Supt. (1900), Jud. Dec. 1324; Dec. of Supt. (1896), Jud. Dec. 1326. **Temporary residence** is not sufficient. Dec. of Supt. (1892), Jud. Dec. 582. **Permanent change of residence** by abandonment of home and taking up other residence entitle child to attend

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school in district where now residing. Dec. of Com'r (1908), Jud. Dec. 504.

Where no other residence is shown children entitled to attend school in district of present abode. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 420.

Where parents have died or separated and child has no other residence than in district where he attends school he must be considered a resident of that district. Dec. of Supt. (1890), Jud. Dec. 1299; Dec. of Supt. (1884), Jud. Dec. 1298.

Determination of school officers.—Where the local authorities decide that child is a nonresident their decision will be sustained in absence of preponderance of evidence to the contrary. Dec. of Supt. (1890), Jud. Dec. 1320.

Restriction upon admission.—Board may not adopt a rule restricting admission of children who have arrived at the age of 5 years. Dec. of Supt. (1887), Jud. Dec. 1315.

Tuition may not be charged resident pupil taking any subject. Dec. of Supt. (1894), Jud. Dec. 1305; Dec. of Supt. (1889), Jud. Dec. 1330.

May suspend nonresident pupil where tuition is not paid. Dec. of Com'r (1905), Jud. Dec. 580.

Instruction to be furnished.—Obligation of a district is not restricted to furnishing instruction in the elementary grades. Dec. of Com'r (1916), 10 St. Dep. Rep. 449.

A tax for the "support of the schools" maintained in the city or district, within the meaning of subdivision 3, includes a tax paid for the erection of a new school building. Com. of Educ. Decision (1915), 7 State Dep. Rep. 577.

Tax paid by nonresident for the construction of school building must be deducted from tuition bill. Dec. of Com'r (1915), 7 St. Dep. Rep. 563.

§ 568. Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.—A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. (*Added by L. 1917, ch. 416, in effect May 8, 1917.*)

ARTICLE XX-A.

(Article added by L. 1913, ch. 627.)

MEDICAL INSPECTION.

Section 570. Medical inspection to be provided.

571. Employment of medical inspectors.

572. Pupils to furnish health certificates.

573. Examination by medical inspector.

574. Record of examinations; eye and ear tests.

575. Existence of contagious diseases; return after illness.

576. Enforcement of law.

577. State medical inspection of schools.

§ 570. Medical inspection to be provided.—Medical inspection shall be provided for all pupils attending the public schools in this state, except in cities of the first class, as provided in this article. Medical inspection shall include the services of a trained registered nurse, if one is employed,

and shall also include such services as may be rendered as provided herein in examining pupils for the existence of disease or physical defects and in testing the eyes and ears of such pupils. (*Added by L. 1913, ch. 627.*)

§ 571. **Employment of medical inspectors.**—The board of education in each city and union free school district, and the trustee or board of trustees of a common school district, shall employ, at a compensation to be agreed upon by the parties, a competent physician as a medical inspector, to make inspections of pupils attending the public schools in the city or district. If appointed by a board of education of a city such physician shall reside within the city. The physicians so employed shall be legally qualified to practice medicine in this state, and shall have so practiced for a period of at least two years immediately prior to such employment. Any such board or trustees may employ one or more school nurses, who shall be registered trained nurses and authorized to practice as such. Such nurses when so employed shall aid the medical inspector of the district and shall perform such duties for the benefit of the public schools as may be prescribed by such inspector.

A medical inspector or school nurse may be employed by the trustees or boards of education of two or more school districts, and the compensation of such inspector, and the expenses incurred in making inspections of pupils as provided herein, shall be borne jointly by such districts, and be apportioned among them according to the assessed valuation of the taxable property therein.

In cities and union free school districts having more than five thousand inhabitants, the board of education may employ such additional medical inspectors as may be necessary to properly inspect the pupils in the school in such cities and union free school district.

The trustees of a common school district or the board of education of a union free school district whose boundaries are coterminous with the boundaries of an incorporated village shall, in the employment of medical inspectors, employ the health officer of the town in which such common school district is located or the health officer of such union free school district, so far as may be advantageous to the interests of such district. (*Added by L. 1913, ch. 627, and amended by L. 1916, ch. 182.*)

§ 572. **Pupils to furnish health certificates.**—A health certificate shall be furnished by each pupil in the public schools upon his entrance in such schools, and thereafter at the opening of such schools at the beginning of each school year. Each certificate shall be signed by a duly licensed physician who is authorized to practice medicine in this state, and shall describe the condition of the pupil when the examination was made, which shall not be more than thirty days prior to the presentation of such certificate, and state whether such pupil is in a fit condition of bodily health to permit his or her attendance at the public schools. Such certificate shall be submitted within thirty days to the principal or teacher having

charge of the school and shall be filed with the clerk of the district. If such pupil does not present a health certificate as herein required, the principal or teacher in charge of the school shall cause a notice to be sent to the parents of such pupil that if the required health certificate is not furnished within thirty days from the date of such notice, an examination will be made of such pupil as provided herein. (*Added by L. 1913, ch. 627.*)

§ 573. **Examination by medical inspectors.**—Each principal or teacher in charge of a public school shall report to the medical inspector having jurisdiction over such school the names of all pupils who have not furnished health certificates as provided in the preceding section, and the medical inspector shall cause such pupils to be separately and carefully examined and tested to ascertain whether any of them are suffering from defective sight or hearing, or from any other physical disability tending to prevent them from receiving the full benefit of school work, or requiring a modification of such work to prevent injury to the pupils or to receive the best educational results. If it be ascertained upon such test or examination that any of such pupils are afflicted with defective sight or hearing or other physical disability as above described the principal or teacher, having charge of such school, shall notify the parents or other persons with whom such pupils are living, as to the existence of such defects and physical disability. If the parents or guardians are unable or unwilling to provide the necessary relief and treatment for such pupils, such fact shall be reported by the principal or teacher to the medical inspector, whose duty it shall be to provide relief for such pupils. (*Added by L. 1913, ch. 627.*)

§ 574. **Record of examinations; eye and ear tests.**—Medical inspectors or principals and teachers in charge of public schools shall make eye and ear tests of the pupils in such schools, at least once in each school year. The state commissioner of health shall prescribe the method of making such tests, and shall furnish general instruction in respect to such tests. The commissioner of education, after consultation with the state commissioner of health, shall prescribe and furnish to the school authorities suitable rules of instruction as to tests and examinations made as provided in this article, together with test cards, blanks, record books and other useful appliances for carrying out the purposes of this article. The commissioner of education shall provide for pupils in the normal schools, city training schools and training classes instruction and practice in the best methods of testing the sight and hearing of children. (*Added by L. 1913, ch. 627.*)

§ 575. **Existence of contagious diseases; return after illness.**—Whenever upon investigation a pupil in the public schools shows symptoms of small-pox, scarlet fever, measles, chicken-pox, tuberculosis, diphtheria, influenza,

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tonsillitis, whooping cough, mumps, scabies or trachoma, he shall be excluded from the school and sent to his home immediately, in a safe and proper conveyance, and the health officer of the city or town shall be immediately notified of the existence of such disease. The medical inspector shall examine each pupil returning to a school without a certificate from the health officer of the city or town, or the family physician, after absence on account of illness or from unknown cause.

Such medical inspectors may make such examinations of teachers, janitors and school buildings as in their opinion the protection of the health of the pupil and teachers may require. (*Added by L. 1913, ch. 627.*)

§ 576. **Enforcement of law.**—It shall be the duty of the commissioner of education to enforce the provisions of this article, and he may adopt such rules and regulations not inconsistent herewith, after consultation with the state commissioner of health, for the purpose of carrying into full force and effect the objects and intent of this article.

He may, in his discretion, withhold the public money from a district which wilfully refuses or neglects to comply with this article, and the rules and regulations made hereunder. (*Added by L. 1913, ch. 627.*)

§ 577. **State medical inspection of schools.**—The commissioner of education shall appoint a competent physician who has been in the actual practice of his profession for a period of at least five years, as state medical inspector of schools. The state medical inspector of schools, under the supervision of the commissioner of education, shall perform such duties as may be required for carrying out the provisions of this article. The said medical inspector shall be appointed in the same manner as other employees of the education department. (*Added by L. 1913, ch. 627.*)

ARTICLE XX-B.

(*Added by L. 1917, ch. 553, in effect May 13, 1917.*)

CHILDREN WITH RETARDED MENTAL DEVELOPMENT.

§ 578. **Children with retarded mental development.**—1. The board of education of each city and of each union free school district, and the board of trustees of each school district shall, within one year from the time this act becomes effective, ascertain, under regulations prescribed by the commissioner of education and approved by the regents of the university, the number of children in attendance upon the public schools under its supervision who are three years or more retarded in mental development.

2. The board of education of each city and of each union free school district in which there are ten or more children three years or more retarded in mental development shall establish such special classes of not

more than fifteen as may be necessary to provide instruction adapted to the mental attainments of such children.

3. The board of education of each city and of each union free school district, and the board of trustees of each school district which contains less than ten such children may contract with the board of education of another city or school district for the education of such children in special classes organized in the schools of the city or district with which such contract is made. (*Added by L. 1917, ch. 553, in effect May 18, 1917.*)

ARTICLE XXI.

CONTRACT SYSTEM.

Section 580. District meeting to authorize contract system.

581. District or city with which such contract may be made.

582. Trustees or boards of education may contract to receive such children.

583. Form of contract.

584. Validity of contract.

585. Apportionment to contracting district.

586. Report of pupils from other districts.

§ 580. District meeting to authorize contract system.—Any school district may decide by a majority vote of the qualified voters present and voting at any district meeting:

1. To contract for the education of all the children of such district in another district or in a city instead of maintaining a home school;

2. To contract for the education of part of the children of such district in another district or in a city and maintain a home school.

Source.—Education L. 1909, § 600, in part, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 14, as amended by L. 1896, ch. 264; L. 1897, ch. 294; L. 1903, ch. 265; L. 1904, ch. 332; originally revised from L. 1887, ch. 219, as amended by L. 1879, ch. 396.

State tuition.—Where a school district, not having conducted an academic department, makes a contract for the education of its children of school age under this section, the State should contribute under section 493, subdivision 6, for each pupil from such district attending the academic department. Rept. of Atty. Genl. (1913), Vol. 2, p. 666. The regulations of the Commissioner of Education, as to the payment of state tuition require a district to maintain a home school to entitle its academic pupils to state tuition.

Action of meeting authorizing contract will not be set aside at request of a minority. Dec. of Com'r (1913), 2 St. Dep. Rep. (Unof.), 392. Action of meeting in refusing to contract sustained. Dec. of Com'r (1909), Jud. Dec. 156.

Vote must be by ballot or by taking and recording the ayes and noes. A majority of those present and voting must concur. Dec. of Supt. (1896), Jud. Dec. 158; Dec. of Com'r (1905), Jud. Dec. 160.

No claim can successfully be maintained against a school district for the instruction of its pupils in another district except by virtue of a contract duly authorized. Dec. of Com'r (1915), 6 St. Dep. Rep. 622.

Contract for instruction.—Parents may not control action of trustee in making contract although wishes of parents should be considered. Dec. of Com'r (1912),

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1 St. Dep. Rep. (Unof.), 438. Enforcement of contract for instruction. Consideration must be paid in accordance with contract. Dec. of Com'r (1914), 4 St. Dep. Rep. 584.

Approval of contract.—Contract not approved where made to avoid reasonable provision for transportation. Dec. of Com'r (1915), 4 St. Dep. Rep. 591.

Effect of contract.—Contracting districts must maintain school building in repair in case it should be found desirable to again maintain school in the district. Dec. of Com'r (1912), 1 St. Dep. Rep. (Unof.), 441.

A school district having a considerable number of pupils and not being sufficiently interested to keep its building in repair and maintain its own school should be dissolved. Dec. of Com'r (1914), 1 St. Dep. Rep. 540.

§ 581. District or city with which such contract may be made.—1. Such contract may be made with one or more districts or cities. The district meeting authorizing such contract may designate the districts or cities with which such contracts may be made.

2. If the district meeting fails to make such designation or if any district or city so designated refuses to make such contract, the trustees of the district authorizing such contract may enter into a contract with a district willing to make such contract.

Source.—Same as § 580, *ante*.

With two or more districts.—When better facilities are afforded by contracting with two or more districts instead of one such contract should be made. Dec. of Com'r (1908), Jud. Dec. 172.

§ 582. Trustees or boards of education may contract to receive such children.—The trustees or board of education of any district or city may enter into a contract to receive and educate in the schools of such district or city the children of any district which shall authorize its trustees to contract for the education of its children as provided by section five hundred and eighty of this chapter.

Source.—Same as § 580, *ante*.

§ 583. Form of contract.—Such contract shall be written and in the form prescribed by the commissioner of education.

Source.—Same as § 580, *ante*.

Trustee refusing to make contract which has been authorized by district meeting may be removed from office. Dec. of Supt. (1896), Jud. Dec. 165

§ 584. Validity of contract.—Such contract shall not be valid or binding upon either party thereto until a copy thereof is filed with the commissioner of education and approved by such commissioner.

Source.—Same as § 580, *ante*.

§ 585. Apportionment to contracting district.—1. Whenever the period of time which a district contracts for the education of its children or such period together with the time school is actually taught in said district shall amount to one hundred and sixty days and the contract shall include all the children of school age in such district, such district shall be entitled to receive one district quota.

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2. Whenever a district maintains a home school and contracts for the education of at least twelve of its children in another district or city, it shall be entitled to one teacher's quota in addition to its district quota.

3. No school district operating under the contract system shall receive a greater apportionment than the total expense incurred in payment of tuition and transportation of pupils as shown by the report of the trustee to the school commissioner.

4. Whenever a district contracts with another district or a city and such district or city maintains a high school or an academic department, and whenever the expense of the tuition and transportation for the elementary children of said district shall exceed two hundred and fifty dollars, the tuition of the academic pupils attending such high school or academic pupils from such contracting district may be paid by the state as provided by section four hundred and ninety-three of this chapter. (*Subd. 4, added by L. 1915, ch. 194.*)

Source.—Same as § 580, *ante*.

§ 586. **Report of pupils from other districts.**—The children attending a school under any such contract shall be reported to the commissioner of education by the trustees or board of education of the district or city wherein such children attend school as though they were residents of such city or school district.

Source.—Education L. 1909, § 601, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 15, as amended by L. 1896, ch. 264; L. 1897, ch. 294; L. 1903, ch. 265; originally revised from L. 1877, ch. 219, as amended by L. 1879, ch. 396.

ARTICLE XXII.

GENERAL INDUSTRIAL SCHOOLS, TRADE SCHOOLS, AND SCHOOLS OF AGRICULTURE, MECHANIC ARTS AND HOME MAKING.

Section 600. General industrial schools, trade schools, and schools of agriculture, mechanic arts and home making, may be established in cities.

601. Establishment of such schools; directors of agriculture, mechanic arts and home-making.

602. Appointment of an advisory board.

603. Authority of the board of education over such schools.

604. State aid for general industrial schools, trade schools, and schools of agriculture, mechanic arts and home making.

605. Application of such moneys.

606. Annual estimate by board of education and appropriations by municipal and school districts.

607. Courses in schools of agriculture for training of teachers.

§ 600. **General industrial schools, trade schools and schools of agriculture, mechanic arts and home making, may be established in cities.**—The board of education of any city, and in a city not having a board of education the officer having the management and supervision of the public school system, may establish, acquire, conduct and maintain as a part of the public school system of such city the following:

1. General industrial schools open to pupils who have completed the elementary school course or who have attained the age of fourteen years; and

2. Trade schools open to pupils who have attained the age of sixteen years and have completed either the elementary school course or a course in the above mentioned general industrial school or who have met such other requirements as the local school authorities may have prescribed; and

3. Schools of agriculture, mechanic arts and home making, open to pupils who have completed the elementary school course or who have attained the age of fourteen, or who have met such other requirements as the local school authorities may have prescribed; and

4. Part time or continuation schools in which instruction shall be given in the trades and in industrial, agricultural and home making subjects, and which shall be open to pupils over fourteen years of age who are regularly and lawfully employed during a part of the day in any useful employment or service, which subjects shall be supplementary to the practical work carried on in such employment or service.

5. Evening vocational schools in which instruction shall be given in the trades and in industrial, agricultural and home making subjects, and which shall be open to pupils over sixteen years of age, who are regularly and lawfully employed during the day and which provide instruction in subjects related to the practical work carried on in such employment; but such evening vocational schools providing instruction in home making shall be open to all women over sixteen years of age who are employed in any capacity during the day.

The word "school," as used in this article, shall include any department or course of instruction established and maintained in a public school for any of the purposes specified in this section. (*Amended by L. 1913, ch. 747.*)

Source.—Education L. 1909, § 820, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 25, as amended by L. 1908, ch. 263; originally revised from L. 1888, ch. 334, § 1. This article was changed by the act of 1910 to provide for the establishment of schools of agriculture, mechanic arts, and home making.

Federal aid.—An act was passed by Congress, approved February 23, 1917, entitled "An act to provide for the promotion of vocational education; to provide for co-operation with the states in the promotion of such education in agriculture and the trades and industries; to provide for co-operation with the states in the preparation of teachers of vocational subjects, and to appropriate money and regulate its expenditure." This act appropriated an annual amount which will reach an annual maximum of \$7,000,000 in 1926 to be apportioned among the states which accept the conditions under which the apportionment is to be made and provide some official body or officer to co-operate with the federal authorities in carrying into effect the provisions of the act. The act creates officers whose duty it will be to prescribe the instruction to be given in vocational subjects and to aid and encourage the states in promoting vocational education. The state legislature enacted the following act accepting the terms and provisions of the Federal Act:

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§§ 601, 602.

L. 1917, chap. 576.—An act to provide for the acceptance of the benefits of an act passed by the senate and house of representatives of the United States of America, in congress assembled, to provide for the promotion of vocational education.

Section 1. The state of New York hereby accepts all of the provisions and the benefits of an act passed by the senate and house of representatives of the United States of America, in congress assembled, entitled "An act to provide for the promotion of vocational education; to provide for co-operation with the states in the promotion of such education in agriculture and the trades and industries; to provide for co-operation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure," approved February twenty-third, nineteen hundred and seventeen.

§ 2. The state treasurer is hereby constituted and appointed the custodian of the moneys paid to the state of New York for vocational education, under the provisions of such act, and such moneys shall be paid out in the manner provided by such act for the purposes therein specified.

§ 3. The regents of the university of the state of New York are hereby designated as the state board for the purpose of carrying into effect the provisions of such act, and are hereby authorized and directed to co-operate with the federal board of vocational education in the administration and enforcement of its provisions, and to perform such official acts and exercise such powers as may be necessary to entitle the state to receive its benefits.

§ 4. This act shall take effect immediately.

§ 601. Establishment of such schools; directors of agriculture, mechanic arts and homemaking.—The board of education of any union free school district shall also establish, acquire and maintain such schools for like purposes whenever such schools shall be authorized by a district meeting. The trustees or board of trustees of a common school district may establish a school or a course in agriculture, mechanic arts and homemaking, when authorized by a district meeting. The board of education of a city, town or union free school district, not maintaining a school of agriculture, mechanic arts and homemaking, may employ a director of agriculture. The boards of education or trustees of two or more districts or towns may by joint contract employ such a director and determine in such contract as to the portion of the compensation which is to be paid by each district. The qualifications of a person employed as such director shall be prescribed by the commissioner of education, as provided by law in respect to teachers employed in public schools of the state. (*Amended by L. 1913, ch. 747, and L. 1917, ch. 560, in effect May 18, 1917.*)

Source.—Same as § 600, *ante*.

§ 602. Appointment of an advisory board.—1. The board of education in a city and the officer having the management and supervision of the public school system in a city not having a board of education shall appoint an advisory board of five members representing the local trades, industries, and occupations. In the first instance two of such members shall be appointed for a term of one year and three of such members shall be appointed for a term of two years. Thereafter as the terms of such members

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shall expire the vacancies caused thereby shall be filled for a full term of two years. Any other vacancy occurring on such board shall be filled by the appointing power named in this section for the remainder of the unexpired term.

2. It shall be the duty of such advisory board to counsel with and advise the board of education or the officer having the management and supervision of the public school system in a city not having a board of education in relation to the powers and duties vested in such board or officer by section six hundred and three of this chapter.

Source.—Education L. 1909, § 821, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 25-a, as added by L. 1908, ch. 263, § 2.

§ 603. **Authority of the board of education over such schools.**—The board of education in a city and the officer having the management and supervision of the public school system in a city not having a board of education and the board of education in a union free school district in which city or district a general industrial school, a trade school, a school of agriculture, mechanic arts and home making, or a part time or continuation school, or an evening vocational school is established as provided in this article, is vested with the same power and authority over the management, supervision and control of such school and the teachers or instructors employed therein as such board or officer now has over the schools and teachers under their charge. Such boards of education or such officer shall also have full power and authority:

1. To employ competent teachers or instructors.
2. To provide proper courses of study.
3. To purchase or acquire sites and grounds and to purchase, acquire, lease or construct and to repair suitable shops or buildings and to properly equip the same.
4. To purchase necessary machinery, tools, apparatus and supplies. (*Amended by L. 1913, ch. 747.*)

Source.—Education L. 1909, § 822, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 26, as amended by L. 1908, ch. 263; originally revised from L. 1888, ch. 334, § 2.

§ 604. **State aid for general industrial schools, trade schools, and schools of agriculture, mechanic arts and homemaking.**—1. The commissioner of education in the annual apportionment of the state school moneys shall apportion therefrom to each city and union free school district for each general industrial school, trade school, part time or continuation school or evening vocational school, maintained therein for thirty-six weeks during the school year and employing one teacher whose work is devoted exclusively to such school, and having an enrollment of at least fifteen pupils and maintaining an organization and a course of study, and conducted in a manner approved by him, a sum equal to two-thirds of the salary paid to such teacher, but not exceeding one thousand dollars.

2. He shall also apportion in like manner to each city, union free school district or common school district for each school of agriculture, mechanic arts and homemaking, maintained therein for thirty-six weeks during the school year, and employing one teacher whose work is devoted exclusively to such school, and having an enrollment of at least fifteen pupils and maintaining an organization and course of study and conducted in a manner approved by him, a sum equal to two-thirds of the salary paid to such teacher. Such teacher may be employed for the entire year, and during the time that the said school is not open shall be engaged in performing such educational services as may be required by the board of education or trustees, under regulations adopted by the commissioner of education. Where a contract is made with a teacher for the entire year and such teacher is employed for such period, as herein provided, the commissioner of education shall make an additional apportionment to such city or district of the sum of two hundred dollars. But the total amount apportioned in each year on account of such teacher shall not exceed one thousand dollars.

3. The commissioner of education shall also make an additional apportionment to each city and union free school district for each additional teacher employed exclusively in the schools mentioned in the preceding subdivisions of this section for thirty-six weeks during the school year, a sum equal to one-third of the salary paid to each such additional teacher, but not exceeding one thousand dollars for each teacher.

4. The commissioner of education shall also apportion in like manner to each city, town and school district employing, or joining in the employment of, a director of agriculture, as authorized by section six hundred and one of this chapter, and establishing, maintaining and conducting an organization and course of instruction in such subject, approved by the commissioner of education, a sum equal to one-half of the salary paid to such director by such city, town or district, or by two or more of such towns or districts, not exceeding in each year the sum of six hundred dollars for each director employed. Where the apportionment is made on account of a director employed by two or more towns or districts, it shall be apportioned to such towns or districts in accordance with the proportionate amount paid by each of such towns or districts under the contract made with such director.

5. The commissioner of education, in his discretion, may apportion to a district or city maintaining such schools or employing such teachers for a shorter time than thirty-six weeks, or for a less time than a regular school day, an amount pro rata to the time such schools are maintained or such teachers are employed. This section shall not be construed to entitle manual training high schools or other secondary schools maintaining manual training departments, to an apportionment of funds herein provided for.

Any person employed as teacher as provided herein may serve as prin-

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cipal of the school in which the said industrial or trade school or course, or school or course of agriculture, mechanic arts and homemaking is maintained. (*Amended by L. 1913, ch. 747, and L. 1917, ch. 560, in effect May 18, 1917.*)

Source.—Education L. 1909, § 823, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 27, as amended by L. 1908, ch. 263; originally revised from L. 1888, ch. 334, § 3.

§ 605. Application of such moneys.—All moneys apportioned by the commissioner of education for schools under this article shall be used exclusively for the payment of the salaries of teachers employed in such schools in the city or district to which such moneys are apportioned. (*Amended by L. 1913, ch. 747.*)

Source.—Same as § 604, *ante*.

§ 606. Annual estimate by board of education and appropriations by municipal and school districts.

1. The board of education of each city or the officer having the management and supervision of the public school system in a city not having a board of education shall file with the common council of such city, within thirty days after the commencement of the fiscal year of such city, a written itemized estimate of the expenditures necessary for the maintenance of its general industrial schools, trade schools, schools of agriculture, mechanic arts and home making, part time or continuation schools or evening vocational schools, and the estimated amount which the city will receive from the state school moneys applicable to the support of such schools. The common council shall give a public hearing to such persons as wish to be heard in reference thereto. The common council shall adopt such estimate and, after deducting therefrom the amount of state moneys applicable to the support of such schools, shall include the balance in the annual tax budget of such city. Such amount shall be levied, assessed and raised by tax upon the real and personal property liable to taxation in the city at the time and in the manner that other taxes for school purposes are raised. The common council shall have power by a two-thirds vote to reduce or reject any item included in such estimate.

2. The board of education in a union free school district which maintains a general industrial school, trade school, a school of agriculture, mechanic arts and home making, part time or continuation schools or evening vocational schools, shall include in its estimate of expenses pursuant to the provisions of sections three hundred and twenty-three and three hundred and twenty-seven of this chapter the amount that will be required to maintain such schools after applying toward the maintenance thereof the amount apportioned therefor by the commissioner of education. Such amount shall thereafter be levied, assessed and raised by tax upon the taxable property of the district at the time and in the manner that other taxes for school purposes are raised in such district. (*Amended by L. 1913, ch. 747.*)

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Farm schools in counties.

§§ 607, 610, 611.

Source.—Education L. 1909, § 824, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 28, as added by L. 1908, ch. 263, § 5.

§ 607. Courses in schools of agriculture for training of teachers.—The state schools of agriculture at Saint Lawrence University, at Alfred University and at Morrisville may give courses for the training of teachers in agriculture, mechanic arts, domestic science or home making, approved by the commissioner of education. Such schools shall be entitled to an apportionment of money as provided in section six hundred and four of this chapter for schools established in union free school districts. Graduates from such approved courses may receive licenses to teach agriculture, mechanic arts and home making in the public schools of the state, subject to such rules and regulations as the commissioner of education may prescribe.

Source.—New.

ARTICLE XXII-a.

(Article added by L. 1915, ch. 307.)

FARM SCHOOLS IN COUNTIES.

Section 610. Establishment of farm schools.

611. Acquisition of lands and erection of buildings.

612. Board of managers.

613. Powers and duties of board.

614. Powers of superintendent; discipline of school.

615. Course of instruction.

616. State aid.

617. Children admitted to such school.

618. Agreements with parents and guardians to pay expense of maintenance; compulsory support.

619. Maintenance by county.

619-a. Reports to board of supervisors; inspection.

619-b. Powers of commissioner of education and state department of education.

§ 610. Establishment of farm schools.—The board of supervisors of any county outside of the city of New York may adopt a resolution by a majority vote of the members of the board establishing a farm school for the purpose of giving instruction in the trades and industrial, agricultural and homemaking subjects to children of the county not more than eighteen nor less than eight years of age who may be admitted thereto as provided by law. (*Added by L. 1915, ch. 307.*)

§ 611. Acquisition of lands and erection of buildings.—Upon the adoption of the resolution as provided in the foregoing section the board of supervisors shall purchase land in some conveniently accessible place in the county to be used for the purpose of such school. They may acquire such land by gift, purchase or condemnation. The land when so acquired shall be held in the name of the county for the benefit of such school.

Upon the acquisition of such land the board of supervisors shall erect the necessary buildings and suitably equip them for use. Such board may also provide for the improvement of existing buildings and make such repairs and alterations on the buildings upon the land used for the purpose of the school as may be necessary for the maintenance and operation thereof. (*Added by L. 1915, ch. 307.*)

§ 612. **Board of managers.**—The board of managers of such school shall consist of not less than five members and shall be composed of all the city, village and district superintendents of schools of the county in which it is located, in addition to such other members as may be necessary to make a total membership of such board of not less than five. Such additional members of the board shall be appointed by the board of supervisors from the resident taxpayers of the county, who shall serve for terms of four years commencing on the first day of January succeeding their appointment. Such terms shall be so arranged that the terms of no two of the members so appointed shall expire in the same year, and for this purpose the terms of the members first appointed hereunder shall be as follows: In case one member shall be appointed, the term shall be four years, in case two members shall be appointed, the terms shall be four and two years, respectively, in case three members shall be appointed, the terms shall be four, three and two years, and in case four members shall be appointed, the terms shall be four, three, two and one year, respectively, which terms shall commence on the first day of January succeeding their appointment, and their successors shall be appointed for full terms of four years as above provided. Appointments to fill vacancies shall be for the unexpired portion of the terms. The members of the board shall serve without compensation. They shall receive their necessary expenses incurred in the performance of their duties. The amount of such expenses shall be charged against the county and shall be paid in the same manner as other county charges. The board shall organize by the election of one of its members as chairman and another as secretary. (*Added by L. 1915, ch. 307.*)

§ 613. **Powers and duties of board.**—The board of managers of such school shall be responsible for the operation and maintenance of the school; employ a superintendent and such teachers and assistants as may be required for the operation and maintenance of the school when authorized so to do by the board of supervisors of the county; fix the compensation of such superintendent, teachers and assistants within the amount made available therefor by the said board of supervisors; prescribe rules and regulations for the management of the school and for the purpose of carrying into effect the object thereof; provide for the detention, maintenance and instruction of all children who are admitted to the school. (*Added by L. 1915, ch. 307.*)

L. 1910, ch. 140.

Farm schools in counties.

§§ 614-617.

§ 614. Powers of superintendent; discipline of school.—The superintendent of the school shall, subject to the regulations of the board of managers:

1. Have the general management of the school and the land, buildings and equipment thereof, and devote his entire time to its affairs;

2. Be responsible for the welfare of pupils of the school and see that the regulations and directions of the board of managers are carried into effect;

3. Supervise and direct the methods of instruction and the performance of duties by the teachers, assistants and employees of such school;

4. Prescribe rules for the government and discipline of the pupils of the school and cause such rules to be enforced;

5. Protect and care for the property of the school;

6. Give special attention to the proper instruction, detention, restraint, discipline, comfort and physical and moral welfare of the pupils of the school, and perform such other duties as may be required of him by the board of managers, with a view of carrying out the purposes of this article. (*Added by L. 1915, ch. 307.*)

§ 615. Course of instruction.—The board of managers shall prescribe the courses of instruction to be followed in such school, subject to the approval of the commissioner of education. Such instruction shall include instruction in agriculture, mechanic arts, trades and homemaking. The provisions of this chapter and of the regulations of the education department relating to vocational instruction in the public schools shall apply to such school so far as they do not conflict with the provisions of this article and may be made applicable thereto. (*Added by L. 1915, ch. 307.*)

§ 616. State aid.—There shall be annually apportioned to such school from the moneys appropriated by the state legislature for the support of the public schools of the state the sum of one thousand dollars and an additional sum of two hundred dollars for each teacher employed therein for a period of thirty-six weeks during each school year, whose entire time is given to the instruction of pupils in such school. No such apportionment shall be made unless there are at least fifteen pupils enrolled and actually in attendance at such school during such period of thirty-six weeks, and unless such school maintains an organization and a course of study and is conducted in a manner approved by the commissioner of education. (*Added by L. 1915, ch. 307.*)

§ 617. Children admitted to such school.—Children not more than eighteen nor less than eight years of age may be admitted to or received in such school, either (1) upon the application of the parents or guardians having the legal custody or control of such children, accompanied by the written consent of such parents or guardians, or (2) upon commitment thereto as truants or incorrigible pupils as provided in section six hun-

§§ 618-619-a.

Farm schools in counties.

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dred and thirty-five of this chapter, or (3) upon commitment thereto as juvenile delinquents as provided by law, provided that children convicted of crime shall not be committed to such school. Children who have no homes or who are without proper parental control or who are under improper guardianship may be sent to and received in such school, in the same manner and under the same authority as in case of other children who are improperly provided for at home. (*Added by L. 1915, ch. 307.*)

§ 618. **Agreements with parents and guardians to pay expense of maintenance; compulsory support.**—The board of managers may make an agreement with the parents or guardian of a child in such school for the payment of an amount therein specified for the instruction and maintenance of such pupil. An application for the admission of a child with the consent of the parents or guardian shall not be granted unless suitable provision be made for the clothing of such child. The amount agreed to be paid for instruction, maintenance and clothing shall be secured to the satisfaction of the board of managers. Such board shall ascertain by investigation the financial ability of parents, guardians, and other persons legally liable for the support of pupils admitted to such school upon commitment, and may demand of such parents, guardians or persons the payment of an amount reasonably sufficient to pay all or a portion of the cost of the instruction, maintenance and clothing of such pupils. The board may proceed against such parents, guardians or persons, by proper suit or proceeding in a court of competent jurisdiction for the recovery of the amount agreed or required to be paid, as herein provided. The amount so recovered, after the payment of the necessary costs and expenses of such suit or proceeding, shall be paid into the treasury of the county, and shall be applied to the payment of the cost of the instruction, maintenance and clothing of such pupils. (*Added by L. 1915, ch. 307.*)

§ 619. **Maintenance by county.**—The board of supervisors shall provide for the maintenance of such school, the repair and improvement of the lands and buildings used or occupied thereby, and the equipment thereof with necessary machinery, tools, apparatus and supplies. The cost thereof, and the expenses incurred for such purposes, shall be charges against the county and shall be audited and paid in the same manner as other charges against the county. The maintenance herein provided for shall include the support, instruction, care, board and clothing of pupils and such other expenses as are necessarily incurred in the operation of the school. (*Added by L. 1915, ch. 307.*)

§ 619-a. **Reports to board of supervisors; inspection.**—The board of managers of such school shall report in writing to the board of supervisors of the county when called upon to do so, and shall transmit to the clerk of the board, annually, on or before the thirtieth day of June. Such annual report shall state such facts in respect to the school as the board

of managers may deem advisable and as the board of supervisors may require. The board of supervisors may, by a committee or any of its members or appointees, inspect such school, and for such purpose may enter upon the land and into the buildings of such school at all reasonable times. (*Added by L. 1915, ch. 307.*)

§ 619-b. Powers of commissioner of education and state department of education.—A school established as provided herein shall be deemed a part of the public school system of the state, and shall be subject to the supervision and control of the commissioner of education and the state department of education in the same manner as other public schools, and shall not be subject to any of the laws of the state relating to charitable or penal institutions. (*Added by L. 1915, ch. 307.*)

ARTICLE XXIII.

COMPULSORY EDUCATION.

Section 620. Instruction required.

- 621. Required attendance upon instruction.
- 622. When a boy is required to attend evening school.
- 623. Instruction elsewhere than at a public school.
- 624. Duties of persons in * paternal relation to children.
- 625. Penalty for failure to perform * paternal duty.
- 626. Unlawful employment of children and penalty therefor.
- 627. Employer must display record certificate and evening, part-time or continuation school certificate.
- 628. Punishment for unlawful employment of children.
- 629. Teachers must keep record of attendance.
- 630. School record certificate.
- 631. Evening, part-time or continuation school certificate.
- 632. Attendance officers.
- 633. Arrest of truants.
- 634. Interference with attendance officers.
- 635. Truant schools.
- 636. Enforcement of law and withholding the state moneys by commissioner of education.

§ 620. Instruction required.—The instruction required under this article shall be:

1. At a public school in which at least the six common school branches of reading, spelling, writing, arithmetic, English language and geography are taught in English.
2. Elsewhere than a public school upon instruction in the same subjects taught in English by a competent teacher.

Source.—New.

Character of instruction.—There is no provision of the Education Law or of the Constitution which limits the obligation of a district to the furnishing of instruc-

* So in original.

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tion for the children therein, in so-called elementary or common school branches. Com. of Educ. Decision (1916), 10 State Dep't. Rep. 449.

§ 621. Required attendance upon instruction.—1. Every child within the compulsory school ages, in proper physical and mental condition to attend school, residing in a city or school district having a population of five thousand or more and employing a superintendent of schools, shall regularly attend upon instruction as follows:

(a.) Each child between seven and fourteen years of age shall attend the entire time during which the school attended is in session, which period shall not be less than one hundred and eighty days of actual school.

(b.) Each child between fourteen and sixteen years of age not regularly and lawfully engaged in any useful employment or service, and to whom an employment certificate has not been duly issued under the provisions of the labor law, shall so attend the entire time during which the school attended is in session. (*Subd. 1, amended by L. 1917, ch. 563, in effect May 18, 1917.*)

2. Every such child, residing elsewhere than in a city or school district having a population of five thousand or more and employing a superintendent of schools, shall attend upon instruction during the entire time that the school in the district shall be in session as follows:

(a) Each child between eight and fourteen years of age.

(b) Each child between fourteen and sixteen years of age not regularly and lawfully engaged in any useful employment or service. (*Subdivision amended by L. 1913, ch. 511.*)

3. The provisions of this section are intended to include all blind children, except such as may receive appointments under the provisions of article thirty-eight of this chapter. (*Section amended by L. 1911, ch. 710.*)

Physical condition.—Trustees may require physician's certificate as to physical disability. The burden of proof is upon the parent and not the school authorities. Dec. of Com'r (1906), Jud. Dec. 443.

Rule as to exclusion of child who lacks mental capacity to receive instruction. Dec. of Supt. (1890), Jud. Dec. 515.

§ 622. When a boy is required to attend evening school.—1. Every boy between fourteen and sixteen years of age, in a city of the first class or a city of the second class, in possession of an employment certificate duly issued under the provisions of the labor law, who has not completed such course of study as is required for graduation from the elementary public schools of such city, and who does not hold either a certificate of graduation from the public elementary school or the pre-academic certificate issued by the regents or the certificate of the completion of an elementary course issued by the education department, shall attend the public evening schools of such city, or other evening schools offering an equivalent course of instruction, for not less than six hours each week, for a period of not less than sixteen weeks.

2. When the board of education in a city or district shall have estab-

ished part-time and continuation schools or courses of instruction for the education of young persons between fourteen and sixteen years of age who are regularly employed in such city or district, said board of education may require the attendance in such schools or on such courses of instruction of any young person in such a city or district who is in possession of an employment certificate duly issued under the provisions of the labor law, who has not completed such courses of study as are required for graduation from the elementary public schools of such city or district, or equivalent courses of study in parochial or other elementary schools, who does not hold either a certificate of graduation from the public elementary school or a pre-academic certificate of the completion of the elementary course issued by the education department, and who is not otherwise receiving instruction approved by the board of education as equivalent to that provided for in the schools and courses of instruction established under the provisions of this act. The required attendance provided for in this paragraph shall be for a total of not less than thirty-six weeks per year, at the rate of not less than four and not more than eight hours per week, and shall be between the hours of eight o'clock in the morning and five o'clock in the afternoon of any working day or days.

3. The children attending such part-time or continuation schools as required in paragraph two of this section shall be exempt from the attendance on evening schools required in paragraph one of this section. (*Amended by L. 1913, ch. 748.*)

Source.—Same as § 621, *ante*.

§ 623. **Instruction elsewhere than at a public school.**—If any such child shall so attend upon instruction elsewhere than at a public school, such instruction shall be at least substantially equivalent to the instruction given children of like age at the public school of the city or district in which such child resides; and such attendance shall be for at least as many hours each day thereof as are required of children of like age at public schools; and no greater total amount of holidays or vacations shall be deducted from such attendance during the period such attendance is required than is allowed in such public school to children of like age. Occasional absences from such attendance, not amounting to irregular attendance in the fair meaning of the term, shall be allowed upon such excuses only as would be allowed in like cases by the general rules and practice of such public school.

If a child required to attend upon instruction as provided in this article does not attend at a public, private or parochial school maintained in the city or district in which the parent or guardian of said child resides, such parent or guardian shall upon request furnish satisfactory proof to the local school authorities of said city or district that said child or ward is attending upon lawful instruction elsewhere. (*Amended by L. 1917, ch. 563, in effect May 18, 1917.*)

Source.—Same as § 621, *ante*.

§ 624. Duties of persons in parental relation to children.—Every person in parental relation to a child within the compulsory school ages and in proper physical and mental condition to attend school, shall cause such child to attend upon instruction, as follows:

1. In cities and school districts having a population of five thousand or above, every child between seven and sixteen years of age as required by section six hundred and twenty-one of this act unless an employment certificate shall have been duly issued to such child under the provisions of the labor law and he is regularly employed thereunder.

2. Elsewhere than in a city or school district having a population of five thousand or above, every child between eight and sixteen years of age, unless such child shall have received an employment certificate duly issued under the provisions of the labor law and is regularly employed thereunder in a factory or mercantile establishment, business or telegraph office, restaurant, hotel, apartment house or in the distribution or transmission of merchandise or messages, or unless such child shall have received the school record certificate issued under section six hundred and thirty of this act and is regularly employed elsewhere than in the factory or mercantile establishment, business or telegraph office, restaurant, hotel, apartment house or in the distribution or transmission of merchandise or messages.

Source.—Education L. 1909, § 531, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 9, as added by L. 1894, ch. 671, amended by L. 1903, ch. 459, L. 1907, ch. 103, L. 1907, ch. 585.

Application.—This section is applicable to St. Vincent's Industrial School and to similar institutions. Rept. of Atty. Genl. (1901) 196.

Refusal of a parent to allow a child to be vaccinated, resulting in the child being refused admittance to school, may constitute a violation of this section. *Shappee v. Curtis* (1911), 142 App. Div. 155, 127 N. Y. Supp. 33. See *People v. Eckerold* (1914), 211 N. Y. 386, 105 N. E. 670, L. R. A. 1915 D. 223, affg. (1914), 160 App. Div. 930, 145 N. Y. Supp. 1137. Provision of statute excluding children who are unvaccinated from the public schools is constitutional. *Matter of Vlemeister* (1904), 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, affg. (1903), 88 App. Div. 44, 84 N. Y. Supp. 712.

§ 625. Penalty for failure to perform parental duty.—A violation of section six hundred and twenty-four shall be a misdemeanor, punishable for the first offense by a fine not exceeding five dollars, or five days' imprisonment, and for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment. Courts of special session and police magistrates shall, subject to removal as provided in sections fifty-seven and fifty-eight of the code of criminal procedure, have exclusive jurisdiction in the first instance to hear, try and determine charges of violations of this section within their respective jurisdictions.

Source.—Same as § 624, *ante*.

Penalty for failure to send children to school after refusing to have them vaccinated.—The law requiring vaccination of children in the public schools is a proper one. When a father sends his child to school unvaccinated, and the school

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authorities refuse to allow said unvaccinated child to attend school (Public Health Law, § 310 as amended by L. 1915, chap. 133 *post.*), and the father refuses to permit vaccination and thereafter does not cause said child to attend on instruction as provided in section 624 of the Education Law he is subject to the penalty provided in section 625 of that act. *People v. Eckerold* (1914), 211 N. Y. 386, 105 N. E. 670, L. R. A. 1915 D. 223, Am. Cas. 1915 C 552, following *Matter of Viemeister*, 179 N. Y. 235, 72 N. E. 97, 103 Am. St. Rep. 859, 70 L. R. A. 796, 1 Am. Cas. 334.

§ 626. Unlawful employment of children and penalty therefor.—It shall be unlawful for any person, firm or corporation:

1. To *employ any child under fourteen years of age, in any business or service whatever, for any part of the term during which the public schools of the district or city in which the child resides are in session.

2. To employ, elsewhere than in a city of the first class or a city of the second class, in a factory or mercantile establishment, business or telegraph office, restaurant, hotel, apartment house or in the distribution or transmission of merchandise or messages, any child between fourteen and sixteen years of age who does not at the time of such employment present an employment certificate duly issued under the provisions of the labor law, or to employ any such child in any other capacity who does not at the time of such employment present a school record certificate as provided in section six hundred and thirty of this chapter.

3. To employ any child between fourteen and sixteen years of age in a city of the first class or a city of the second class who does not, at the time of such employment, present an employment certificate, duly issued under the provisions of the labor law.

Source.—Education L. 1909, § 532, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 8, as added by L. 1894, ch. 671, amended by L. 1896, ch. 606; L. 1903, ch. 459; L. 1907, ch. 585.

Labor certificate.—Commissioner of education has not jurisdiction to require a health officer to issue a labor certificate. *Dec. of Com'r* (1912), 1 St. Dep. Rep. (Unof.), 420.

§ 627. Employer must display record certificate and evening, part-time or continuation school certificate.—The employer of any child between fourteen and sixteen years of age in a city or district shall keep and shall display in the place where such child is employed, the employment certificate and also his evening, part-time or continuation school certificate issued by the school authorities of said city or district or by an authorized representative of such school authorities, certifying that the said child is regularly in attendance at an evening, part-time or continuation school of said city as provided in section six hundred and thirty-one of this chapter. (*Amended by L. 1913, ch. 748.*)

Source.—Same as § 626, *ante*.

§ 628. Punishment for unlawful employment of children.—Any person, firm, or corporation, or any officer, manager, superintendent or employee

* So in original.

acting therefor, who shall employ any child contrary to the provisions of sections six hundred and twenty-six and six hundred and twenty-seven hereof shall be guilty of a misdemeanor, and the punishment therefor shall be for the first offense a fine of not less than twenty dollars nor more than fifty dollars; for a second and each subsequent offense, a fine of not less than fifty dollars nor more than two hundred dollars. (*Amended by L. 1913, ch. 748.*)

Source.—Education L. 1909, § 533, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 5, as added by L. 1894, ch. 671, amended by L. 1903, ch. 459; L. 1905, ch. 280; L. 1907, ch. 103; L. 1907, ch. 585.

References.—Employment of children of school age in factories and mercantile establishments, Labor Law, §§ 70–78, 160–173.

Action for penalty.—Treasurer of a city may bring an action to recover a penalty incurred. Rept. of Atty. Genl. (1895), 202.

§ 629. Teachers must keep record of attendance.—An accurate record of the attendance of all children between seven and sixteen years of age shall be kept by the teacher of every school, showing each day by the year, month, day of the month and day of the week, such attendance, and the number of hours in each day thereof; and each teacher upon whose instruction any such child shall attend elsewhere than at school, shall keep a like record of such attendance. Such record shall, at all times, be open to the attendance officers or other person duly authorized by the school authorities of the city or district, who may inspect or copy the same; and every such teacher shall fully answer all inquiries lawfully made by such authorities, inspectors, or other persons, and a willful neglect or refusal so to answer any such inquiry shall be a misdemeanor.

Source.—Education L. 1909, § 534, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 6, as added by L. 1894, ch. 671, amended by L. 1903, ch. 459; tit. 16, § 4-a, as added by L. 1907, ch. 585.

§ 630. School record certificate.—1. A school record certificate shall contain a statement certifying that a child has regularly attended the public schools, or schools equivalent thereto, or parochial schools, for not less than one hundred and thirty days during the twelve months next preceding his fourteenth birthday or during the twelve months next preceding his application for such school record, and has completed the work in reading, writing, spelling, arithmetic, English language and geography, in English, prescribed for the first six years of the public elementary school or parochial school or school of equal rank maintaining an equivalent course of study in which the branches specified in subdivision one of section six hundred and twenty of this chapter are taught in English. Such record shall also give the date of birth and residence of the child, as shown on the school records, and the name of the child's parents, guardian or custodian. Such school record certificate shall be in the form prescribed or approved by the commissioner of education.

No school record certificate shall be issued to any child under fifteen

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years of age for the purpose of obtaining an employment certificate, unless such child at the age of fourteen is a graduate of a public elementary school or parochial school or a school of equal rank maintaining an equivalent course of study in which the branches specified in subdivision one of section six hundred and twenty of this chapter are taught in English; or holds a pre-academic certificate issued by the regents, or a certificate of the completion of an elementary course issued by the state education department. (*Subd. 1, amended by L. 1913, ch. 101, and by L. 1917, ch. 563, in effect May 18, 1917.*)

2. A teacher or superintendent to whom application shall be made for a school record certificate required under the provisions of the labor law shall issue a school record certificate to any child who, after due investigation and examination, may be found to be entitled to the same as follows:

a. In a city of the first class by the principal or chief executive of a school.

b. In all other cities and in school districts having a population of five thousand or more and employing a superintendent of schools, by the superintendent of schools only.

c. In all other school districts by the principal teacher of the school.

d. In each city or school district such certificate shall be furnished on demand to a child entitled thereto or to the board or commissioner of health.

Source.—Same as § 629, *ante*.

§ 631. **Evening, part-time or continuation school certificate.**—The school authorities in a city or district, or officers designated by them, are hereby required to issue to each child lawfully in attendance at an evening, part-time or continuation school, an evening, part-time or continuation school certificate at least once in each month during the months said evening, part-time or continuation school is in session and at the close of the term of said evening, part-time or continuation school, provided that said child has been in attendance upon said evening school, for not less than six hours each week or upon said part-time or continuation school for not less than four hours each week, for such number of weeks as will, when taken in connection with the number of weeks such evening, part-time or continuation school respectively, shall be in session during the remainder of the current or calendar year, make up a total attendance on the part of said child in said evening school, of not less than six hours per week for a period of not less than sixteen weeks or in said part-time or continuation school, of not less than four hours per week for a period of not less than thirty-six weeks. Such certificate shall state fully the period of time which the child to whom it is issued was in attendance upon such evening, part-time or continuation school. (*Amended by L. 1913, ch. 748.*)

Source.—Same as § 629, *ante*.

§ 632. **Attendance officers.**—1. The school authorities of each city,

union free school district, or common school district whose limits include in whole or in part an incorporated village, shall appoint and may remove at pleasure one or more attendance officers of such city or district, and shall fix their compensation and may prescribe their duties not inconsistent with this article and make rules and regulations for the performance thereof; and the superintendent of schools shall supervise the enforcement of this article within such city or school district.

2. The town board of each town shall appoint, subject to the written approval of the school commissioner of the district, one or more attendance officers, whose jurisdiction shall extend over all school districts in said town, and which are not by this section otherwise provided for, and shall fix their compensation, which shall be a town charge; and such attendance officers, appointed by said board, shall be removable at the pleasure of the school commissioner in whose commissioner district such town is situated.

Source.—Education L. 1909, § 535, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 7, as added by L. 1894, ch. 671, amended by L. 1896, ch. 606; L. 1903, ch. 459; L. 1905, ch. 280.

Reference.—Attendance officers in towns to be appointed by town boards of education, Education Law, § 340.

§ 633. Arrest of truants.—1. The attendance officer may arrest without a warrant any child between seven and sixteen years of age who is a truant from instruction upon which he is lawfully required to attend within the city or district of such attendance officer. He shall forthwith deliver the child so arrested to a teacher from whom such child is then a truant, or, in case of habitual and incorrigible truants, shall bring them before a police magistrate for commitment to a truant school as provided in section six hundred and thirty-five.

2. The attendance officer shall promptly report such arrest and the disposition which he makes of such child, to the school authorities of the said city or district where such child is lawfully required to attend upon instruction.

3. A truant officer in the performance of his duties may enter, during business hours, any factory, mercantile or other establishment within the city or school district in which he is appointed and shall be entitled to examine employment certificates or registry of children employed therein on demand.

Source.—Education L. 1909, § 536, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 4, as added by L. 1894, ch. 671, amended by L. 1896, ch. 606; L. 1903, ch. 459; L. 1905, ch. 311.

Negligence of truant officer.—The rule of *respondent superior* does not apply to the relation existing between the board of education of a union free school district and an attendance officer, and the board is not liable for the act of such officer in wrongfully arresting a pupil, by reason of which in his effort to escape along a line of a railroad, the pupil was killed. *Reynolds v. Board of Education* (1898), 33 App. Div. 88, 53 N. Y. Supp. 75. See also *Rhall v. Board of Education* (1899), 40 App. Div. 412, 57 N. Y. Supp. 977.

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When board of education not liable for personal injuries to infant confined in industrial school for truancy. See *Ackley v. Board of Education* (1916), 174 App. Div. 44, 159 N. Y. Supp. 249.

§ 634. Interference with attendance officer.—Any person interfering with an attendance officer in the lawful discharge of his duties and any person owning or operating a factory, mercantile or other establishment who shall refuse on demand to exhibit to such attendance officer the registry of the children employed or the employment certificate of such children shall be guilty of a misdemeanor.

Source.—Same as § 633, ante.

§ 635. Truant schools.—1. The school authorities of any city or school district may establish schools, or set apart separate rooms in public school buildings, for children between seven and sixteen years of age, who are habitual truants from instruction upon which they are lawfully required to attend, or who are insubordinate or disorderly during their attendance upon such instruction, or irregular in such attendance. Such school or room shall be known as a truant school; but no person convicted of crimes or misdemeanors, other than truancy, shall be committed thereto.

2. School authorities may provide for the confinement, maintenance and instruction of any child who is an habitual truant from instruction upon which he is lawfully required to attend, or is insubordinate or disorderly during attendance upon such instruction, or is irregular in such attendance in such schools; and they or the superintendent of schools in any city or school district, may, after reasonable notice to such child and the persons in parental relation to such child, and an opportunity for them to be heard, and with the consent in writing of the persons in parental relation to such child, order such child to attend such school, or to be confined and maintained therein, under such rules and regulations as such authorities may prescribe, for a period not exceeding two years; but in no case shall a child be so confined after he is sixteen years of age. (*Subd. 2, amended by L. 1917, ch. 563, in effect May 18, 1917.*)

3. Such authorities may order such a child to be confined and maintained during such period in any private school, orphans' home or similar institution controlled by persons of the same religious faith as the persons in parental relation to such child, and which is willing and able to receive, confine and maintain such child, upon such terms as to compensation as may be agreed upon between such authorities and such private school, orphans' home or similar institution.

4. If the person in parental relation to such child shall not consent to either of such orders said person shall be proceeded against in court under section six hundred and twenty-five of this chapter by the school authorities or such officer as they may designate. In case the person in parental relation to such child establishes to the satisfaction of the court that such child is beyond his control such child shall be proceeded against as a dis-

orderly person, and upon conviction thereof, if the child was lawfully required to attend a public school, the child shall be sentenced to be confined and maintained in such truant school for a period not exceeding two years; or if such child was lawfully required to attend upon instruction otherwise than at a public school, the child may be sentenced to be confined and maintained for a period not exceeding two years in such private school, orphans' home or other similar institutions, if there be one, controlled by persons of the same religious faith as the persons in parental relation to such child, which is willing and able to receive, confine and maintain such child for a reasonable compensation. Such confinement shall be conducted with a view to the improvement and to the restoration, as soon as practicable, of such child to the institution elsewhere upon which he may be lawfully required to attend.

4-a. An habitual truant and a child who, being subject to the provisions of this article, has been lawfully suspended or expelled from school, and is not receiving equivalent instruction elsewhere, as provided by section six hundred and twenty-three of this chapter, are hereby declared to be ungovernable children. Any such child may be apprehended by a truant officer of the school district or city where the child resides, or by any peace officer, and brought before a police magistrate having jurisdiction. Notice shall thereupon be given to the child's parent, guardian, or other person standing in parental relation to the child, and upon the submission of satisfactory proof that the child is an habitual truant or that, being subject to this article, he has been lawfully suspended or expelled from school and is not receiving instruction elsewhere, the magistrate may commit such child to a truant school maintained by such district or city, or, if no such truant school is maintained, to a private school, orphans' home or other similar institution if there be one, controlled by persons of the same religious faith as the persons in parental relation to such child, which is willing and able to receive, confine and maintain such child for a reasonable compensation. (*Subd. 4-a, added by L. 1917, ch. 563, in effect May 18, 1917.*)

5. The authorities committing any such child, and in cities and districts having a superintendent of schools such superintendent shall have authority, in his discretion, to parole at any time any truant so committed by them.

6. Every child lawfully suspended from attendance upon instruction for more than one week, shall be required to attend such truant school during the period of such suspension.

7. The school authorities of any city or school district, not having a truant school, may contract with any other city or district having a truant school, for the confinement, maintenance and instruction therein of children whom such school authorities might require to attend a truant school, if there were one in their own city or district.

8. Industrial training shall be furnished in every such truant school.

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9. The expense attending the commitment and cost of maintenance of any truant residing in any city, or district, employing a superintendent of schools shall be a charge against such city, or district, and in all other cases shall be a county charge.

Source.—Education L. 1909, § 537, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 2, as added by L. 1894, ch. 671, amended by L. 1896, ch. 606; L. 1903, ch. 459; L. 1905, ch. 280.

Commitment of truants.—A male child under sixteen years of age may not be lawfully committed to the State Agricultural and Industrial School upon a specific charge of truancy unless he be a poor person. Rept. of Atty. Genl. (1914), 400. Expulsion of pupil; procedure for commitment. Dec. of Com'r (1906), Jud. Dec. 499.

§ 636. Enforcement of law and withholding the state moneys by commissioner of education.—1. The commissioner of education shall supervise the enforcement of this law and he may withhold one-half of all public school moneys from any city or district, which, in his judgment, wilfully omits and refuses to enforce the provisions of this article, after due notice, so often and so long as such wilful omission and refusal shall, in his judgment, continue.

2. If the provisions of this article are complied with at any time within one year from the date on which said moneys were withheld, the moneys so withheld shall be paid over by said commissioner of education to such district or city, otherwise forfeited to the state.

Source.—Education L. 1909, § 538, as amended by L. 1909, ch. 409; revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 16, § 10, as added by L. 1894, ch. 671, amended by L. 1895, ch. 908; L. 1905, ch. 280.

ARTICLE XXIV.

SCHOOL CENSUS.

Section 650. School census in cities of the first class, except the city of New York.

651. School census in cities not of the first class.

652. School census in school districts.

653. Penalty for withholding information.

654. Payment of expenses.

§ 650. School census in cities of the first class, except the city of New York.—A permanent census board is hereby established in each city of the first class, except the city of New York. In the city of New York provision shall be made by the board of education for taking a school census in connection with the work of enforcing the compulsory education law. Such permanent census board shall consist of the mayor, the superintendent of schools, the police commissioner or officer performing duties similar to those of a police commissioner. The mayor shall be the chairman of such board. Such board shall have power to make such rules and regulations

as may be necessary to carry out the provisions of this article. Such board shall have power to appoint a secretary and such clerks and other employees as may be necessary to carry out the provisions of this article and to fix the salaries of the same. Such board shall ascertain through the police force, the residences and employments of all persons between the ages of four and eighteen years residing within such cities and shall report thereon from time to time to the school authorities of such cities. Under the regulations of such board, during the month of October, nineteen hundred and nine, it shall be the duty of the police commissioners in such cities of the first class to cause a census of the children of their respective cities to be taken. Thereafter such census shall be amended from day to day by the police, precinct by precinct, as changes of residence occur among the children of such cities within the ages prescribed in this article and as other persons come within the ages prescribed herein and as other persons within such ages shall become residents of such cities, so that said board shall always have on file a complete census of the names and residences of the children between such ages and of the persons in parental relation thereto. It shall be the duty of persons in parental relation to any child residing within the limits of said cities of the first class to report at the police station house of the precinct within which they severally reside, the following information:

1. Two weeks before any child becomes of the compulsory school age the name of such child, its residence, the name of the person or persons in parental relation thereto, and the name and location of the school to which such child is sent as a pupil.

2. In case a child of compulsory school age is for any cause removed from one school and sent to another school, or sent to work in accordance with the labor law, all the facts in relation thereto.

3. In case the residence of a child is removed from one police precinct to another police precinct, the new residence and the other facts required in the two preceding subdivisions.

4. In case a child between the ages of four and eighteen becomes a resident of one of said cities of the first class for the first time the residence and such other facts as the census board shall require. Such census shall include all persons between the ages of four and eighteen years, the day of the month and the year of the birth of each of such persons, their respective residences by street and number, the names of their parents or guardians, such information relating to illiteracy and to the enforcement of the law relating to child labor and compulsory education as the school authorities of the state and of such cities shall require and also such further information as such authorities shall require. (*Amended by L. 1914, ch. 480.*)

Source.—Education L. (1909) § 1000, revised from L. 1908, ch. 249, § 1.

L. 1914, ch. 480, § 3.—The permanent census board established and maintained in the city of New York in pursuance of the education law, is hereby abolished

together with any official or other position created under said board or regulations made by its authority, and all records, documents, office equipment, and property of whatever kind in possession of said board or owned by it at the time this act takes effect, shall be transferred to and become the property of the board of education of the city of New York. All persons now in the employment of the said permanent census board, whether officers, clerks, enumerators, or other employees, shall be transferred to service under the board of education of the city of New York, and be employed subject to its by-laws, and be entitled to such compensation as is now or may hereafter be provided by lawful authority, subject to change of title or to reassignment, or to removal for cause, and subject to the general power of the board to abolish unnecessary positions. All persons appointed as census enumerators under the permanent census board in the city of New York, and acting as such at the time of the passage of this act shall be transferred to service as attendance officers under the board of education, subject to the conditions hereinbefore prescribed. All moneys appropriated for the use of the permanent census board for the year nineteen hundred and fourteen, and unexpended at the time this act takes effect, shall be transferred to the appropriate account of the board of education of the city of New York and used for the purpose of taking a school census and enforcing the compulsory education law.

Reference.—Enforcement of article by commissioner of education, Education Law, § 94.

§ 651. **School census in cities not of the first class.**—The board of education of each city of the second class and of each city of the third class shall constitute a permanent census board in such city. Such board shall, under its regulations, cause a census of the children in its city to be taken and to be amended from day to day so that there shall always be on file with such board a complete census giving the facts and information required in the census provided for in section six hundred and fifty of the education law in cities of the first class. All persons required to give information or make reports under the provisions of section six hundred and fifty of the education law to authorities of cities of the first class shall be required to give similar information or make similar reports under regulations of the board of education in a city of the second class or a city of the third class. (*Amended by L. 1917, ch. 567, in effect May 18, 1917.*)

Source.—Education L. 1909, § 1001, revised from L. 1908, ch. 249, § 2.

§ 652. **School census in school districts.**—The board of trustees of every school district shall annually on the thirtieth day of August cause a census of all children between the ages of five and eighteen years to be taken in their respective school districts. Such census shall include the information required from cities as provided in this article.

Source.—Education L. 1909, § 1002, revised from L. 1908, ch. 249, § 3.

§ 653. **Penalty for withholding information.**—A parent, guardian or other person having under his control or charge a child between the ages of four and eighteen years who withholds or refuses to give information in his possession relating to such child and required under this article, or any such parent, guardian or other person who gives false information

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in relation thereto, shall be liable to and punished by fine not exceeding twenty dollars or by imprisonment not exceeding thirty days.

Source.—Education L. 1909, § 1003, revised from L. 1908, ch. 249, § 4.

§ 654. **Payment of expenses.**—The money required for the purpose of carrying this article into effect shall be paid by the cities and school districts respectively, included in the provisions of this article, but, in cities in which a permanent census board as provided in section six hundred and fifty of this chapter is not established and maintained, except the city of New York, and in school districts, such moneys shall be paid for the services rendered in the taking of the school census, on the certificate of the state commissioner of education that such census has been satisfactorily taken. (*Amended by L. 1914, ch. 480.*)

Source.—Education L. 1909, § 1004, revised from L. 1908, ch. 249, § 5.

ARTICLE XXV.

TEXT-BOOKS.

Section 670. Power to designate text-books.

671. Requisites for change.

672. Penalty for violation.

673. Free text-books in union free school districts.

§ 670. **Power to designate text-books.**—1. In the several cities and union free school districts of the state, boards of education or such body or officer as perform the functions of such boards, shall designate text-books to be used in the schools under their charge.

2. In the common school districts in the state the text-books used in the schools therein shall be designated at an annual school meeting by a two-thirds vote of all the legal voters present and voting at such school meeting.

Source.—Education L. 1909, § 580, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 9; originally revised from L. 1877, ch. 413, as amended by L. 1884, ch. 427.

Reference.—Town board of education to include in budget amount required for purchase of text-books, Education Law, § 345.

§ 671. **Requisites for change.**—1. When a text-book shall have been designated for use in a union free school district or city as provided in subdivision one of the preceding section, it shall not be lawful to supersede such text-book by any other book within a period of five years from the time of such designation except upon a three-fourths vote of the board of education, or of such body or officer as performs the function of such board.

2. When a text-book shall have been designated in any common school district as provided in subdivision two of the preceding section it shall not be lawful to supersede such text-book except upon a three-fourths vote of the legal voters present and voting upon such proposition at an annual meeting of such district.

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Physiology and hygiene.

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Source.—Education L. 1909, § 581, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 10; originally revised from L. 1877, ch. 413, § 2.

Textbooks lawfully designated cannot be changed within five years. Writing books are textbooks. Dec. of Supt. (1888), Jud. Dec. 1232. After having designated a textbook and fixed a time when same should take effect, the board revoked its action by less than three-fourths vote. Action sustained. Dec. of Supt. (1887), Jud. Dec. 1227.

Action of trustee in changing textbook after lapse of 5 years since vote of district sustained. Dec. of Supt. (1888), Jud. Dec. 1231.

§ 672. Penalty for violation.—Any person violating any of the provisions of this article shall be liable to a penalty of not less than fifty dollars nor more than one hundred dollars for every such violation, to be sued for by any taxpayer of the school district, and recovered before any justice of the peace and when collected, to be paid to the collector or treasurer for the benefit of said school district.

Source.—Education L. 1909, § 582, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 11; originally revised from L. 1877, ch. 413, § 3.

§ 673. Free text-books in union free school districts.—1. The qualified voters of any union free school district present at any annual school meeting or at any special school meeting duly and legally called for that purpose, shall have power, by a majority vote, to be ascertained by taking and recording the ayes and noes, to vote a tax for the purchase of all text-books used, or to be used, in the schools of the district.

2. If such tax shall be voted it shall be the duty of the board of education of such district, within ninety days thereafter, to purchase and furnish free text-books to all the pupils attending the schools in such district. Such board of education shall have power to establish such rules and regulations concerning the use by the pupils of such text-books, and the care, preservation and custody thereof as it shall deem necessary.

Source.—Education L. 1909, § 583, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 8, § 13, as added by L. 1897, ch. 195.

Reference.—Free text-books in towns; amount required for purchase to be included in town budget, Education Law, § 345.

ARTICLE XXVI.

PHYSIOLOGY AND HYGIENE.

Section 690. Instruction regarding nature of alcoholic drinks.

691. Enforcement of last section.

§ 690. Instruction regarding nature of alcoholic drinks.—1. The nature of alcoholic drinks and other narcotics and their effects on the human system shall be taught in connection with the various divisions of physiology and hygiene, as thoroughly as are other branches in all schools under state control, or supported wholly or in part by public money of the state, and also in all schools connected with reformatory institutions.

2. All pupils in the above-mentioned schools below the second year of the high school and above the third year of school work computing from the beginning of the lowest primary, not kindergarten, year, or in corresponding classes of ungraded schools, shall be taught and shall study this subject every year with suitable text-books in the hands of all pupils, for not less than three lessons a week for ten or more weeks, or the equivalent of the same in each year, and must pass satisfactory tests in this as in other studies before promotion to the next succeeding year's work; except that, where there are nine or more school years below the high school, the study may be omitted in all years above the eighth year and below the high school, by such pupils as have passed the required tests of the eighth year.

3. In all schools above-mentioned, all pupils in the lowest three primary, not kindergarten, school years or in corresponding classes in ungraded schools shall each year be instructed in this subject orally for not less than two lessons a week for ten weeks, or the equivalent of the same in each year, by teachers using text-books adapted for such oral instruction as a guide and standard, and such pupils must pass such tests in this as may be required in other studies before promotion to the next succeeding year's work. Nothing in this article shall be construed as prohibiting or requiring the teaching of this subject in kindergarten schools.

4. The local school authorities shall provide needed facilities and definite time and place for this branch in the regular courses of study.

5. The text-books in the pupils' hands shall be graded to the capacities of fourth year, intermediate, grammar and high school pupils, or to corresponding classes in ungraded schools. For students below high school grade, such text-books shall give at least one-fifth their space, and for students of high school grade, shall give not less than twenty pages to the nature and effects of alcoholic drinks and other narcotics. This subject must be treated in the text-books in connection with the various divisions of physiology and hygiene, and pages on this subject in a separate chapter at the end of the books shall not be counted in determining the minimum. No text-book on physiology not conforming to this article shall be used in the public schools.

6. All regents' examinations in physiology and hygiene shall include a due proportion of questions on the nature of alcoholic drinks and other narcotics, and their effects on the human system.

Source.—Education L. 1909, § 760, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 19, as amended by L. 1895, ch. 1041; L. 1896, ch. 901; originally revised from L. 1884, ch. 30.

§ 691. Enforcement of last section.—1. In all normal schools, teachers' training classes and teachers' institutes, adequate time and attention shall be given to instruction in the best methods of teaching this branch, and no teacher shall be licensed who has not passed a satisfactory examination in the subject and the best methods of teaching it. On satisfactory evidence that any teacher has wilfully refused to teach this subject, as

provided in this article, the commissioner of education shall revoke the license of such teacher.

2. No public money of the state shall be apportioned by the commissioner of education or paid for the benefit of any city until the superintendent of schools therein shall have filed with the treasurer or chamberlain of such city an affidavit, and with the commissioner of education a duplicate of such affidavit, that he has made thorough investigation as to the facts, and that to the best of his knowledge, information and belief, all the provisions of this article have been complied with in all the schools under his supervision in such city during the last preceding legal school year.

3. Nor shall any public money of the state be apportioned by the commissioner of education or by school commissioners, or paid for the benefit of any school district, until the president of the board of trustees, or in the case of common school districts the trustee or some one member of the board of trustees, shall have filed with the school commissioner having jurisdiction an affidavit that he has made thorough investigation as to the facts and that to the best of his knowledge, information and belief, all the provisions of this article have been complied with in such district, which affidavit shall be included in the trustees' annual report.

4. It shall be the duty of every school commissioner to file with the commissioner of education an affidavit in connection with his annual report, showing all districts in his jurisdiction that have and those that have not complied with all the provisions of this article, according to the best of his knowledge, information and belief, based upon a thorough investigation by him as to the facts.

5. Nor shall any public money of the state be apportioned or paid for the benefit of any teachers' training class, teachers' institute or other school mentioned herein until the officer having jurisdiction or supervision thereof shall have filed with the commissioner of education an affidavit that he has made thorough investigation as to the facts and that to the best of his knowledge, information and belief, all the provisions of this article relative thereto have been complied with.

6. The principal of each normal school in the state shall at the close of each school year file with the commissioner of education an affidavit that all the provisions of this article applicable thereto have been complied with during the school year just terminated and until such affidavit shall be filed no warrant shall be issued by the commissioner of education for the payment by the treasurer of any part of the money appropriated for such school.

7. It shall be the duty of the commissioner of education to provide blank forms of affidavit required herein for use by the local school officers, and he shall include in his annual report a statement showing every school, city or district which has failed to comply with all the provisions of this article during the preceding school year.

8. On complaint by appeal to the commissioner of education by any

patron of the schools mentioned in the last preceding section or by any citizen that any provision of this article has not been complied with in any city or district, the commissioner of education shall make immediate investigation, and on satisfactory evidence of the truth of such complaint, shall thereupon and thereafter withhold all public money of the state to which such city or district would otherwise be entitled, until all the provisions of this article shall be complied with in said city or district, and shall exercise his power of reclamation and deduction under section four hundred and ninety-one of this chapter.

Source.—Education L. 1909, § 761, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 20, as amended by L. 1895, ch. 1041; L. 1896, ch. 901; originally revised from L. 1884, ch. 30, § 2.

ARTICLE XXVI-A.

(Article added by L. 1916, ch. 567.)

DISCIPLINE AND PHYSICAL TRAINING.

Section 695. Instruction in physical training and kindred subjects.

696. Rules of regents.

697. State aid for teachers employed.

§ 695. Instruction in physical training and kindred subjects.—After the first day of September, nineteen hundred and sixteen, all male and female pupils above the age of eight years in all elementary and secondary schools shall receive as part of the prescribed courses of instruction therein such physical training as the regents after conference with the military training commission may determine, during periods which shall average at least twenty minutes in each school day. Pupils above such age attending the public schools shall be required to attend upon such prescribed courses of instruction. The boards of education and trustees of the several cities and school districts in the state shall require the prescribed instruction to be given in such courses, within such cities and districts respectively, under the direction of the commissioner of education and in accordance with rules of the regents. Such boards of education or trustees, when the number of pupils in the city or district required to attend upon such instruction is sufficient, shall employ a competent teacher or teachers to give such instruction. The trustees or boards of education of two or more contiguous districts in the same supervisory district, when authorized or directed by the commissioner of education, may join in the employment of a competent teacher to give such instruction; and the salary of such teacher and the expenses incurred on account of such instruction shall be apportioned by the district superintendent among such districts according to the assessed valuation thereof, and as so apportioned shall be a charge upon each of such districts. Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in

such schools over eight years of age shall attend upon such courses; and if such courses are not so established and maintained in any private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to children of like ages in the public school or schools of the city or district in which the child resides.

Whenever the regents shall adopt recommendations of the military training commission in relation to the establishment in elementary and secondary schools of habits, customs and methods adapted to the development of correct physical posture and bearing, mental and physical alertness, self-control, disciplined initiative, sense of duty and spirit of co-operation under leadership, as provided in the military law, the regents shall prescribe and enforce such rules as may be necessary to carry into effect the recommendations so adopted. (*Added by L. 1916, ch. 567.*)

§ 696. **Rules of regents.**—It shall be the duty of the regents to adopt rules determining the subjects to be included in courses of physical training provided for in this article, the period of instruction in each of such courses, the qualifications of teachers, the attendance upon such courses of instruction, and relating to carrying out the recommendations of the military training commission when adopted by the regents as provided for in this article. (*Added by L. 1916, ch. 567.*)

§ 697. **State aid for teachers employed.**—The commissioner of education, in the annual apportionment of state school moneys, shall apportion therefrom to each city and school district on account of courses of instruction as provided in this article, established and maintained in the schools of such city or district during the school year or any part thereof, a sum equal to one-half of the salary paid to each teacher on account of instruction given in such courses, but the entire amount apportioned on account of a single teacher during a school year shall not exceed six hundred dollars. Such apportionments shall be made out of moneys to be appropriated therefor, subject to the provisions of law relative to apportionments of public money to the public schools of the state. Such apportionments shall not be made unless such courses of instruction shall be approved by the commissioner of education and the instruction therein shall meet the standards prescribed and conform to the provisions of this article and the rules of the regents of the university in respect thereto. If two or more districts shall jointly maintain such courses of instruction, the commissioner of education shall apportion a like amount on account of the salary paid to the teacher, which shall be apportioned to the school districts in accordance with the amount required to be paid by each district for the maintenance of such courses of instruction. (*Added by L. 1916, ch. 567.*)

ARTICLE XXVI-B.

(Added by L. 1917, ch. 210, in effect April 19, 1917.)

Section 700. Instruction in the humane treatment of animals and birds.

§ 700. Instruction in the humane treatment of animals and birds.—The officer, board or commission authorized or required to prescribe courses of instruction shall cause instruction to be given in every elementary school under state control or supported wholly or partly by public money of the state, in the humane treatment and protection of animals and birds and the importance of the part they play in the economy of nature. Such instruction shall be for such period of time during each school year as the board of regents may prescribe and may be joined with work in literature, reading, language, nature study or ethnology. Such weekly instruction may be divided into two or more periods. A school district shall not be entitled to participate in the public school money on account of any school or the attendance at any school subject to the provisions of this section, if the instruction required hereby is not given therein. The commissioner of education shall, pursuant to this act, cause the consideration of the humane treatment of animals and birds to be included in the program of teachers' institutes. (*Added by L. 1917, ch. 210, in effect April 19, 1917.*)

ARTICLE XXVII.

THE FLAG.

Section 710. Purchase and display of flag.

711. Rules and regulations.

712. Commissioner of education shall prepare program.

713. Military drill excluded.

§ 710. Purchase and display of flag.—It shall be the duty of the school authorities of every public school in the several cities and school districts of the state to purchase a United States flag, flag-staff and the necessary appliances therefor, and to display such flag upon or near the public school building during school hours, and at such other times as such school authorities may direct.

Source.—Education L. 1909, § 700, revised from L. 1898, ch. 481, § 1.

§ 711. Rules and regulations.—The said school authorities shall establish rules and regulations for the proper custody, care and display of the flag, and when the weather will not permit it to be otherwise displayed, it shall be placed conspicuously in the principal room in the school-house.

Source.—Education L. 1909, § 701, revised from L. 1898, ch. 481, § 2.

§ 712. Commissioner of education shall prepare program.—1. It shall be the duty of the commissioner of education to prepare, for the use of the

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public schools of the state, a program providing for a salute to the flag and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.

2. It shall also be his duty to make special provision for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day and Flag day, and such other legal holidays of like character as may be hereafter designated by law when the legislature makes an appropriation therefor.

Source.—Education L. 1909, § 702, revised from L. 1898, ch. 481, § 3.

§ 713. **Military drill excluded.**—Nothing herein contained shall be construed to authorize military instruction or drill in the public schools during school hours.

Source.—Education L. 1909, § 703, revised from L. 1898, ch. 481, § 5.

ARTICLE XXVIII.

FIRE DRILLS.

Section 730. Duty to maintain drills.

731. Penalty for neglect.

732. Duty to instruct teachers.

733. Not applicable to colleges or universities.

§ 730. **Duty to maintain drills.**—It shall be the duty of the principal or other person in charge of every public or private school or educational institution within the state, having more than one hundred pupils, or maintained in a building two or more stories high to instruct and train the pupils by means of drills, so that they may in a sudden emergency be able to leave the school building in the shortest possible time and without confusion or panic. Such drills or rapid dismissals shall be held at least once in each month.

Source.—Education L. 1909, § 720, revised from L. 1901, ch. 201, § 1.

§ 731. **Penalty for neglect.**—Neglect by any principal or other person in charge of any public or private school or educational institution to comply with the provisions of this article shall be a misdemeanor punishable at the discretion of the court by fine not exceeding fifty dollars; such fine to be paid to the pension fund of the local fire department where there is such a fund.

Source.—Education L. 1909, § 721, revised from L. 1901, ch. 201, § 2.

§ 732. **Duty to instruct teachers.**—It shall be the duty of the board of education or school board or other body having control of the schools in any district or city to cause a copy of this article to be printed in the

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manual or handbook prepared for the guidance of teachers, where such manual or handbook is in use or may hereafter come into use.

Source.—Education L. 1909, § 722, revised from L. 1901, ch. 201, § 3.

§ 733. **Not applicable to colleges or universities.**—The provisions of this article shall not apply to colleges or universities.

Source.—Education L. 1909, § 723, revised from L. 1901, ch. 201, § 4.

ARTICLE XXIX.

ARBOR DAY.

Section 750. Arbor day.

751. Manner of observance.

752. Prescribed course of exercises.

§ 750. **Arbor day.**—The commissioner of education shall designate by proclamation, annually, the day to be observed as Arbor day. (*Amended by L. 1916, ch. 220.*)

Source.—Education L. 1909, § 740, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 44; originally revised from L. 1888, ch. 196, § 1.

§ 751. **Manner of observance.**—It shall be the duty of the authorities of every public school in this state to assemble the pupils in their charge on that day in the school building, or elsewhere, as they may deem proper, and to provide for and conduct, under the general supervision of the city superintendent or the school commissioner, or other chief officers having the general oversight of the public schools in each city or district, such exercises as shall tend to encourage the planting, protection and preservation of trees and shrubs, and an acquaintance with the best methods to be adopted to accomplish such results.

Source.—Education L. 1909, § 741, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 45; originally revised from L. 1888, ch. 196, § 2.

§ 752. **Prescribed course of exercises.**—The commissioner of education may prescribe from time to time a course of exercises and instruction in the subjects hereinbefore mentioned, which shall be adopted and observed by the public school authorities on Arbor day. Upon receipt of copies of such course sufficient in number to supply all the schools under their supervision, the school commissioner or city superintendent aforesaid shall promptly provide each of the schools under his charge with a copy, and cause it to be observed.

Source.—Education L. 1909, § 742, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 46; originally revised from L. 1888, ch. 196, § 3.

ARTICLE XXX.

TEACHERS' INSTITUTE.

Section 770. Duties of commissioner of education regarding teachers' institutes.

771. Duties of school commissioners.

772. Schools must be closed.

773. Penalty for failure to attend or to close schools.

774. Teachers must attend; entitled to salaries.

775. Payment of expenses.

§ 770. Duties of commissioner of education regarding teachers' institutes.—It shall be the duty of the commissioner of education:

1. To appoint a teachers' institute once in each year in each school commissioner district of the state, for the benefit and instruction of the teachers in the public schools, and of such as intend to become teachers, with special reference to the presentation of subjects relating to the principles of education and methods of instruction in the various branches of study pursued in the schools. After consultation with the school commissioners, the said commissioner of education shall have power to determine the duration of each institute and to designate the time and place of holding the same.

2. To employ suitable persons, at a reasonable compensation, to supervise and conduct the institutes, and, in his discretion, to provide for such additional instruction as he may deem advisable and for the best interests of the schools.

3. To appoint in his discretion an institute for two or more school commissioner districts.

4. To establish such regulations for the government of institutes as he may deem best; and he may establish such regulations in regard to certificates of qualification or recommendation which may be issued by school commissioners as will, in his judgment, furnish incentives and encouragement to teachers to attend the institutes.

5. To visit the institutes, or cause them to be visited by representatives of the education department, for the purpose of examining into the course and character of instruction given, and of rendering such assistance as he may find expedient.

Source.—Education L. 1909, § 620, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 10, § 1; originally revised from L. 1864, ch. 555, tit. 11, §§ 1, 3, 4, as amended by L. 1885, ch. 340, § 9.

Reference.—Teachers' institutes have been displaced by teachers' conferences called by district superintendents in supervisory districts, Education Law, § 395, subd. 2.

§ 771. Duties of school commissioners.—It shall be the duty of every school commissioner, subject always to the advice and direction of the commissioner of education:

1. To notify all teachers, trustees, boards of education and others known

to him who may desire to become teachers under his jurisdiction, of the time when and the place where the institute will be held.

2. To make all necessary arrangements for holding the institute when appointed; see that a suitable room is provided; attend to all necessary details connected therewith; assist the conductor in organization; keep a record of all teachers in attendance and notify the trustees of the number of days attended by the teachers of the various districts, which shall be the basis of pay to such teacher for attendance as hereafter provided.

3. To transmit to the commissioner of education at the close of each institute, in such form, and within such time, as such commissioner shall prescribe, a full report of the institute, including a list of all teachers in attendance, the number of days attended by each teacher, with such other information as may be required.

4. To present a full statement of all expenses incurred by him in carrying on the institute, with vouchers for all expenditures made, accompanying the same by an affidavit of the correctness of statements made and of accounts presented.

Source.—Education L. 1909, § 621, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 10, § 2; originally revised from L. 1864, ch. 555, tit. 11, §§ 2, 7.

§ 772. Schools must be closed.—1. All schools in school districts and parts of school districts within any school commissioner district wherein an institute is held, not included within the boundaries of an incorporated city, except as herein provided, shall be closed during the time such institute shall be in session.

2. The closing of a school within the school commissioner district wherein an institute shall be held, at which a teacher has attended, shall not work a forfeiture of the contract under which such teacher was employed.

3. In all districts having a population of more than five thousand, and employing a superintendent whose time is exclusively devoted to the supervision of the schools therein, the schools may be closed or not at the option of the boards of education in such districts.

Source.—Education L. 1909, § 623, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 10, § 4, as amended by L. 1897, ch. 512; originally revised from L. 1864, ch. 555, tit. 11, § 5, as amended by L. 1867, ch. 406; L. 1885, ch. 340; L. 1890, ch. 524.

§ 773. Penalty for failure to attend or to close schools.—Wilful failure on the part of a teacher to attend a teachers' institute as required, shall be sufficient cause for the revocation of such teacher's license, and a wilful failure on the part of trustees to close their schools during the holding of an institute as required, shall be sufficient cause for withholding the public moneys to which such districts would otherwise be entitled.

Source.—Education L. 1909, § 625, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 10, § 6, as amended by L. 1896, ch. 264.

§ 774. Teachers must attend; entitled to salaries.—1. Any person under contract to teach in a school in any commissioner district, is required to

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attend an institute if one is held for that district, even though at the time of such institute the school is not in session, and shall be entitled to receive full salary for the actual time in attendance at such institute.

2. The trustees of every school district are hereby directed to give the teachers employed in their district the whole of the time, while an institute for the school commissioner district in which their school is located is in session, for attendance thereat and shall make no deduction whatever from the salaries of such teachers for the time so spent.

Source.—Same as § 773, *ante*.

§ 775. **Payment of expenses.**—The treasurer shall pay, on the warrant of the comptroller, to the order of any one or more of the school commissioners, such sum of money as the commissioner of education shall certify to be due to them for expenses in holding a teachers' institute; and upon the like warrant and certificate shall pay to the order of any persons employed by the commissioner of education as additional instructors to conduct, instruct, teach or supervise any such teachers' institute.

Source.—Education L. 1909, § 626, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 10, § 7; originally revised from L. 1864, ch. 555, tit. 11, § 6.

ARTICLE XXXI.

TRAINING CLASSES.

Section 790. Designation of schools for classes.

791. Regulations for classes.

792. Instruction free.

793. * School commissioners shall supervise and examine classes; teachers' certificates.

794. Teachers' training schools or classes under superintendents of schools.

§ 790. **Designation of schools for classes.**—The commissioner of education shall designate the academies and union free schools in which training classes may be organized to give instruction in the science and practice of common school teaching. Such classes shall be distributed among the academies and high schools of the several school commissioner districts of the state and consideration shall be given to the number of school districts in each and the location and character of the institution designated.

Source.—Education L. 1909, § 640, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 11, § 2; originally revised from L. 1890, ch. 170, § 2.

§ 791. **Regulations for classes.**—1. Every academy and union school so designated shall instruct a training class of not less than ten nor more than twenty-five scholars, and every scholar admitted to such class shall continue under instruction not less than thirty-six weeks.

2. Whenever it shall be shown to the satisfaction of the commissioner of education that any pupil attending such classes has been prevented

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from attending the same for the full term of thirty-six weeks, or that for any reason satisfactory to such commissioner, said classes have not been held for the full term of thirty-six weeks or have been attended by less than ten members, such commissioner may excuse such default and allow to the trustees of the academy or union free school in which said classes have been instructed an equitable allowance proportionate to the number of pupils and period of instruction.

3. The commissioner shall prescribe the conditions of admission to the classes, the course of instruction and the rules and regulations under which said instruction shall be given.

Source.—Education L. 1909, § 641, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 11, § 3; originally revised from L. 1890, ch. 170, § 3.

§ 792. *Instruction free.*—Instruction shall be free to all scholars admitted to such classes, who have continued in them the length of time required by the preceding section.

Source.—Education L. 1909, § 642, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 11, § 4; originally revised from L. 1890, ch. 170, § 4.

§ 793. *School commissioners shall supervise classes.*—Each class organized in any academy or union school under appointment by the commissioner of education for the instruction in the science and practice of common school teaching, shall be subject to the visitation of the school commissioner of the district in which such academy or union school is situated; and it shall be the duty of said school commissioner to advise and assist the principals of said academies or union schools in the organization and management of said classes.

Source.—Education L. 1909, § 644, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 11, § 7; originally revised from L. 1890, ch. 170, § 7.

§ 794. *Teachers' training schools or classes under superintendents of schools.*—The board of education or the public school authorities of any city or of any school district having a population of five thousand or more and employing a superintendent of schools, may establish, maintain, direct and control one or more schools or classes for the professional instruction and training of teachers in the principles of education and in the method of instruction for not less than two years.

Source.—Education L. 1909, § 645, revised from L. 1895, ch. 1031, as amended by L. 1897, ch. 495.

ARTICLE XXXII.

NORMAL SCHOOLS; STATE NORMAL COLLEGE.

Section 810. Normal schools continued.

811. Local boards.

812. Powers of local boards.

813. Bond of treasurer.

814. Salary of secretary and treasurer.

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- 815. Local boards shall have management of buildings and property.
- 816. Courses of study.
- 817. Teachers' salaries, et cetera.
- 818. Commissioner may perform duties of defaulting local board.
- 819. Diplomas.
- 820. Requisites for admission; privileges and duties of pupils.
- 821. Practice departments in Fredonia school.
- 822. Special policemen.
- 823. Village or city may insure normal school property.
- 824. Expense of insurance a village or city charge.
- 825. Deposit of insurance moneys in bank.
- 826. Acceptance of grants and bequests authorized.
- 827. Education of Indian youth.
- 828. Selection of Indian youth.
- 829. Age of youth and limit of time for support.
- 830. Guardians of youth.
- 831. Indian pupils on equality with others.
- 832. New York State normal college.
- 833. Board of trustees.
- 834. Contracts for the education of children, residing in a city or district, in which a state normal school is located.

§ 810. Normal schools continued.—The state normal schools heretofore established at Brockport, Buffalo, Cortland, Fredonia, Geneseo, New Paltz, Oneonta, Oswego, Plattsburg and Potsdam, are continued.

Source.—Education L. 1909, § 660.

Consolidators' note.—Besides the normal schools enumerated in this section and the New York State Normal College mentioned in § 679 (now §§ 832, 833), there is a normal college in the city of New York and various training schools in various localities which have no place here because maintained by local authorities. The normal school at Jamaica was transferred to the city of New York by L. 1905, ch. 524.

Acts relating to normal schools.—The following acts establishing and relating to normal schools have not been repealed:—

Albany.—L. 1905, ch. 716; L. 1906, ch. 435.

Brockport.—L. 1867, chs. 21, 96, 571; L. 1880, ch. 171.)

Buffalo.—L. 1867, ch. 583.

Cortland.—L. 1867, ch. 199; L. 1868, chs. 174, 198; L. 1871, ch. 113; L. 1873, ch. 155.

Fredonia.—L. 1867, ch. 223; L. 1870, ch. 563; L. 1882, ch. 217.

Geneseo.—L. 1867, ch. 195; L. 1868, ch. 601; L. 1870, ch. 286; L. 1871, ch. 294; L. 1876, ch. 222.

Jamaica.—L. 1905, ch. 524.

New Paltz.—L. 1885, ch. 287.

Oneonta.—L. 1887, ch. 374.

Oswego.—L. 1906, ch. 680.

Potsdam.—L. 1867, ch. 6; L. 1868, ch. 68.

Jamaica.—L. 1885, ch. 506; L. 1893, ch. 553; L. 1895, ch. 932.

Westchester County.—Provision for location, when new normal school is established, L. 1917, ch. 230.

§ 811. Local boards.—There shall continue to be a local board of each of said state normal schools, consisting of not less than three nor more than

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thirteen persons and the members thereof shall hold their offices until removed by the concurrent action of the chancellor of the university and the commissioner of education. A vacancy in any of said boards shall be filled by appointment by the commissioner of education.

Source.—Education L. 1909, § 661, revised from L. 1866, ch. 466, § 3, as amended by L. 1897, ch. 224; L. 1901, ch. 492, § 8, as added by L. 1869, ch. 18.

§ 812. Powers of local boards.—1. Local boards shall have the immediate supervision and management of said schools, subject, however, to the general supervision of the commissioner of education and to his direction in all things pertaining to the school. Said local boards shall have power to appoint one of their number chairman, one secretary and another treasurer of the board. The secretary may also be treasurer.

2. A majority of each of said boards shall form a quorum for the transaction of business, and in the absence of any officer of the board, another member may be appointed pro tempore to fill his place and perform his duties.

3. It shall be the duty of such board to make and establish, and from time to time to alter and amend, such rules and regulations for the government of such schools under their charge, respectively, as they shall deem best, which shall be subject to the approval of the commissioner of education.

4. They shall also severally transmit through the commissioner of education, and subject to his approval and in the form which he directs, a report to the legislature on the first day of January in each year, showing the condition of the school under their charge during the year next preceding, including, especially, an account in detail of their receipts and expenditures, which shall be duly verified by the oath or affirmation of their chairman and secretary.

Source.—Education L. 1909, § 662, revised from L. 1866, ch. 466, § 3, in part, as amended by L. 1897, ch. 224; L. 1901, ch. 492.

§ 813. Bond of treasurer.—The treasurer shall give an undertaking to the people of the state for the faithful performance of his trust in an amount fixed by the commissioner of education. The undertaking shall be approved by said commissioner and filed in the office of the comptroller.

Source.—Same as § 812, *ante*.

§ 814. Salary of secretary and treasurer.—The secretary and the treasurer shall each be paid an annual salary to be fixed by the local board with the approval of the commissioner of education, but the aggregate amount of such salaries shall not exceed four hundred dollars.

Source.—Same as § 812, *ante*.

§ 815. Local boards shall have management of buildings and property.—The local boards of managers of the respective normal schools in this state shall have the custody, keeping and management of the grounds and build-

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ings provided or used for the purposes of such schools, respectively, and other property of the state pertaining thereto, with power to protect, preserve and improve the same.

Source.—Education L. 1909, § 663, revised from L. 1880, ch. 348, § 1.

§ 816. **Courses of study.**—It shall be the duty of the commissioner of education to prescribe the courses of study to be pursued in each of said schools.

Source.—Education L. 1909, § 664, revised from L. 1866, ch. 466, § 4.

§ 817. **Teachers, salaries, et cetera.**—The commissioner of education shall determine the number of teachers to be employed in each normal school and the salary of such teachers. The employment of such teachers shall also be subject to his approval.

Source.—Education L. 1909, § 664, revised from L. 1866, ch. 466, § 4.

Removal of principal.—It was held under former law (L. 1866, ch. 466, § 4) that the superintendent of public instruction had no power to remove the principal of a normal school without the concurrence of the local board nor to attach conditions to his approval. *People ex rel. Gilmour v. Hyde* (1882), 89 N. Y. 11.

§ 818. **Commissioner may perform duties of defaulting local board.**—During such time as any local board shall fail or refuse to discharge any duty the commissioner of education is hereby authorized to discharge such duty of such local boards or any of their officers; and the acts of said commissioner of education in the premises shall be as valid and binding as if done by a competent local board or its officers, or with their co-operation.

Source.—Education L. 1909, § 665, revised from L. 1866, ch. 466, § 8, as added by L. 1869, ch. 18.

§ 819. **Diplomas.**—The commissioner of education shall prepare suitable diplomas to be granted to the students of such school, who shall have completed one or more of the courses of study and discipline prescribed, and a diploma signed by him, the chairman and secretary of the local board and the principal of the school, shall be of itself a certificate of qualification to teach common schools.

Source.—Education L. 1909, § 666, revised from L. 1866, ch. 466, § 6.

§ 820. **Requisites for admission; privileges and duties of pupils.**—1. All applicants for admission to a normal school shall be residents of this state, or, if not, they shall be admitted only upon the payment of such tuition fees as shall be, from time to time, prescribed by the commissioner of education. Applicants shall present such evidences of proficiency or be subject to such examination as shall be prescribed by said commissioner.

2. A normal school shall not receive into its academic department any pupil not a resident of the territory, for the benefit or advantage of whose residents the state has pledged itself to maintain such academic depart-

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ment unless such pupil declares it to be her intention to remain in such school to complete the regular normal course.

3. All students duly admitted to the normal department shall be entitled to all the privileges of the school, free from all charges for tuition or for the use of books or apparatus, but every pupil shall pay for books lost by him, and for any damage to books in his possession. Any pupil may be dismissed from the school by the local board for immoral or disorderly conduct, or for neglect or inability to perform his duties.

Source.—Education L. 1909, § 667, revised from L. 1866, ch. 466, § 5, as amended by L. 1889, ch. 142.

§ 821. **Practice departments in Fredonia school.**—The local board of control of the state normal school at Fredonia shall have the same powers and privileges in respect to practice departments as boards of education, under subdivision three of section three hundred and ten and section three hundred and seventeen of this chapter.

Source.—Education L. 1909, § 668, revised from L. 1866, ch. 466, § 9, as added by L. 1904, ch. 677.

§ 822. **Special policemen.**—For the purpose of protecting and preserving such buildings, grounds and other property, and preventing injuries thereto, and preserving order, preventing disturbances, and preserving the peace in such buildings and upon such grounds, the local boards of managers of each of said normal schools shall have power, by resolution or otherwise, to appoint, from time to time, one or more special policemen, and to remove the same at pleasure, who shall be police officers, with the same powers as constables of the town or city where such school is located, whose duty it shall be to preserve order, and prevent disturbances and breaches of the peace in and about the buildings, and on and about the grounds used for said school, or pertaining thereto, and protect and preserve the same from injury, and to arrest any and all persons making any loud or unusual noise, causing any disturbance, committing any breach of the peace, or misdemeanor or any wilful trespass upon such grounds, or in or upon said buildings, or any part thereof and convey such person or persons so arrested, with a statement of the cause of the arrest, before a proper magistrate to be dealt with according to law.

Source.—Education L. 1909, § 669, revised from L. 1880, ch. 348, § 3.

§ 823. **Village or city may insure normal school property.**—Each village and city in this state, wherein is located a state normal and training school, may insure and keep insured, the real and personal property of such school against loss or damage by fire, when the state refuses to insure, or keep adequately insured, such property. The insurance is to be in the name of the state, and in case of loss, any moneys obtained from such insurance are to be used and disposed of the same as if the state had effected such insurance. The amount of insurance to be carried shall be determined by the municipal authorities of such village or city.

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Source.—Education L. 1909, § 670, revised from L. 1905, ch. 252, § 1.

§ 824. **Expense of insurance a village or city charge.**—The amount of money necessary to effect and continue such insurance shall be raised annually by such village or city at the same time, and in the same manner, as the ordinary expenses of the village or city are raised.

Source.—Education L. 1909, § 671, revised from L. 1905, ch. 252, § 2.

§ 825. **Deposit of insurance moneys in bank.**—Where any loss or damage, against which insurance exists, occurs to the real or personal property of any of the normal and training schools of the state, the moneys realized from such insurance shall be deposited by each company in which such property is insured in a bank to be designated by the state comptroller, subject to the check of the local board of managers of such school, countersigned by the state comptroller. Such moneys shall be kept as a separate fund to the credit of the local board of managers of such school, and shall be immediately available to be expended under the direction of such local board of managers, subject to the approval of the commissioner of education, to repair or replace, wholly or partially, the real or personal property so damaged or destroyed.

Source.—Education L. 1909, § 672, revised from L. 1894, ch. 488, § 1.

§ 826. **Acceptance of grants and bequests authorized.**—The local board of managers of any state normal and training school of this state, may accept, for the state, by and with the consent of the commissioner of education the gift, grant, devise or bequest of money or other property, and * to apply the same to any purpose, not inconsistent with the general purposes of such school, which shall be prescribed in the instrument by which such gift, grant, devise or bequest shall be made.

Source.—Education L. 1909, § 673, revised from L. 1896, ch. 165, § 1.

§ 827. **Education of Indian youth.**—The state treasurer shall pay, on the warrant of the comptroller, on bills approved by the commissioner of education, from the general fund, such sum as may be appropriated for the support and education of Indian youth in the state normal schools.

Source.—Education L. 1909, § 674, revised from L. 1850, ch. 89, § 1.

§ 828. **Selection of Indian youth.**—The selection of such youth shall be made by the commissioner of education, from the several Indian tribes located within this state; and in making such selection due regard shall be had to a just participation in the privileges of this article by each of the said several tribes, and, if practicable, reference shall also be had to the population of each of said tribes in determining such selection.

Source.—Education L. 1909, § 675, revised from L. 1850, ch. 89, § 2.

§ 829. **Age of youth and limit of time for support.**—Such youth shall

* So in original.

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not be under sixteen years of age, nor shall any of such youth be supported or educated at said normal schools for a period exceeding three years.

Source.—Education L. 1909, § 676, revised from L. 1850, ch. 89, § 3.

§ 830. **Guardians of youth.**—The local board of each normal school shall be the guardians of such Indian youth, during the period of their connection with the school; and shall pay their necessary expenses, as provided in section eight hundred and twenty-seven of this article.

Source.—Education L. 1909, § 677, revised from L. 1850, ch. 89, § 4.

§ 831. **Indian pupils on equality with others.**—The Indian pupils selected in pursuance of this article, and attending said normal schools, shall enjoy the same privileges, of every kind, as the other pupils attending said schools, including the payment of traveling expenses, not exceeding ten dollars to each pupil.

Source.—Education L. 1909, § 678, revised from L. 1850, ch. 89, § 5.

§ 832. **New York state normal college.**—1. The state normal school heretofore established at Albany is continued under the name of the New York state normal college and the executive committee of said college shall be known as the board of trustees thereof.

2. The said state normal college shall be as heretofore, under the supervision, management and government of the commissioner of education and the regents of the university. The said commissioner and regents shall from time to time, make all needful rules and regulations; fix the number and compensation of teachers and others to be employed therein; prescribe the examination and the terms and conditions on which pupils shall be received and instructed therein; the number of pupils from the respective counties conforming as nearly as may be to the ratio of population, and provide in all things for the good government and management of the said college. The board of trustees of such college may appoint a secretary and a treasurer and fix their compensation. (*Subd. 2, amended by L. 1913, ch. 511.*)

Source.—Education L. 1909, § 679, revised from subds. 1 and 4, new. Balance derived from L. 1844, ch. 311, § 3; L. 1848, ch. 318, § 3.

Consolidators' note.—This section relates to the New York State Normal College at Albany, which was established as the New York State Normal School by L. 1844, ch. 311, and continued by L. 1848, ch. 318. The Regents, under date of March 13, 1890, incorporated the institution as the New York State Normal College and changed the "executive committee" to the "board of trustees." The provisions of law relating to state normal schools, not inconsistent with these sections, apply to this institution, hence the latter subdivision.

§ 833. **Board of trustees.**—1. The board of trustees having the care, management and government of said college shall consist of five persons of whom the commissioner of education shall be one. Said commissioner shall be president ex officio of said board. The other members of such board shall be appointed by said commissioner subject to the approval of the regents.

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2. In addition to the powers and duties named herein the commissioner of education and the board of trustees of said state normal college shall possess all the powers and duties which the said commissioner and the local boards respectively possess under this article in relation to state normal schools.

Source.—Same as § 832, *ante*.

§ 834. Contracts for the education of children, residing in a city or district, in which a state normal school is located.—The commissioner of education is authorized to enter into a contract with the board of education of a city or district in which a state normal school is located for the education by the state, for such period of time as may be agreed upon, of all or part of the children of legal school age residing in such city or school district. Before such contract becomes binding, it must be approved by the board of regents. Such contract must be executed in duplicate and one contract filed with the commissioner of education and the other with the state comptroller. A board of education in such a city or district is hereby authorized and empowered to enter into such contracts with the said commissioner of education and to perform all necessary acts to carry out the purposes of this act. (*Added by L. 1916, ch. 315.*)

ARTICLE XXXIII.

FINES, PENALTIES, FORFEITURES AND COSTS.

Section 850. Disposition of fines for benefit of common schools.

- 851. Report and payment of fines.
- 852. Disposition of fines for benefit of schools of town, district or city.
- 853. Disposition of fines in case of joint district.
- 854. Penalty for falsely claiming to represent commissioner of education, regents or other school officer.
- 855. Forfeiture of amount of moneys lost by neglect.
- 856. Forfeiture of amount of penalty where suit is neglected.
- 857. No costs to plaintiffs in certain cases.
- 858. Costs, expenses and damages a district charge in certain cases.
- 859. Payment of costs, charges and expenses by vote of district meeting.
- 860. Appeal to county judge.
- 861. Hearing before county judge.
- 862. Duty of trustees to carry out order.

§ 850. Disposition of fines for benefit of common schools.—Whenever, by any statute, a penalty or fine is imposed for the benefit of common schools, and not expressly of the common schools of a town or school district, it shall be taken to be for the benefit of the common schools of the county within which the conviction is had; and the fine or penalty, when paid or collected, shall be paid forthwith into the county treasury, and the treasurer shall credit the same as school moneys of the county, unless the county comprise a city having a special school act, in which case he shall

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report it to the commissioner of education, who shall apportion it upon the basis of population by the last census, between the city and the residue of the county, and the portion belonging to the city shall be paid into its treasury.

Source.—Education L. 1909, § 500, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 25; originally revised from L. 1864, ch. 555, tit. 3, § 22.

Reference.—Disposition of fines and penalties recovered by district attorney, County Law, § 201.

§ 851. Report and payment of fines.—Every district attorney shall report, annually, to the board of supervisors, all such fines and penalties imposed in any prosecution conducted by him during the previous year; and all moneys collected or received by him or by the sheriff, or any other officer, for or on account of such fines or penalties, shall be immediately paid into the county treasury, and the receipt of the county treasurer shall be a sufficient and the only voucher for such money.

Source.—Education L. 1909, § 501, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 26; originally revised from L. 1864, ch. 555, tit. 3, § 23.

Reference.—Report by district attorney of fines and penalties collected, County Law, § 201.

§ 852. Disposition of fines for benefit of schools of town, district or city.—Whenever a fine or penalty is inflicted or imposed for the benefit of the common schools of a town or school district, the magistrate, constable or other officer collecting or receiving the same shall forthwith pay the same to the county treasurer of the county in which the schoolhouse is located, who shall credit the same to the town or district for whose benefit it is collected. If the fine or penalty be inflicted or imposed for the benefit of the common schools of a city having a special school act, or of any part or district of a city, it shall be paid into the city treasury.

Source.—Education L. 1909, § 502, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 27; originally revised from L. 1864, ch. 555, tit. 3, § 24.

§ 853. Disposition of fine in case of joint district.—Whenever a penalty or fine is imposed upon any school district officer for a violation or omission of official duty, or upon any person for any act or omission within a school district, or touching property or the peace and good order of the district, and such penalty or fine is declared to be for the use or benefit of the common schools of the town or of the county, and such school district lies in two or more towns or counties, the town or county intended by the act shall be taken to be the one in which the schoolhouse, or the schoolhouse longest owned or held by the district is at the time of such violation, act or omission.

Source.—Education L. 1909, § 503, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 2, § 28; originally revised from L. 1864, ch. 555, tit. 3, § 25.

§ 854. Penalty for falsely claiming to represent commissioner of education, regents or other school officer.—It shall be a misdemeanor for any

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employee, agent or representative of a firm, company or corporation engaged in selling, publishing or manufacturing papers, periodicals, books, maps, charts, school supplies, apparatus or furniture, or any other person engaged or employed in such business to falsely represent to a board of trustees or board of education of a school district or to a teacher employed in a public school in this state or to a superintendent of schools or other school officer that he is an agent, employee, or representative of the commissioner of education, the state education department, the regents, or of any other school officer.

Source.—Education L. 1909, § 504, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 1, § 16, as added by L. 1906, ch. 58.

Reference.—False personation of public officer a misdemeanor, Penal Law, § 931.

§ 855. **Forfeiture of amount of moneys lost by neglect.**—Whenever the share of school moneys or any portion thereof, apportioned to any town or school district, or any money to which a town or school district would have been entitled, shall be lost, in consequence of any wilful neglect of official duty by any school commissioner, town clerk, trustees or clerks of school districts, the officer guilty of such neglect shall forfeit to the town, or school district so losing the same, the full amount of such loss with interest thereon.

Source.—Education L. 1909, § 505, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 1; originally revised from L. 1864, ch. 555, tit. 13, § 1.

Reference.—Loss of public moneys through disobedience to orders of commissioner of education, Education Law, § 95.

Trustees liable for moneys lost by reason of advance payment to contractor for work not yet done. Dec. of Supt. (1888), Jud. Dec. 768.

§ 856. **Forfeiture of amount of penalty where suit is neglected.**—Where any penalty for the benefit of a school district, or of the schools of any school district, town, school commissioner district or county, shall be incurred, and the officer, whose duty it is by law to sue for the same, shall wilfully and unreasonably refuse or neglect to sue for the same, such officer shall forfeit the amount of such penalty to the same use, and it shall be the duty of his successor in office to sue for the same.

Source.—Education L. 1909, § 506, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 2; originally revised from L. 1864, ch. 555, tit. 13, § 2.

§ 857. **No costs to plaintiffs in certain cases.**—1. In any action against school officers, including supervisors of towns, in respect to their duties and powers under this chapter, for any act performed by virtue of or under the color of their offices, or for any refusal or omission to perform any duty enjoined by law, and which might have been the subject of an appeal to the commissioner of education, no costs shall be allowed to the plaintiff, in cases where the court shall certify that it appeared on the trial that the defendants acted in good faith.

2. The provision of subdivision one of this section shall not extend to

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suits for penalties, nor to suits or proceedings to enforce the decisions of the commissioner of education.

Source.—Education L. 1909, § 507, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 3; originally revised from L. 1864, ch. 555, tit. 13, § 6.

Costs.—Trustees not to be indemnified for costs unless district meeting votes to pay claim, or it is decided, on appeal from the refusal of the district meeting to pay the claim, that the amount thereof should be a charge upon the district. *People ex rel. Wallace v. Abbott* (1887), 107 N. Y. 225, 13 N. E. 779.

No costs will be allowed if an appeal to the commissioner of education could have been brought. *People ex rel. Yale v. Eckler* (1880), 19 Hun 609, 614; *Ex parte Bennett* (1846), 3 Den. 175; *Whitbeck v. Billings* (1874), 1 Hun 494, 3 T. & C. 764.

§ 858. Costs, expenses and damages a district charge in certain cases.—

1. Whenever the trustees of any school district, or any school district officers, have been or shall be instructed by a resolution adopted at a district meeting to defend any action brought against them, or to bring or defend an action or proceeding touching any district property or claim of the district, or involving its rights or interests, or to continue any such action or defense, all their costs and reasonable expenses, as well as all costs and damages adjudged against them, shall be a district charge and shall be levied by tax upon the district.

2. If the amount claimed by them be disputed by a district meeting, it shall be adjusted by the county judge of any county in which the district or any part of it is situated.

Source.—Education L. 1909, § 508, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 4; originally revised from L. 1864, ch. 555, tit. 13, § 7, as amended by L. 1878, ch. 174.

Costs.—District owes no duty to trustee to pay costs until they shall have been audited in the manner pointed out by the statute. *People ex rel. Wallace v. Abbott* (1887), 107 N. Y. 225, 13 N. E. 779.

Where suit has not been brought.—An appropriation voted to pay expenses of a suit which has not been instituted is without authority. *Dec. of Com'r* (1910), *Jud. Dec.* 304.

Expenses of litigation between trustees.—Where, without the consent of the defendant trustee, an action for an injunction was brought by one claiming to be one of the three trustees of the school district, to which action one conceded to be a trustee was joined as a plaintiff against another trustee and one claiming to be a trustee and a teacher employed by him, to determine who was elected trustee at the annual meeting and who was legally employed to teach the school for the then ensuing school year, in which plaintiffs obtained a preliminary injunction restraining defendants from entering the school-house, etc., and by a decision of the Court of Appeals it was held that it was no case for an injunction, the services and expenses of the litigation were wholly unnecessary and can not form the basis of any just charge against the school district. The action not having been brought by all of the trustees of the school district did not affect any property, claim, rights or interest of the school district within the meaning of sections 858-862 of the Education Law. Neither were the plaintiffs in said action entitled to any relief under section 1931 of the Code of Civil Procedure. *Matter of Humphrey* (1916), 94 Misc. 377, 157 N. Y. Supp. 807.

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§ 859. Payment of costs, charges and expenses by vote of district meeting.—1. Whenever such trustees or any school district officer shall have brought or defended any such action or proceeding, without any such resolution of the district meeting, and after the final determination of such suit or proceeding, shall present to any regular meeting of the inhabitants of the district, an account, in writing, of all costs, charges and expenses paid by him or them, with the items thereof, and verified by his or their oath or affirmation, and a majority of the voters at such meeting shall so direct, it shall be the duty of the trustees to cause the same to be assessed upon and collected of the taxable property of said district, in the same manner as other taxes are by law assessed and collected; and, when so collected, the same shall be paid over, by an order upon the collector or treasurer to the officers entitled to receive the same.

2. The provision of subdivision one of this section shall not extend to suits for penalties, nor to suits or proceedings to enforce the decisions of the commissioner of education.

Source.—Education L. 1909, § 509, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 5; originally revised from L. 1864, ch. 555, tit. 13, § 8.

Defense of suit affecting district property.—Where a trustee erects a division fence surrounding the school site and is sued by the adjoining owner, he may be compensated for the amount paid by him. *Matter of Purdy* (1900), 56 App. Div. 544, 67 N. Y. Supp. 642.

Expense of defending action.—Where a committee of taxpayers appointed by a district meeting reports that a shortage exists in accounts of district officers, and the person charged sue the members of the committee for libel and the suit was determined in favor of defendant committee, a district meeting has no authority to reimburse the members of the committee for their expenses in defending such suit. *People ex rel. Underhill v. Skinner* (1902), 74 App. Div. 58, 77 N. Y. Supp. 36.

Independent of this section there is no liability against a district for costs incurred by a trustee in prosecuting an action for the collection of a tax, without the consent of a district meeting. *Beck v. Kerr* (1903), 87 App. Div. 1, 83 N. Y. Supp. 1057.

§ 860. Appeal to county judge.—1. Whenever any officer mentioned in section eight hundred and fifty-nine shall have complied with the provisions of such section and the meeting shall have refused to direct the trustees to levy a tax for the payment of the costs, charges and expenses claimed by him, such officer shall immediately give notice to such meeting that he will appeal to the county judge of the county in which such district is located from the refusal of said meeting to vote a tax for the payment of such claim.

2. Within ten days after the refusal of the meeting to allow such claim such officer shall serve upon the clerk of the district or, if there be no district clerk, upon the town clerk of the town an itemized statement of his claim, duly verified, together with a written notice that on a certain day named therein such officer will present such claim to the county judge for settlement.

3. The clerk upon whom such notice and claim are served shall file the

same in his office and such notice and claim shall be subject to the inspection of any of the inhabitants of the school district.

4. The meeting at which notice of the intention of such officer to appeal to the county judge is given or any subsequent district meeting, duly called, may appoint one or more of the legal voters of such district or authorize the trustee to employ counsel to appear before the county judge at the time fixed for a hearing on such claim and protect the rights of the district upon such settlement. The expenses incurred in the performance of this duty shall be a charge upon the district and the trustees upon a presentation of the account of such expenses with proper vouchers therefor shall pay the same from any available funds in the district or include the necessary amount in a tax-list to be levied upon the district.

5. A refusal of the trustees to levy such tax for the payment of such expenses shall be subject to an appeal to the commissioner of education.

Source.—Education L. 1909, § 510, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 6; originally revised from L. 1864, ch. 555, tit. 13, § 9, as amended by L. 1871, ch. 746.

Application.—This and the preceding section do not apply to a claim for costs by a trustee in unsuccessfully defending an appeal taken to the commissioner of education. *Matter of Roach* (1900), 31 Misc. 590, 65 N. Y. 653; *People ex rel Wallace v. Abbott* (1887), 107 N. Y. 225, 13 N. E. 779.

Reimbursement of trustee for expenses in defending mandamus suit.—The refusal of the trustee of a school district to pay a claim against the district, because the condition of the funds of the school district was such that he believed that, if he paid the claim, he would be unable to meet the necessary annual expenses of the district, may fairly be said to have been done in the interests of the district; and if the trustee, without obtaining authority from the district meeting, unsuccessfully defends a mandamus proceeding instituted against him to compel the payment of the claim, and the inhabitants of the school district refuse to vote that he be reimbursed for the expenses incurred by him in defending the proceeding, the county judge has jurisdiction to make an order charging such expenses upon the school district. *Matter of Anderson v. School District No. 15, Town of Cortlandt* (1903), 89 App. Div. 231, 85 N. Y. Supp. 943.

Title to office of trustee, or regularity of meeting called to consider the claim may not be considered or determined by county judge in proceeding under this section. *Matter of Purdy* (1900), 56 App. Div. 544, 67 N. Y. Supp. 642.

§ 861. Hearing before county judge.—1. Upon the appearance of the parties, or upon due proof of service of the notice and copy of the account, the county judge shall examine into the matter and hear the proofs and allegations presented by the parties, and decide by order whether or not the account, or any and what portion thereof, ought justly to be charged upon the district, with costs and disbursements to such officer.

2. Such costs and disbursements shall not exceed the sum of thirty dollars, and the decision of the county judge shall be final; but no portion of such account shall be so ordered to be paid which shall appear to such judge to have arisen from the wilful neglect or misconduct of the claimant. The account with the oath of the party claiming the same shall be prima

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facie evidence of the correctness thereof. The county judge may adjourn the hearing from time to time, as justice shall seem to require.

Source.—Education L. 1909, § 511, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 7; originally revised from L. 1864, ch. 555, tit. 13, § 10, as amended by L. 1871, ch. 746, L. 1874, ch. 514.

Final order.—The word “final” contained in subdivision 2 of this section is intended to give the order of the county judge the effect of a final order in a special proceeding, and not to prevent the review of the order by the appellate division. *Matter of Anderson v. School district No. 15, town of Cortlandt* (1903), 89 App. Div. 231, 85 N. Y. Supp. 943.

§ 862. **Duty of trustees to carry out order.**—It shall be the duty of the trustees of any school district, within thirty days after service upon them or upon the district clerk of a copy of an order of the county judge and notice thereof to them or any two of them, to cause the same to be entered at length in the book of record of said district, and to raise the amount thereby directed to be paid, by a tax upon the district, to be by them assessed and levied in the same manner as a tax voted by the district.

Source.—Education L. 1909, § 512, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 8; originally revised from L. 1864, ch. 555, tit. 13, § 11.

ARTICLE XXXIII-A.

(Added by L. 1917, ch. 786, in effect June 8, 1917.)

BOARD OF EDUCATION IN THE SEVERAL CITIES OF THE STATE.

Section 865. Board of education.

- 866. Board of education; eligibility; how chosen; term of office; vacancies.
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- 877. Education budget.
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- 880. Funds; custody and disbursement of.
- 881. Continuation in office of boards, bureaus, teachers, principals and other employees.

§ 865. **Board of education.**—1. A board of education is hereby established in each city of the state. The educational affairs in each city shall

be under the general management and control of a board of education to consist of not less than three and not more than nine members, to be chosen as hereinafter provided, and to be known as members of the board of education. The number of members on the board of education of each city shall be as follows:

a. A city having nine members or less on its board of education shall continue to have such number of members on said board as such board contains at the time this law goes into effect.

b. A city having a population of one million or more shall have a board of education to consist of seven members.

c. In all other cities of the state the number of members of the board of education shall be nine.

2. A board of education in office at the time this law goes into effect except as hereinafter provided shall continue in office and possess the powers and duties of a board of education under this article until its successor shall be chosen as provided herein.

3. The provisions of this act shall apply to and govern the operation and administration of the public school system and other educational affairs in a city which is created after this act goes into effect. The authorities in charge of the operation and administration of the schools and other educational affairs of the school districts included within such city at the time the act creating such city goes into effect shall continue in charge thereof until the first Tuesday in May thereafter. On such first Tuesday in May a board of education consisting of five members shall be elected at the annual school election in accordance with the provisions of this chapter. One member of such board shall be elected for one year, one member for two years, one member for three years, one member for four years, and one member for five years from the said first Tuesday of May. As their terms expire their successors shall be chosen for a full term of five years. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 866. Board of education; eligibility; how chosen; term of office; vacancies.—1. No person shall be eligible to the office of member of a board of education who is not a citizen of the United States and who has not been a resident of the city for which he is chosen for a period of at least three years immediately preceding the date of his election or appointment.

2. In a city having a population of one million or more and divided into boroughs, there shall be a board of education consisting of seven members. Two members of such board shall be residents of the borough having the largest population, two shall be residents of the borough having the second largest population, and one shall be a resident of each of the other boroughs in such city. The mayor shall appoint such members on the first Wednesday in January, nineteen hundred and eighteen, and in appointing them shall designate the terms of office of such members so that the term of one member shall expire on the first Tuesday in May, nineteen

hundred and nineteen; one on the first Tuesday in May, nineteen hundred and twenty; one on the first Tuesday in May, nineteen hundred and twenty-one; one on the first Tuesday in May, nineteen hundred and twenty-two; one on the first Tuesday in May, nineteen hundred and twenty-three; one on the first Tuesday in May, nineteen hundred and twenty-four; and one on the first Tuesday in May, nineteen hundred and twenty-five. Their successors shall be chosen for full terms of seven years. Thereafter, as vacancies occur on such board they shall be filled from the several boroughs so that each borough shall always be represented on such board as required under this subdivision. A vacancy occurring otherwise than by expiration of term shall be filled for the unexpired term.

3. In each city in which the law provides, prior to the time this article goes into effect, that the members of the board of education shall be chosen by vote of the people at an election separate from the general or municipal election, the members of the board of education of that city shall hereafter be elected by the voters at large at the annual school election.

4. In each city in which the law provides, prior to the time this article goes into effect, that the members of the board of education shall be chosen by vote of the people at a general or municipal election, the members of such board of education shall continue to be so chosen by the voters at large at either a general or municipal election, or at both, and for the terms prescribed by such law.

5. In each other city of the state members of the board of education shall be appointed from the city at large by the mayor except as otherwise provided herein, but in a city having a population of four hundred thousand or more and less than one million, such appointments shall be subject to confirmation by the council. The members of the board of education in a city having a population of four hundred thousand or more and less than one million shall be appointed by the mayor on January fifteenth, nineteen hundred and eighteen, subject to confirmation by the council, for terms of one, two, three, four and five years from the first Tuesday in May, nineteen hundred and seventeen, and their successors shall be appointed as provided herein for five years.

6. If the number of members on a board of education in a city in which the members of such board are chosen at an annual school, general or municipal election exceeds nine, no person shall be elected to membership thereon as vacancies occur until the number of members on such board shall be less than nine.

7. If the number of members on a board of education in a city in which the members of such board are appointed by the mayor exceeds nine, the term of office of each member of such board shall cease and terminate when this act takes effect, except as otherwise provided herein, and the mayor in each of such cities shall thereupon appoint a board of education to consist of nine members. Such members shall be appointed for the following terms: two members to serve until the first Tuesday in

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May, nineteen hundred and eighteen; two to serve until the first Tuesday in May, nineteen hundred and nineteen; two until the first Tuesday in May, nineteen hundred and twenty; two until the first Tuesday in May, nineteen hundred and twenty-one, and one until the first Tuesday in May, nineteen hundred and twenty-two. As their terms expire, their successors shall be chosen for a full term of five years.

8. The persons either elected or appointed to membership for a full term on a board of education, and their successors in office, shall be elected or appointed for terms of five years each, except as otherwise provided in this act.

9. In a city having less than five members on its board of education the term of office of such members shall be for the period of time specified in the law in effect prior to the time this act goes into effect. As the terms of office of such members expire their successors shall be chosen for like terms.

10. When a vacancy occurs in a board of education by expiration of term prior to the first Tuesday in May, nineteen hundred and twenty-two, such vacancy shall be filled at the time it occurs, and the person chosen shall take office immediately and hold the same for a term of five years, except as otherwise provided herein, from the first Tuesday in May following the date on which such vacancy occurs and thereafter his successor shall be chosen for a full term of five years.

11. If a vacancy occurs other than by expiration of term of office in the office of a member of a board of education in a city in which such members are elected at a school, or general, or municipal election, such vacancy shall be filled by appointment by the mayor until the next annual school election is held, and such vacancy shall then be filled at such election for the unexpired portion of such term.

12. If such vacancy occurs in such office in a city in which the members of the board of education are appointed by the mayor, such vacancy shall be filled by appointment by the mayor of such city for the unexpired portion of such term, but in a city having a population of four hundred thousand or more and less than one million, such appointment shall be subject to confirmation by the council. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 867. Meetings of board of education.—1. The annual meeting of a board of education shall be held on the second Tuesday in May, at which meeting the board shall select a president for the ensuing year.

2. Each of such boards shall also fix a time for holding regular board meetings which shall be at least as often as once each month and shall also prescribe a method for calling special meetings of such board. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 868. Powers and duties of board of education.—Subject to the pro-

visions of this chapter, the board of education in a city shall have the power and it shall be its duty

1. To perform any duty imposed upon boards of education or trustees of common schools under this chapter or other statutes, or the regulations of The University of the State of New York or the commissioner of education so far as they may be applicable to the school or other educational affairs of a city, and not inconsistent with the provisions of this article.

2. To create, abolish, maintain and consolidate such positions, divisions, boards or bureaus as, in its judgment, may be necessary for the proper and efficient administration of its work; to appoint a superintendent of schools, such associate, district and other superintendents, examiners, directors, supervisors, principals, teachers, lecturers, special instructors, medical inspectors, nurses, auditors, attendance officers, secretaries, clerks, janitors and other employees and other persons or experts in educational, social or recreational work or in the business management or direction of its affairs as said board shall determine necessary for the efficient management of the schools and other educational, social, recreational and business activities; and to determine their duties except as otherwise provided herein.

3. To have the care, custody, control and safekeeping of all school property or other property of the city used for educational, social or recreational work and not specifically placed by law under the control of some other body or officer, and to prescribe rules and regulations for the preservation of such property.

4. To purchase and furnish such apparatus, maps, globes, books, furniture and other equipment and supplies as may be necessary for the proper and efficient management of the schools and other educational, social and recreational activities and interests under its management and control. To provide textbooks or other supplies to all the children attending the schools of such cities in which free textbooks or other supplies are lawfully provided prior to the time this act goes into effect.

5. To establish and maintain such free elementary schools, high schools, training schools, vocational and industrial schools, kindergartens, technical schools, night schools, part-time or continuation schools, vacation schools, schools for adults, open air schools, schools for the mentally and physically defective children or such other schools or classes as such board shall deem necessary to meet the needs and demands of the city.

6. To establish and maintain libraries which may be open to the public, to organize and maintain public lecture courses, and to establish and equip playgrounds, recreation centers, social centers, and reading rooms from such funds as the education law or other statutes authorize and the state appropriates for such purposes, and from such other funds as may be provided therefor from local taxation or other sources.

7. To authorize the general courses of study which shall be given in

the schools and to approve the content of such courses before they become operative.

8. To authorize and determine the textbooks to be used in the schools under its jurisdiction, but in a city having a board of superintendents, the books thus authorized and determined shall be from lists recommended by such board.

9. To prescribe such regulations and by-laws as may be necessary to make effectual the provisions of this chapter and for the conduct of the proceedings of said board and the transaction of its business affairs for the general management, operation, control, maintenance and discipline of the schools, and of all other educational, social or recreational activities and other interests under its charge or direction.

10. To perform such other duties and possess such other powers as may be required to administer the affairs placed under its control and management, to execute all powers vested in it, and to promote the best interests of the schools and other activities committed to its care. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 869. Superintendent of schools, associate superintendents, board of superintendents.—The superintendent or an associate superintendent of schools of a city in office when this article goes into effect shall hold his position for the term for which he was chosen and until his successor is chosen. A superintendent or associate superintendent appointed after this article goes into effect shall hold his position in a city of the first class for a period of six years from the date of his appointment subject to removal for cause and in all other cities subject to the pleasure of the board of education. In a city having a population of one million or more there shall be eight associate superintendents, and the superintendent of schools and such associate superintendents shall constitute a board of superintendents. The superintendent of schools shall be the chairman of such board. A superintendent or an associate superintendent may vacate his position by filing a written resignation with the board of education. No person shall be eligible to the position of superintendent of schools or associate, district or other superintendent of schools or a member of the board of examiners unless he is

1. A graduate of a college or university approved by The University of the State of New York, and has had at least five years' successful experience in the teaching or in the supervision of public schools since graduation; or

2. A holder of a superintendent's certificate issued by the commissioner of education under regulations prescribed by the regents of The University of the State of New York, and has had at least ten years' successful experience in teaching, or in public school administration, or equivalent educational experience approved by the commissioner of education. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 870. **Powers and duties of superintendent of schools.**—The superintendent of schools of a city shall possess, subject to the by-laws of the board of education, the following powers and be charged with the following duties:

1. To enforce all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities under the direction of the board of education, to be the chief executive officer of such board and the educational system, and to have a seat in the board of education and the right to speak on all matters before the board, but not to vote.

2. To prepare the content of each course of study authorized by the board of education, but in a city having a board of superintendents the content of each of such courses shall be prepared and recommended by the board of superintendents, submitted to the board of education for its approval and, when thus approved, the superintendent or board of superintendents, as the case may be, shall cause such courses of study to be used in the grades, classes and schools for which they are authorized.

3. To recommend suitable lists of textbooks to be used in the schools, but in a city having a board of superintendents such board of superintendents shall recommend to the board of education such lists.

4. To have supervision and direction of associate, district and other superintendents, directors, supervisors, principals, teachers, lecturers, medical inspectors, nurses, auditors, attendance officers, janitors and other persons employed in the management of the schools or the other educational activities of the city authorized by this chapter and under the direction and management of the board of education; to transfer teachers from one school to another, or from one grade of the course of study to another grade in such course, and to report immediately such transfers to said board for its consideration and action, but in a city having a board of superintendents such transfers shall be made upon the recommendation of such board; to report to said board of education violations of regulations and cases of insubordination, and to suspend an associate, district or other superintendent, director, supervisor, expert, principal, teacher or other employee until the next regular meeting of the board, when all facts relating to the case shall be submitted to the board for its consideration and action.

5. To have supervision and direction over the enforcement and observance of the courses of study, the examination and promotion of pupils, and over all other matters pertaining to playgrounds, medical inspection, recreation and social center work, libraries, lectures and all the other educational activities and interests under the management, direction and control of the board of education, but in a city having a board of superintendents rules and regulations for the promotion and graduation of pupils shall be made by such board.

6. To issue such licenses to teachers, principals, directors and other members of the teaching and supervising staff as may be required under

the regulations of the board of education in cities in which such board requires its teachers to hold qualifications in addition to or in advance of the minimum qualifications required under this chapter. In a city having a board of examiners, such licenses shall be issued on the recommendation of such board. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 871. **Board of examiners.**—In a city having a population of one million or more there shall be a board of examiners to consist of four members. No person while in the supervising or teaching service in the city shall serve on such board. It shall be the duty of the board to hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools in such city, except examiners, and to prepare all necessary eligible lists. Eligible lists shall not be merged and one eligible list shall be exhausted before nominations are made from a list of subsequent date. No eligible lists, except a principals' eligible list shall remain in force for a longer period than three years. The board of examiners may employ temporary assistants at a compensation fixed by the board of education. It shall perform such other duties as the board of education may require. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 872. **Appointment of district or other superintendents, teachers and other employees; their salaries, et cetera.**—1. District superintendents, directors, supervisors, principals, teachers and all other members of the teaching and supervising staff, except associate superintendents and examiners, authorized by section eight hundred and sixty-eight of this article, shall be appointed by the board of education, upon the recommendation of the superintendent of schools, but in a city having a board of superintendents on the recommendation of such board, for a probationary period of not less than one year and not to exceed three years; such period to be fixed by the board of education in its discretion. The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, and in a city having a board of superintendents on the recommendation of such board, by a majority vote of the board of education.

2. Associate superintendents, examiners and all other employees authorized by section eight hundred and sixty-eight of this article, except as otherwise provided in subdivision one of this section, shall be appointed by the board of education.

3. At the expiration of the probationary term of a person appointed for such term, the superintendent of schools, and, in a city having a board of superintendents, such board shall make a written report to the board of education recommending for permanent appointment those persons who have been found competent, efficient and satisfactory. Such persons and all others employed in the teaching, examining or supervising service of

the schools of a city, who have served the full probationary period, or have rendered satisfactorily an equivalent period of service prior to the time this act goes into effect shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing by the affirmative vote of a majority of the board. In a city in which teachers have not permanent tenure under the laws in force prior to the time this act goes into effect, such teachers shall be entitled to receive permanent appointments after serving the probationary period fixed by the board of education as herein provided.

4. No principal, supervisor, director, or teacher shall be appointed to the teaching force of a city who does not possess qualifications required under this chapter and under the regulations prescribed by the commissioner of education for the persons employed in such positions in the schools of the cities of the state, but a board of education may prescribe additional or higher qualifications for the persons employed in any of such positions.

5. In a city having a population of four hundred thousand or more, recommendations for appointment to the teaching and supervising service, except for the position of superintendent of schools, associate superintendent or district superintendent, or director of a special branch, principal of or teacher in a training school, or principal of a high school, shall be from the first three persons on appropriate eligible lists prepared by the board of examiners. Eligible lists in force at the time this act takes effect and the relative standing of persons whose names are on said lists shall not be affected by the passage of this act. The board of education, on the recommendation of the superintendent of schools, and in a city having a board of superintendents on the recommendation of such board, shall designate, subject to the other provisions of this chapter, the kind and grades of licenses which shall be required for service as principal, branch principal, director, supervisor or teacher of a special branch, head of department, assistant or any other position of the teaching staff together with the academic and professional qualifications required for each kind or grade of license. No person required to have a license under the provisions of this chapter in order to be employed in a position who does not have such license shall have any claim for salary.

6. The salaries of all members of the supervising and teaching force and of all employees and for all positions authorized under section eight hundred and sixty-eight of this act shall continue to be on the same basis as such salaries and positions are when this article goes into effect, and such salaries shall continue to be regulated and increased in the same manner, by the same provisions of law and under the same conditions as such salaries are regulated and increased under the laws governing such salaries at the time this article goes into effect. Rules and regulations shall be adopted governing excusing of absences and for the granting of leaves of absence either with or without pay. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 873. **Local school board districts.**—1. The local school board districts in a city having a population of one million or more are hereby continued as they exist at the time this article goes into effect subject, however, to the provisions contained herein. The board of education of such city may modify the boundaries of such districts, consolidate two or more of such districts, and establish new districts.

2. There shall be in each of such districts a local school board of five members appointed by the president of the borough in which such district is located. The board of education shall designate as a member of a local school board one member of the board of education and the city superintendent of schools shall assign one district superintendent to advise with such board.

3. The members of such local school boards in office prior to the time this article goes into effect shall serve for the term for which they were appointed. The full term of office of a member of such board shall be five years. A vacancy on such board shall be filled by the borough president for the unexpired term.

4. Subject to the provisions of this chapter a local school board shall within its district have the power and it shall be its duty to visit the schools at least once every quarter; to make recommendations to the board of education with respect to matters affecting the interests of the schools; subject to the by-laws of the board of education, to transfer teachers from school to school, to excuse absences of teachers, to hear charges against principals or teachers and make recommendations thereon to the board of education, and to perform such other duties as may be required under said by-laws; to provide by-laws regulating the exercise of the powers and duties vested in it, provided such by-laws are not in conflict with the by-laws of the board of education; to elect a secretary and determine his duties. The secretary is hereby authorized to administer oaths and take affidavits in all matters pertaining to the schools in his district, in which a local school board has power to act, and for that purpose shall possess all the powers of a commissioner of deeds, but shall not be entitled to any fees or emoluments thereof. The board of education shall provide for the expenses of a local school board and for its places of meeting. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 874. **Bonds of employees.**—The board of estimate and apportionment of a city or in a city having no board of estimate and apportionment the body or officer performing the duties performed by a board of estimate and apportionment which may now legally require bonds of such employees may continue to require bonds of such employees in such amount as such board of estimate and apportionment or other body or officer shall determine. In all other cities bonds may be required of such employees by the board of education. The premiums on such bonds shall be paid by the city. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 875. **Buildings, sites, et cetera.**—1. A board of education is authorized and it shall have power to purchase, repair, remodel, improve or enlarge school buildings or other buildings or sites, and to construct new buildings, subject to such limitations and restrictions and exceptions as are herein provided.

2. Whenever in the judgment of a board of education it is necessary to select a new site, or to enlarge a present site, or to designate a playground or recreation center, or to acquire title to or lease real property for other education purposes authorized by this chapter, such board may take options on property desirable for such purposes but before taking title thereto shall pass a resolution stating the necessity therefor, describing by metes and bounds the grounds or territory desired for each of these purposes, and estimating the amount of funds necessary therefor. An item for such amount if funds are not available for the purchase or lease of such property may be included in the next annual budget if not included in a special budget as herein provided.

3. Whenever in the judgment of a board of education the needs of the city require a new building for school purposes or for recreation or other educational purposes authorized by this chapter, or when in its judgment a building should be remodelled or enlarged, such board shall pass a resolution specifying in detail the necessity therefor and estimating the amount of funds necessary for such purpose. An item for such amount if funds are not available for the construction of such building may be included in the next annual budget if not included in a special budget as herein provided.

4. No site shall be designated except upon a majority vote of a board of education and no building shall be constructed, remodelled or enlarged until the plans and specifications therefor are approved by the board of education.

5. After a site has been selected and plans and specifications for a building thereon have been approved as provided herein, a board of education in a city having a population of more than four hundred thousand but less than one million may, in its discretion, by regulation deliver such plans and specifications to the council which may thereupon, in its discretion, award a contract for the erection of such building in the same manner and in accordance with the provisions of law regulating the awarding of contracts for the construction of municipal buildings of such city.

6. In a city of the second class in which the common council, the board of estimate and apportionment and the board of contract and supply and the commissioner of public works or other city officials, or any one or more thereof, has the authority under the law in force prior to the time this act takes effect to erect, remodel, improve, or enlarge school buildings or to purchase supplies or real property for any school purpose, such officers, board or boards shall continue to possess such powers and duties and to perform such functions.

7. When the real property of a city under the control and management of the board of education is no longer needed for educational purposes in the city, such board shall notify the common council of such fact and in a city having no common council, the council or the commissioners of the sinking fund, and such common council or such council or such commissioners of the sinking fund, as the case may be, may then sell or dispose of such property in the manner in which other real property owned by the city may be sold or disposed of and the proceeds thereof shall be credited to the funds under the control and administration of the board of education in such city, except that in cities where the proceeds of such sales are required by statute, in effect prior to the time this article goes into effect, to be paid to the credit of the sinking fund established and maintained therein, the proceeds of such sales shall continue to be paid to the credit of the sinking fund of such city or cities as required by statute, and except that in a city having a council or a board of estimate and apportionment, such council or board may, by resolution, authorize the use of the proceeds of such sale for other municipal purposes.

8. No contract for the purchase of supplies, furniture, equipment, or for the construction or the alteration or remodelling of any building shall be entered into by a board of education involving an expenditure or liability of more than one thousand dollars unless said board shall have duly advertised for estimates for the same and the contract in each case shall be awarded to the lowest responsible bidder furnishing the security as required by such board. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 876. **Purchase and sale of real property.**—The board of education may purchase real property for any of the purposes authorized by law and shall take title thereof in the name of the city, and when the owner of such property refuses to sell the same or such board is unable to agree with the owner of such property on the purchase price thereof, it shall have the power and authority to institute such proceedings and take any action necessary to acquire title to such property under and pursuant to the provisions of the condemnation law, city charter, or of any special statute authorizing proceedings to acquire title by right to eminent domain, except that in a city in which the common council, board of contract and supply or other city officers or body are authorized and empowered by law to acquire title to real property for school purposes under the laws in force at the time this act goes into effect, said council, board, officers or body shall continue to possess such powers and shall exercise the same, including the power to condemn real property for said purposes, under the provisions of law relating thereto notwithstanding any of the provisions contained in this act. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 877. **Annual estimate.**—1. The board of education in each city having a population of less than one million shall prepare annually an itemized estimate for the current or ensuing fiscal year of such sum of money as it

may deem necessary for the purposes stated in this section, after crediting thereto the amount anticipated in the next apportionment of school funds from the state and the estimated amount to be received from all other sources. Such itemized estimate in such cities shall be filed at such times and in such manner as city departments or officers are required to submit estimates for such departments or officers. The board of education in each other city shall prepare annually an itemized estimate for the ensuing fiscal year and file the same on or before the first day of September. Such estimate shall be for the following purposes:

a. The salary of the superintendent of schools, associate, district or other superintendents, examiners, directors, supervisors, principals, teachers, lecturers, special instructors, auditors, medical inspectors, nurses, attendance officers, clerks and janitors and the salary, fees or compensation of all other employees appointed or employed by said board of education.

b. The other necessary incidental and contingent expenses including ordinary repairs to buildings and the purchase of fuel and light, supplies, textbooks, school apparatus, books, furniture and fixtures and other articles and service necessary for the proper maintenance, operation and support of the schools, libraries and other educational, social or recreational affairs and interests under its management and direction. The provisions of this section in regard to the purchase of light shall not apply to a city having a population of one million or more.

c. The remodelling or enlarging of buildings under its control and management, the construction of new buildings for uses authorized by this chapter and the furnishing and equipment thereof, the purchase of real property for new sites, additions to present sites, playgrounds or recreation centers and other educational or social purposes, and to meet any other indebtedness or liability incurred under the provisions of this chapter or other statutes, or any other expenses which the board of education is authorized to incur.

2. In a city which had, according to the state census of nineteen hundred and fifteen, a population of less than fifty thousand such estimate shall be filed with the clerk of the common council and the common council shall include, except as otherwise provided herein, in the next annual tax and assessment roll of the city the amount specified in such estimate and the same shall be collected in the same manner as other city taxes are collected and shall be placed to the credit of the board of education as herein provided. In each city in which the law provides, prior to the time this article goes into effect, that such assessment shall be included in a school tax and assessment roll, separate and distinct from the annual tax and assessment roll, and at a different time, such assessment shall continue to be included in a school tax and assessment roll, to be prepared and levied at the same time each year as the law provides in respect to said cities prior to the time this article goes into effect. In case more than twenty-five thousand dollars is required to be raised by tax for the pur-

poses specified in paragraph c of subdivision one of this section, the common council, or the board of education, or either, may provide for the submission to the voters of the city, at a tax election, the proposition for the expenditure of such sum or may levy a tax to be payable in installments, for such purposes, and may issue and sell municipal bonds as hereinafter provided. In cities in which the board of education is either appointed, or is elected at a general or municipal election, the submission of such question shall be to the voters of such city at either a general or municipal election.

3. In a city of the third class in which the common council, under statutes in effect prior to the time when this act takes effect, has the power to determine the amount of funds which shall be included in the estimate for the support and maintenance of public schools, and in any such city in which the mayor under such statutes has the power to consider and determine the amounts included in such estimate for the support and maintenance of public schools, such common council and mayor shall have the same power and shall perform the same duties as are required under the statutes in effect prior to the taking effect of this act, and the provisions of such statutes shall continue in full force and effect notwithstanding the provisions of this act. Nothing in this act shall be construed as conferring upon the common council of a city of the third class the power to determine the amount which shall be used for school purposes, which was not specifically conferred upon the common council of such city under the statutes in effect prior to the taking effect of this act. Where the mayor, under a statute in effect prior to the taking effect of his act, reduces or eliminates items in the estimate for the support and maintenance of public schools in the city, he must return such estimate to the board of education, stating his reasons for making such reductions or eliminations, within ten days after the filing of such estimate, and thereupon the board of education may take action on such estimate and may by a three-fourths vote of the members of the board restore the items so reduced or eliminated, and the estimate shall thereupon become effective and the amounts specified therein shall be levied and collected in the same manner as other city taxes are collected.

4. In a city of the second class in which the board of estimate and apportionment has authority, under the statutes in effect prior to the time this act goes into effect, to determine the amount of funds which shall be included for the support and maintenance of public schools in the estimate to be submitted to the common council, and in a city of the first class having a population of less than four hundred thousand, according to the federal census of nineteen hundred and ten, such estimate shall be filed with the mayor. The mayor shall place such estimate before the board of estimate and apportionment at the same time and in the same manner as estimates from city departments or officers are placed before said board of estimate and apportionment, and such estimate shall thereafter be subject

to the same consideration, action and procedure as all other estimates from city departments or officers. The said board of estimate and apportionment may increase, diminish or reject any item contained in said estimate, except for fixed charges for which the city is liable. When such estimate is adopted the board of estimate and apportionment shall file it with the common council.

5. The board of education in each other city of the second class shall file such estimate with the mayor. The common council of each city included within the provisions of this subdivision shall include the amount of such estimate in the tax and assessment roll of the city and the same shall be collected and placed to the credit of the board of education as herein provided, except that a tax for the purposes specified in paragraph c of subdivision one of this section shall be levied payable in installments and bonds therefor shall be issued and sold as hereinafter provided.

6. In a city which had, according to the federal census of nineteen hundred and ten, a population of four hundred thousand or more but less than one million such estimate shall be filed with the officer authorized to receive other department estimates and the same acted on by such officer and by the council of such city in the same manner and with the same effect as other department estimates. The council is also authorized, in its discretion, to include in such budget a sum for any of the purposes enumerated in paragraph c of subdivision one of this section, and any further amount for such purposes as may be authorized by a tax election held in such city pursuant to the provisions of this chapter. After the adoption of such budget the council shall cause the amount thereof to be included in the tax and assessment roll of the city and the same shall be collected in the same manner and at the same time as other taxes of the city are collected, and placed to the credit of the board of education.

7. In a city which had, according to the federal census of nineteen hundred and ten, a population of one million or more such estimate shall be filed with the board of estimate and apportionment. If the total amount requested in such estimate shall be equivalent to or less than four and nine-tenths mills on every dollar of assessed valuation of the real and personal property in such city liable to taxation, the board of estimate and apportionment shall appropriate such amount. If the total amount contained in such estimate shall exceed the said sum of four and nine-tenths mills on every dollar of assessed valuation of the real and personal property in such city liable to taxation, such estimate shall, as to such excess, be subject to such consideration and such action by the board of estimate and apportionment, the board of aldermen, and the mayor as that taken upon departmental estimates submitted to the board of estimate and apportionment. The board of estimate and apportionment is authorized to make additional appropriations for educational purposes authorized by this chapter. The general school fund shall consist of all moneys raised for the payment of the salaries of all persons employed in the supervising and

teaching staff, including the superintendent of schools and all associate, district and other superintendents, members of the board of examiners, attendance officers, supervisor of lectures, lecturers and director and assistant director of the division of reference and research. The special school fund shall contain and embrace all moneys raised for educational purposes not comprised in the general school fund. The general school fund shall be raised in bulk and for the city at large. The board of education shall administer all moneys appropriated or available for educational purposes in the city, subject to the provisions of law relating to the audit and payment of salaries and other claims by the department of finance.

8. A board of education may, to meet emergencies which may arise, submit a special estimate in which items for extraordinary expenses may be submitted to meet such emergencies. Such estimate shall contain a complete statement of the purposes for which the items are requested and the necessity therefor. The same method of procedure shall be followed in submitting such estimate and such estimate shall be subject to the same consideration and action as is required in the submission, consideration and action upon the regular annual estimate submitted by a board of education. The common council in such a city shall have power to make the appropriations requested by a board of education in such special estimate. The common council of a city of the third class, the common council, the board of estimate and apportionment of a city of the second class and, in a city having a population of four hundred thousand or more and less than one million, according to the federal census of nineteen hundred and ten, the council may temporarily borrow the amount appropriated on city certificates of indebtedness or by the issuance of revenue bonds, or other municipal bonds, which certificates of indebtedness or bonds shall be payable at such time and in such manner as shall be provided by general laws or the charter of such city for other certificates of indebtedness or revenue bonds.

9. In cities in which the boundaries of the school district or districts are not coterminous with the city boundaries and in which the board of education, under the provisions of law existing at the time of the passage of this act, is authorized to levy taxes for school purposes, the board of education is hereby authorized and empowered to prepare, fix and determine the education budget for all the purposes set forth in this section, and said board of education shall levy and collect the necessary tax or taxes for all the purposes specified in said budget in accordance with the provisions of the education law. In the event the boundaries of said city or cities are hereafter made coterminous with the school district boundaries this provision shall no longer apply.

10. A board of education shall not incur a liability or an expense chargeable against the funds under its control or the city for any purpose in excess of the amount appropriated or available therefor or otherwise authorized by law.

11. In a city in which, under the statutes in effect prior to the time of the taking effect of this act, it is provided that the estimate of expenditures for the support and maintenance of the public schools of the city shall not be less than a specified per capita sum, based on the number of pupils enrolled in the public schools of the city, the amount authorized or required to be included in the estimate of school expenditures as provided in this act shall not be less than the per capita sum specified in such statute (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 878. **Tax election.**—1. In a city having a population of less than seventy-five thousand, according to the federal census of nineteen hundred and ten, the board of education may call a tax election, by giving notice thereof as notice is required under the education law of an annual school election and submit to those qualified to vote at such election a proposition to expend a sum of money in excess of twenty-five thousand dollars for any of the purposes enumerated in paragraph c of subdivision one of section eight hundred and seventy-seven of this chapter. The provisions of law relating to and governing annual school elections, including inspectors, notices, qualifications of voters, challenges, hours for keeping polls open, penalties, canvass of votes, filing returns, supplying ballots, and all other matters relating to an annual election shall apply to and govern, so far as may be practicable, a tax election except in a city in which the election of members of the board of education is held at the general or municipal election. In such cities the law applying to and governing such general or municipal elections shall apply to and govern such tax election.

2. In such a city in which the members of the board of education are elected at the general or municipal election, a tax election for like purposes may be held by direction of the board of education. The provisions of law regulating such general or municipal elections in such cities shall apply to and govern the method of calling and holding tax elections in said cities. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 879. **Bond issue.**—1. When the common council or the voters of a city authorize an appropriation to be raised by a tax in installments for any of the purposes enumerated in paragraph c of subdivision one of section eight hundred and seventy-seven of this chapter, city bonds shall be issued in the same manner and under the same provisions as other bonds are or may be issued by such city. The principal and interest of such bonds shall be paid out of moneys raised by tax therefor in the same manner as other school moneys are raised, when such bonds and the interest thereon shall become due and payable. In a city having a population of four hundred thousand or more but less than one million, according to the federal census of nineteen hundred and ten, such bonds shall be issued by the council.

2. In a city of the second class and in a city of the first class having a population of less than four hundred thousand, according to the federal census of nineteen hundred and ten, the common council and the board

of estimate and apportionment shall have power to determine upon the necessity of issuing bonds for any of the purposes enumerated in paragraph c of subdivision one of section eight hundred and seventy-seven of this chapter, and when bonds shall be thus authorized such bonds shall be issued by the municipal authorities.

3. In a city having a population of four hundred thousand or more but less than one million, the council of such city may, by a vote of four-fifths of its members, authorize from time to time the issuance of bonds of said city to defray the expense of the construction, improvement and equipment of school buildings or the purchase or acquisition of school sites, which expense shall not have been included in the budget, in such amounts and payable at such times and places and having such rates of interest, not exceeding six per centum per annum, as said council may determine, interest to be paid semi-annually, said bonds, however, to be due in not more than fifty years from their date and to be sold for not less than their par value and accrued interest. Such bonds may be made payable in equal proportions during a number of successive years not exceeding a period of fifty years from their issuance, as the council shall determine. Such bonds shall be issued and sold by the authorities of the city in the same manner that bonds for other municipal purposes are issued and sold and the proceeds of the sale of such bonds shall be paid into the treasury of the city and placed to the credit of the board of education. As such bonds become due the municipal authorities of the city shall include in the tax levy, and assess upon the property of the city, the amount necessary to pay such bonds and interest thereon.

4. In a city having a population of one million or more, the board of estimate and apportionment may in its discretion annually cause to be raised such sums of money as may be required for the purposes enumerated in subdivision c of section eight hundred and seventy-seven of this act, in the manner provided by law for the raising of money for such purposes. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 880. **Funds; custody and disbursement of.**—1. Public moneys apportioned to a city by the state and all funds raised or collected by the authorities of a city for school purposes or to be used by the board of education for any purpose authorized in this chapter, or any other funds belonging to a city and received from any source whatsoever for similar purposes, shall be paid into the treasury of such city and shall be credited to the board of education.

2. Such funds shall be disbursed only by authority of the board of education and upon written orders drawn on the city treasurer or other fiscal officer of the city. Such orders shall be signed by the superintendent of schools and the secretary of the board of education or such other officers as the board may authorize. Such orders shall be numbered consecutively

and shall specify the purpose for which they are drawn and the person or corporation to whom they are payable.

3. It shall be unlawful for a city treasurer or other officer having the custody of city funds to permit the use of such funds for any purpose other than that for which they are lawfully authorized and such funds shall not be paid out except on audit of the board of education and the countersignature of the comptroller, and in a city having no comptroller by an officer designated by the officer or body having the general control of the financial affairs of such city. The board of education of such city shall make, in addition to such classification of its funds and accounts as it desires for its own use and information, such further classification of the funds under its management and control and of the disbursements thereof as the comptroller of the city, or the officer or body having the general control of the financial affairs of such city, shall require, and such board shall furnish such data in relation to such funds and their disbursements as the comptroller or such other financial officer or body of the city shall require. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

§ 881. Continuation in office of boards, bureaus, teachers, principals and other employees, et cetera.—Except as otherwise provided herein the boards, bureaus, teachers, principals, supervisors, superintendents, heads of departments, assistants to principals, examiners, supervisor of lectures, directors and all other officers and employees of the school system or of boards of education of the several cities of the state, lawfully appointed or assigned before this act takes effect, shall continue to hold their respective positions for the term for which they were appointed or until removed as provided in subdivision three of section eight hundred and seventy-two of this article.

2. If a board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

3. If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled. The names of such persons shall be placed upon such preferred list in the order in which their services have been thus discontinued. (*Added by L. 1917, ch. 786, in effect June 8, 1917.*)

EFFECT OF CITY SCHOOL LAW; REPEAL.

L. 1917, ch. 786, § 2. City school district.—Each city in which the school district boundaries are coterminous with the city boundaries is hereby declared to be a city school district. In a city in which the city boundaries and the school district boundaries are not coterminous the school district boundaries shall remain as they existed prior to the time this act takes effect and until such time as such school district boundaries may be changed as provided by law. In each city where the school district boundaries are not coterminous with the city boundaries the school district which contains the whole or the greater portion of the inhabitants of the city shall be the city school district of said city and shall be subject to the provisions of this act.

§ 3. Repeal of inconsistent provisions; effect of repeal.—All acts or parts of acts, general or special, inconsistent with the provisions of this act are hereby repealed. The repeal of the acts specified in the schedule hereto annexed, or of such inconsistent acts or parts of such acts, shall not affect any right existing or accrued or any liability incurred prior to the passage of this act, and all acts or parts of acts, general or special, not specifically repealed by this act and not inconsistent with the provisions of this act shall remain in full force and effect.

§ 4. Pending actions or proceedings; existing rules.—The repeal of a law or any part of it specified in the annexed schedule and any provision of this act shall not affect pending actions or proceedings brought by or against the board of education of a city, or by or against a city, in respect to the public schools thereof, under or in pursuance of any of the provisions of the laws hereby repealed, but the same may be prosecuted or defended in the same manner and for the same purpose by the board of education of the city under the provisions of this chapter as though such laws had not been repealed. The rules and regulations adopted by a board of education in pursuance of any law hereby repealed shall continue in full force and effect notwithstanding such repeal, until the same are modified, amended or repealed by the board of education as provided in this chapter. Nothing in this act shall affect titles to school property, but such property may be held either in the name of the city school district or of the board of education, as provided in this act or in any other act relating to titles to such property.

§ 5. Time of taking effect.—This act shall take effect immediately.

§ 6. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

SCHEDULE OF LAWS REPEALED.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1829	234	All	1858	269	All
1842	137	All	1859	105	All
1844	131	All	1859	298	All
1844	175	All	1862	18	124
1846	7	All	1863	377	All
1847	51	All	1864	98	All
1849	184	105, 106	1865	88	All
1850	66	All	1866	9	All
1850	77	All	1866	58	All
1852	156	All	1866	378	All
1852	258	All	1866	579	All
1853	252	All	1867	115	All
1854	348	All	1867	353	All
1856	164	5	1867	573	All
1857	382	All	1867	787	All
1857	572	All	1867	822	All
1858	34	1-9, 11-21	1868	82	All
1858	95	All	1868	249	All

L. 1917, ch. 786.

Effect of school law; repeal.

§ 6.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1868	312	All	1896	146	All
1868	630	All	1896	161	All
1868	729	All	1896	416	All
1869	43	All	1896	425	161-169
1869	122	All	1896	710	All
1869	363	All	1896	747	161-181
1870	118	All	1897	372	All
1871	186	All	1897	378	1056,
1873	234	All	1059-1064, 1067, 1068, all of 1069, ex-		
1873	386	All	cept subdivision 8, 1070-1090, 1093.		
1873	623	All	1897	402	All
1873	666	All	1897	479	All
1875	169	All	1897	752	All
1875	577	All	1897	760	84,
1877	243	All	85, 86, subds. 1-12; 87-97, 99.		
1877	441	All	1898	48	All
1879	318	All	1898	182	240-252
1880	17	2	1898	232	6
1880	524	All	1898	298	All
1881	70	All	1898	430	All
1881	180	All	1898	431	All
1881	294	All	1898	498	All
1882	168	All	1899	40	All
1883	163	All	1899	275	74, 185-197
1884	61	All	1899	304	1-20
1886	26	174-183	1899	586	All
1886	313	All	1899	627	All
1886	120	58, 268	1900	152	All
1887	279	All	1900	160	150-166
1887	368	16	1900	562	All
1888	103	All	1900	563	All
1888	381	All	1900	573	All
1889	15	All	1900	659	8,
1889	18	All	part amending §§ 161-163, 166, 167.		
1889	220	All	1901	56	2, 3
1889	387	All	1901	110	All
1890	15	All	1901	127	All
1890	215	All	1901	196	18, 19
1891	105	324-343,	1901	204	16-19
343-a, 344-348.			1901	285	All
1892	22	All	1901	298	All
1892	182	229, 229-a-229-a	1901	466	1056,
1892	626	5	1059-1064, 1067, 1068, all of 1069 ex-		
1892	671	Title 6, §§ 1-125	cept subdivision 8, 1070-1090, 1093.		
1893	10	All	1901	473	All
1893	216	All	1901	718	All
1893	345	7	1902	63	150-167
1893	381	All	1902	223	All
1893	454	All	1902	269	98-113
1893	524	All	1902	284	All
1893	531	20-24	1902	494	1
1894	10	All	1902	560	All
1894	33	All	1902	572	160-174
1894	454	All	1903	43	All
1895	123	All	1903	46	All
1895	189	All	1903	71	All
1895	370	All	1903	187	All
1895	394	156-177	1903	249	2
1895	526	All	1903	295	5
1895	565	5, 42	1903	399	6, 8
1895	751	144-150,	1903	416	All
150-a-150-c, 151-155.			1903	449	3,
1895	831	All	parts amending §§ 99-101.		
1895	950	23-27	1903	555	All
1895	998	All	1903	562	All
1895	1032	All	1904	189	All

§ 6.			Effect of school law; repeal.			L. 1917, ch. 786.		
LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION			
1904	242	All	1911	184	165-184,			
1904	300	340-353	and so much of section 17 as relates					
1904	319	6,	to the salary of the city superintendent of schools.					
parts amending §§ 106-109, 113.			1911	187	7, 8			
1904	542	All	1911	242	116-129			
1904	650	199-208	1911	340	2			
1905	109	All	1911	386	All			
1905	357	Title 22, §§ 1-13	1911	422	All			
1905	364	All	1911	522	All			
1905	468	20	1911	617	32-34			
1905	486	All	1911	645	19, 20			
1905	593	220-241	1911	648	44,			
1906	68	All	subd. 7; 240-256.					
1906	335	17	1911	699	36-38			
1906	495	All	1912	438	All			
1907	118	All	1912	455	All			
1907	130	All	1913	13	All			
1907	165	All	1913	45	All			
1907	203	Title 12, § 4	1913	314	All			
1907	537	All	1913	481	250-257			
1907	543	All	1913	507	127-142			
1907	595	All	1913	539	102			
1907	653	6	1913	659	1,			
1907	751	384-405	part amending § 383, subd. 7.					
1907	752	Title 18, §§ 1-3	1913	688	All			
1907	755	90, 381-404	1913	749	All			
1908	29	167,	1914	4	1			
168, 168-a, 169, 170.			1914	217	290-293			
1908	51	All	1914	226	All			
1908	336	All	1914	228	All			
1908	406	All	1914	281	20			
1908	452	Article	1914	286	All			
9, §§ 1-17, 20.			1914	289	All			
1908	454	150-166	1914	354	200			
1908	481	All	1914	476	1			
1908	503	170-199	1915	13	11			
1909	85	All	1915	69	279-289			
1909	365	2, 3	1915	113	All			
1909	550	24, 25	1915	229	120			
1909	574	150-153	1915	356	257-268			
1909	591	All	1915	359	3			
1910	49	All	1915	611	49-51			
1910	101	All	1916	229	23			
1910	391	All	1916	271	All			
1910	464	All	1916	431	All			
1910	466	All	1916	464	15, 16			
1910	491	1,	1916	488	All			
part amending §§ 152, 153.			1916	530	92, 281-294			
1910	559	351-365	1916	575	80-84			
1910	632	93-99						
1911	77	All						

ARTICLE XXXIV.

APPEALS OR PETITIONS TO COMMISSIONER OF EDUCATION.

Section 880. Appeals or petitions to commissioner of education and other proceedings.

881. Powers of commissioner upon appeals * of petitions, et cetera.

882. Filed papers and copies thereof.

* So in original.

§ 880. Appeals or petitions to commissioner of education and other proceedings.—Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this act and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting;
2. By any school commissioner and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district;
3. By a supervisor in refusing to pay any such moneys to any such district;
4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.
5. By any trustees of any school library concerning such library, or the books therein, or the use of such books;
6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.
7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

Source.—Education L. 1909, § 360, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 14, § 1; originally revised from L. 1864, ch. 555, tit. 12, § 1.

References.—Appeals from decision or order of school commissioner on alteration, etc., of school district, Education Law, § 125; from proceedings or decision of special meeting in union free school district, Id. § 326; from acts of district superintendents of schools and controversies relating to election of district superintendent, Id. § 398; from acts of town school meeting and town board of education, Id. § 365; from determination of state teachers' retirement fund board as to retirement of teachers, Id. § 1109, subd. 4. Proceedings for removal of school officers, Id. § 95; of member of board of education, Id. § 309; of district superintendent, Id. § 392.

Construction.—This statute is to be liberally construed in permitting appeals to the commissioner in disputes arising in the administration of our school system, and by its terms the decision of the commissioner is made conclusive and binding upon all the agencies of the state, such as is the appellant in this proceeding. *People ex rel. Board of Education v. Finley* (1914), 211 N. Y. 51, 105 N. E. 109.

Intent of act.—The law contemplates that the jurisdiction of the commissioner shall be state wide and shall cover all controversies regarding any official act of local school officers. Dec. of Supt. (1887), Jud. Dec. 10.

What constitutes proceeding.—Presentation of charges against trustees, and the fixing of a hearing is a "proceeding" within the meaning of section 880 of the Education Law, making the decision of the Commissioner of Education therein "final and conclusive and not subject to question or review in any place or court whatever." *People ex rel. Jennings v. Finley* (1916), 175 App. Div. 204, 161 N. Y. Supp. 817.

Appeal should be brought.—The remedy provided by this section of an appeal to the commissioner of education by one believing himself aggrieved by the action of any school district meeting, is a very simple, expeditious and effective proceeding at an expense not exceeding twenty-five dollars, and it is the official duty of school trustees to serve their district in this economical manner rather than embark in litigation that results in their making a claim against the school district for the expense of such litigation. *Matter of Humphrey* (1916), 94 Misc. 377, 157 N. Y. Supp. 807.

Acts of boards of education of cities.—His jurisdiction extends to the determination of appeals brought from the action of boards of education of cities. Dec. of Com'r (1908), Jud. Dec. 12.

Acts of committees of boards.—Appeal will not lie from determination of a committee where confirmatory action of the whole board is required. Dec. of Com'r (1915), 4 St. Dep. Rep. 631; Dec. of Com'r (1915), 4 St. Dep. Rep. 634.

Money claims.—Commissioner has not jurisdiction to try issues involving disputed monetary claims. Dec. of Com'r (1913), 4 St. Dep. Rep. (Unof.), 394; Dec. of Supt. (1891), Jud. Dec. 22. Unliquidated claim for services as surveyor should be prosecuted in the courts and not before the Commissioner. Dec. of Com'r (1915), 6 St. Dep. Rep. 589.

Person not school officer.—The commissioner has no jurisdiction over a person after he has ceased to be a school officer. Redress to obtain moneys of district unlawfully withheld by such person must be by action in the courts. Dec. of Supt. (1887), Jud. Dec. 17.

An appeal to the commissioner may be taken from the action of a city board of education in removing the principal of a public school from office. *People ex rel. Walrath v. O'Brien* (1906), 112 App. Div. 97, 97 N. Y. Supp. 1115. An appeal may also be taken from a removal of teachers. *People ex rel. Keyser v. Bd. of Education* (1900), 32 Misc. 63, 66, 66 N. Y. Supp. 149. From the refusal of an officer of the district to pay school money. *Ex parte Bennett* (1846), 3 Dem. 175. From the refusal of school trustees to adopt a resolution to appoint teachers. *Hutchinson v. Skinner* (1897), 21 Misc. 729, 734, 49 N. Y. Supp. 360. From the refusal of a trustee to pay teachers' wages. *People ex rel. Bowers v. Allen* (1897), 19 Misc. 464, 44 N. Y. Supp. 566; *People ex rel. Yale v. Ecker* (1880), 19 Hun 609. An appeal may also be taken to the commissioner by a party aggrieved by an attempt of the collector to enforce the payment of a tax without having posted notice. *Whitbeck v. Billings* (1874), 1 Hun 494, 3 T. & C. 764.

Title to office can be finally decided only in proceedings at law as quo warranto, mandamus or prohibition, and a court of equity will not entertain jurisdiction over contests for public office. This rule applied to a contest over the title to the office of school trustee when both claimants rested upon an election alleged to be regular and valid, and *held*, that it was not a case for an injunction. The public interests in such case require the contending parties to adopt the remedy provided by this section of the Education Law, which confers upon the commissioner of education power to review "any decision made by any school district meeting." *Welker v. Lathrop* (1914), 210 N. Y. 434, 104 N. E. 938.

Appeal from act of school commissioner in appointing trustee. *Morah v. Steele* (1913), 157 App. Div. 109, 141 N. Y. Supp. 868.

Title to property.—Controversy as to title of property in the possession of officers of a dissolved district, claimed by the district to which the dissolved district was annexed is not within exclusive jurisdiction of commissioner of education. Board of Education, Union Free School District, No. 1, *Ossining v. Storms* (1911), 147 App. Div. 679, 132 N. Y. Supp. 639.

Control over public schools of city of New York.—The Commissioner of Educa-

tion, as chief executive officer of the State Education Department, has supervisory control over the public schools of the city of New York and jurisdiction to review the acts of its board of education pertaining to the qualifications of teachers and their eligibility to appointment in said schools. *People ex rel. Board of Education v. Draper* (1912), 78 Misc. 329, 138 N. Y. Supp. 351.

Review of dismissal of teacher in New York City for neglect of duty, see *People ex rel. Peixotto v. Board of Education* (1914), 160 App. Div. 557, 145 N. Y. Supp. 853, *affd.* (1914), 212 N. Y. 463, 106 N. E. 307, in which case the court said: "Having been removed on a charge of neglect of duty, if the relator has any grievance, it is with respect to the sufficiency of the evidence to sustain the charge, and on that question she had her statutory remedy by appeal to the State Commissioner of Education, which she should have exhausted before invoking the aid of the Court."

Appeal by teacher in public schools of city of New York removed for "neglect of duty."—If a school teacher in the public schools of the city of New York, who has been removed on a charge of "neglect of duty" has any grievance with respect to the sufficiency of the evidence to sustain the charge, she should appeal to the State Commissioner of Education before invoking the aid of the court. *It seems*, that while the board of education of the city of New York is vested with authority to excuse a teacher, absent on the ground of illness, it may, in some circumstances, find that absence for alleged illness constitutes a "neglect of duty" justifying a discharge. *People ex rel. Peixotto v. Board of Education* (1914), 160 App. Div. 557, 145 N. Y. Supp. 853, *affd.* (1914), 212 N. Y. 463, 106 N. E. 307. It was held in special term in this case (82 Misc. 684, 144 N. Y. Supp. 87), reversed on appeal, that the provision of section 1093 of the Greater New York Charter that the report of the elemental schools committee after a trial "shall be subject to final action by the board * * * except as to matters in relation to which" an appeal may be taken to the commissioner of education, and the language of section 880 of the Education Law that the decision of such commissioner "shall be final and conclusive and not subject to review in any place or court whatever," do not deprive a party of the right to seek redress in the courts or withhold from the tribunals of justice the right to grant relief in appropriate cases.

When writ of prohibition will not lie to prevent superintendent of public schools of New York city from appealing to state commissioner of education from act of board of education.—Where it is claimed by the superintendent of public schools in the city of New York that the board of education of that city has improperly placed a large number of persons on the eligible list from which teachers are to be drawn, many of whom are incompetent to discharge the duties which would be assigned to them, the determination and action of the board of education with reference thereto comes within the terms of subdivision 7 of this section, and the subject-matter of the attempted appeal is of the character expressly recognized by the statute as one concerning which such an appeal may be taken, and the superintendent is aggrieved and interested in having the decision of the board of education reviewed. Hence a writ of prohibition will not lie against him to prevent such an appeal. *People ex rel. Board of Education v. Finley* (1914), 211 N. Y. 51, 105 N. E. 109.

Objection to condemnation proceedings for the acquisition of relator's property for a school-house under either section 206, subd. 7, *ante*, or section 459, *ante*, need not be taken by an appeal to the Commissioner of Education. In order to take property by right of eminent domain the school authorities must comply with the conditions the statute prescribed, and until then the land owner may legally object to the condemnation of his property. *Matter of Hemenway* (1909), 134 App. Div. 86, 118 N. Y. Supp. 931.

Review by the courts.—The provision of this section exempting from review by

the courts decisions of the commissioner of education made upon appeals to him from acts or decisions of local school officers, has no application to an order made by him in the first instance removing school officers from office. *People ex rel. Light v. Skinner* (1889), 159 N. Y. 162, 53 N. E. 806, affg. 37 App. Div. 44, 55 N. Y. Supp. 337; *Matter of Light* (1899), 30 App. Div. 50, 51 N. Y. Supp. 743.

It has been held that the remedy afforded by an appeal to the commissioner of education from the action of a city board of education in removing the principal of a public school from office, is adequate and that certiorari will not lie to review his dismissal. *People ex rel. Walrath v. O'Brien* (1906), 112 App. Div. 97, 97 N. Y. Supp. 1115.

Where the Commissioner of Education determines that attempted resignations and other appointments by trustees of a union free school district pending proceedings for their removal were not made in good faith and were a scheme to defeat the pending proceeding, his decision removing the trustees and ordering a special election is final and not subject to review by the newly-appointed trustees. *People ex rel. Jennings v. Finley* (1916), 175 App. Div. 204, 161 N. Y. Supp. 817.

The object of the provision as to conclusiveness obviously was to place upon the Commissioner the supervision and control of the public school system, and in the matters committed to his charge, to make his decision final so that his time may be devoted to the schools and not to the courts. *People ex rel. Jennings v. Finley* (1916), 175 App. Div. 204, 161 N. Y. Supp. 817.

Collateral attack of validity or order dissolving school district, not permitted. *Smith v. Cowan* (1900), 47 App. Div. 116, 62 N. Y. Supp. 106.

The right to subject the property of the inhabitants of a school district to a tax and the determination of the validity of meetings for that purpose has not been exclusively delegated to the Commissioner of Education, but a party aggrieved, if he has a clear legal right, may enforce it in the courts. *Austin v. Board of Trustees* (1910), 68 Misc. 538, 125 N. Y. Supp. 222.

A committee appointed at a school district meeting to investigate the financial affairs of the district reported a shortage and implicated two persons named in the report. Such persons sued the members of the committee for libel. The action for libel resulted in favor of the defendants. The defendants presented a claim against the district for expenses incurred in defending such action, and it was allowed at a school district meeting. Upon an appeal the commissioner of education set aside the action of the school meeting. It was held that the action of the commissioner was conclusive under the statute; that the statute is not unconstitutional in this respect; and even if it were unconstitutional the decision of the commissioner was correct upon its merits and would not be disturbed. *People ex rel. Underhill v. Skinner* (1902), 74 App. Div. 58, 77 N. Y. Supp. 36.

The interest which a parent may have in the school of the district is not such as to authorize an appeal by him from the action of a board in unlawfully terminating a contract with a teacher. *Com. of Educ. Decision* (1915), 6 State Dep. Rep. 515.

An appeal may be taken from the action of trustees of a school district "in paying or refusing to pay a teacher." *Com. of Educ. Decision* (1915), 7 State Dep. Rep. 589.

Where the determination of an appeal involves the measure of damages for a breach of a contract to teach, which the appellant has been unable to enter upon and complete because of such breach, the remedy must be sought by action in the courts. *Com. of Educ. Decision* (1915), 6 State Dep. Rep. 536.

The right to trial by jury is waived by answering an appeal to the commissioner of education. *People ex rel. Yale v. Ecker* (1880), 19 Hun 609.

Costs may not be awarded where a party has the right to appeal to the commissioner of education. *Whitbeck v. Billings* (1874), 1 Hun 494, 3 T. & C. 764.

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§ 881. Powers of commissioner upon appeals or petitions, et cetera.—The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.
2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.
3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.
4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

Source.—Education L. 1909, § 361, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 14, § 2; originally revised from L. 1864, ch. 555, tit. 12, § 2.

Aggrieved party.—Appeal dismissed where appellant is not an "aggrieved" party, and has no substantial interest in the matter. Dec. of Supt. (1890), Jud. Dec. 56; Dec. of Supt. (1893), Jud. Dec. 15.

Regulation of practice.—Unreasonable delay in taking appeal, not excused, will defeat the appeal. Dec. of Com'r (1915), 7 St. Dep. Rep. 575; Dec. of Com'r (1915), 5 St. Dep. Rep. 631; Dec. of Supt. (1887), Jud. Dec. 19; Dec. of Supt. (1902), Jud. Dec. 19; Dec. of Supt. (1887), Jud. Dec. 21; Dec. of Supt. (1887), Jud. Dec. 338.

The rule regulating practice on appeals, requiring the petition to be served and filed within thirty days from the time when the act occurred from which the appeal is brought must be complied with, except where a sufficient excuse for delay is submitted. Com. of Educ. Decision (1915), 6 State Dep. Rep. 507.

Appeal will be dismissed where the case is so defectively prepared and presented that no intelligent understanding can be obtained from the papers. Dec. of Supt. (1889), Jud. Dec. 15; Dec. of Supt. (1891), Jud. Dec. 18.

Appeal will not be entertained where the matter has already been adjudicated by a court of competent jurisdiction. Dec. of Supt. (1886), Jud. Dec. 13.

Failure to serve papers within time.—An attempt to bring an appeal made within the time prescribed by the rules ought not to be rendered nugatory by failure to serve the papers within such time, where the appellants show a meritorious cause, and the delay has not in any way impaired the respondent's defense. Com. of Educ. Decision (1915), 6 State Dep. Rep. 533.

The rules do not prohibit the consideration of an appeal that is not brought within the prescribed time, and where it appears necessary, a determination will be made upon the merits, notwithstanding delay in directing the appeal. Com. of Educ. Decision (1916), 10 State Dep. Rep. 444.

A rehearing or new trial may be granted by the Commissioner. Dec. of Supt. (1859), Jud. Dec. 23. Application for a rehearing will be denied unless newly discovered evidence is shown or decision rendered under a misapprehension. Dec. of Com'r (1915), 7 St. Dep. Rep. 566.

Trustee restrained from paying out moneys of district pending proceeding for his removal from office. Dec. of Com'r (1915), 5 St. Dep. Rep. 592.

Personal enmity may not be exploited by appeal. Dec. of Com'r (1916), 8 St. Dep. Rep. 607.

§ 882. Filed papers and copies thereof.—The commissioner shall file,

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arrange in the order of time, and keep in his office, so that they may be at all times accessible, all the proceedings on every appeal or petition to him under this article, including his decision and orders founded thereon; and copies of all such papers and proceedings, authenticated by him under his seal of office, shall be evidence equally with the originals.

Source.—Education L. 1909, § 362, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 14, § 3; originally revised from L. 1864, ch. 555, tit. 12, § 3.

ARTICLE XXXV.

ORPHAN SCHOOLS.

Section 900. Schools of orphan asylums.

901. Rules subject to supervision of school authorities.

902. Annual reports.

§ 900. Schools of orphan asylums.—The schools of the several incorporated orphan asylum societies in this state, other than those in the city of New York, shall participate in the distribution of the school moneys, in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts. The schools of said societies shall be subject to the rules and regulations of the common schools in such cities or districts, but shall remain under the immediate management and direction of the said societies as heretofore.

Source.—Education L. 1909, § 860, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 32; originally revised from L. 1850, ch. 261, §§ 1, 2.

Reference.—Distribution of school moneys generally, Education Law, §§ 490-501.

Application.—The act of 1850 was intended to and does apply to all asylums incorporated since as well as before the passage of that act, and they are entitled to share in money raised by tax in the district as well as in that raised by tax in the state. *People ex rel. St. Thomas Orphan Asylum v. Glowacki* (1873), 2 T. & C. 436.

Employment and payment of teachers.—The above section authorizes the board of education of a city to employ and pay teachers for the secular education of the inmates of a boys' orphan asylum. The fact that such asylum is controlled by a religious organization, and that the teachers employed were members of a sisterhood connected with such denomination is immaterial, since the statute clearly recognizes the fact that the instruction of the inmates of such an asylum is neither practicable nor possible elsewhere than in the institution itself. It is the duty of the board to provide such secular education regardless of the religious belief of those in control of the asylum. *Sargent v. Board of Education of Rochester* (1904), 177 N. Y. 317, 69 N. E. 722, affg. (1902), 76 App. Div. 588, 79 N. Y. Supp. 127.

§ 901. Rules subject to supervision of school authorities.—Every such asylum may make all laws, rules and regulations relative to the education and discipline of their inmates, as a majority of the trustees thereof at their annual meetings shall think fit and proper; but such laws, rules and

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regulations shall not be repugnant to the laws of this state in its policy in reference to public and primary instruction, and shall be subject at all times to the inspection and supervision of the several educational officers of the different villages, towns or cities in which such orphan asylums may be located.

Source.—Education L. 1909, § 861, revised from L. 1847, ch. 485, § 2.

§ 902. Annual reports.—An annual report shall be made and sworn to by the presiding officer of any such asylum, stating the number of inmates thereof, the time spent by them in pursuing studies therein, in what studies they shall have been instructed, and the manner in which the public funds distributed to it shall have been expended, which shall be filed with the commissioner of education.

Source.—Education L. 1909, § 862, revised from L. 1847, ch. 485, § 4.

ARTICLE XXXVI.

SCHOOLS FOR COLORED CHILDREN.

Section 920. No exclusion on account of race or color.

921. Provision for separate schools.

922. Only qualified teachers shall be employed.

§ 920. No exclusion on account of race or color.—No person shall be refused admission into or be excluded from any public school in the state of New York on account of race or color.

Source.—Education L. 1909, § 980, revised from L. 1900, ch. 492, § 1.

§ 921. Provision for separate schools.—The trustees of any union school district, or of any school district organized under a special act, may, when the inhabitants of any district shall so determine, by resolution, at any annual meeting, or at a special meeting called for that purpose, establish separate schools for the instruction of colored children resident therein, and such school shall be supported in the same manner and receive the same care, and be furnished with the same facilities for instruction, as the white schools therein.

Source.—Education L. 1909, § 981, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 29; originally revised from L. 1864, ch. 555, tit. 10, § 2.

Constitutionality.—The statute permitting establishment of colored schools, provided equal facilities and accommodations are afforded to all, is constitutional. *People ex rel. Cisco v. School Board* (1900), 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 118. And see *People ex rel. King v. Gallagher* (1883), 93 N. Y. 438, 45 Am. Rep. 232.

§ 922. Only qualified teachers shall be employed.—No person shall be employed to teach any of such schools who shall not, at the time of such employment, be legally qualified.

Source.—Education L. 1909, § 982, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 30; originally revised from L. 1864, ch. 555, tit. 10, § 3.

ARTICLE XXXVII.

INDIAN SCHOOLS.

- Section 940. Duties of commissioner regarding Indian children.
- 941. Co-operation of Indians shall be sought.
 - 942. Rights of Indians and of state shall be guarded.
 - 943. Indian children not entitled to free tuition in public schools.
 - 944. Employment of teachers, et cetera.
 - 945. Required attendance upon instruction.
 - 946. Duties of persons in parental relation to Indian children.
 - 947. Penalty for failure to send children to school.
 - 948. Persons employing Indian children unlawfully to be fined.
 - 949. Teachers' record of attendance.
 - 950. Attendance officers.
 - 951. Arrest of truants.
 - 952. Commissioner of education to contract for keeping of truants.
 - 953. Enumeration.
 - 954. Payment of services herein required.

§ 940. Duties of commissioner regarding Indian children.—The commissioner of education shall establish schools in such places and maintain such courses of instruction therein for the education of the Indian children of the state as he shall deem necessary. He shall have general supervision of such education and shall cause to be erected where necessary convenient and suitable school buildings for the accommodation of all the Indian children of the state. He shall also enforce the statutes relating to the education of the Indians and pay from the funds set apart for Indian education any necessary expense incurred thereby.

Source.—Education L. 1909, § 880, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 33; originally revised from L. 1856, ch. 71, § 1.

§ 941. Co-operation of Indians shall be sought.—In the discharge of the duties imposed by this article, the said commissioner shall endeavor to secure the co-operation of all the several bands of Indians, and for this purpose, shall visit, by himself or his authorized representative, all the reservations where they reside, lay the matter before them in public assembly, inviting them to assist either by appropriating their public moneys to this object, or by setting apart lands and erecting suitable buildings, or by furnishing labor or materials for such buildings, or in any other way which he or they may suggest as most effectual for the promotion of this object.

Source.—Education L. 1909, § 881, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 34; originally revised from L. 1856, ch. 71, § 2.

§ 942. Rights of Indians and of state shall be guarded.—In any contract which may be entered into with said Indians, for the use or occupancy of any land for school grounds, sites or buildings, care shall be taken to protect the title of the Indians to their lands, and to reserve to the state

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the right to remove or otherwise dispose of all improvements made at the expense of the state.

Source.—Education L. 1909, § 882, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 35; originally revised from L. 1856, ch. 71, § 3.

§ 943. Indian children not entitled to free tuition in public schools.—Indian children residing on a reservation are not entitled to free tuition in districts outside the reservation but may be received into the schools of such districts on the approval of the trustees thereof and the commissioner of education.

Source.—Education L. 1909, § 883, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 7, § 37; originally revised from L. 1856, ch. 71, § 5.

§ 944. Employment of teachers, et cetera.—The commissioner of education shall employ all necessary teachers, truant officers and other assistants and employees and fix their salaries as shall be necessary for the proper enforcement of the statutes relating to Indian education.

Source.—New.

§ 945. Required attendance upon instruction.—1. Every Indian child between six and sixteen years of age, in proper physical and mental condition to attend school, shall regularly attend upon instruction at a school in which at least the common school branches of reading, spelling, writing, arithmetic, English grammar and geography are taught in English, or upon equivalent instruction by a competent teacher elsewhere than at such school as follows: Every Indian child between fourteen and sixteen years of age not regularly and lawfully engaged in any useful employment or service, and every such child between six and fourteen years of age, shall so attend upon instruction as many days annually during the period between the first days of September and the following July as a public school of the community or district of the reservation, in which such child resides, shall be in session during the same period.

2. If any such child shall so attend upon instruction elsewhere than at the public school, such instruction shall be at least equivalent to the instruction given to Indian children of like age at a school of the community or district in which such child shall reside; and such attendance shall be for at least as many hours of each day thereof, as are required of children of like age at public schools and no greater total amount of holidays and vacations shall be deducted from such attendance during the period such attendance is required than is allowed in public schools for children of like age. Occasional absences from such attendance, not amounting to irregular attendance in a fair meaning of the term, shall be allowed upon such excuses only as would be allowed in like cases by the general rules and practices of public schools.

Source.—Education L. 1909, § 901, revised from L. 1904, ch. 424, § 3.

§ 946. Duties of persons in parental relation to Indian children.—Any

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person in parental relation to an Indian child between six and sixteen years of age in proper physical and mental condition to attend school, shall cause such child to attend upon instruction as provided in this article.

Source.—Education L. 1909, § 902, revised from L. 1904, ch. 424, § 4.

§ 947. **Penalty for failure to send children to school.**—A violation of this section shall be a misdemeanor, punishable for the first offense by a fine not exceeding five dollars or by imprisonment not exceeding ten days, and for each subsequent offense, by a fine not exceeding twenty-five dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment. Courts of special sessions shall, subject to removal, as provided in sections fifty-seven and fifty-eight of the code of criminal procedure, have exclusive jurisdiction in the first instance to hear, try and determine charges of violation of this section within their respective jurisdictions.

Source.—Education L. 1909, § 902, revised from L. 1904, ch. 424, § 4.

§ 948. **Persons employing Indian children unlawfully to be fined.**—A person, firm, association or corporation shall not employ any Indian child residing on any Indian reservation between six and fourteen years of age, in any business or service whatever, during any part of the term during which the school in the community or district in which such child resides is in session, or shall not employ any Indian child residing on any reservation between fourteen and sixteen years of age, who does not, at the time of such employment present a consent in writing signed by the principal teacher of the reservation to the effect that such child may be employed, and specifying the nature of the service and the duration of such service or employment. Any person, firm, association or corporation who shall employ any Indian child contrary to the provisions of this section shall for each offense forfeit and pay to the principal teacher of the reservation a penalty of twenty-five dollars, the same, when paid, to be used for the support and maintenance of the schools on said reservation.

Source.—Education L. 1909, § 903, revised from L. 1904, ch. 424, § 5.

§ 949. **Teachers' record of attendance.**—An accurate record of attendance of all Indian children between six and sixteen years of age shall be kept by the teacher of every Indian school, showing each day, by the year, month, day of the month and day of the week, such attendance, and the number of hours in each day thereof; and each teacher upon whose instruction such Indian child shall attend elsewhere than at the school in the community or district of the reservation where he resides, shall keep a like record of such attendance. Such records shall at all times be open to the principal teacher of the reservation and its attendance officers who may inspect and copy the same and any teacher shall answer all lawful inquiries made by them. A wilful neglect or refusal to keep such a record or answer such inquiries shall be a misdemeanor.

Source.—Education L. 1909, § 904, revised from L. 1904, ch. 424, § 6.

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§ 950. **Attendance officers.**—The principal teacher of the Indian schools on each reservation shall supervise the enforcement of this article within said reservation and shall appoint subject to the approval of the commissioner of education and remove at pleasure such number of attendance officers as the commissioner of education shall deem necessary, whose jurisdictions shall extend over all school districts on the reservation for which they shall be appointed. And said principal teachers are also vested with the same power and authority as the attendance officers appointed by them.

Source.—Education L. 1909, § 905, revised from L. 1904, ch. 424, § 7.

§ 951. **Arrest of truants.**—Any attendance officer may arrest without warrant anywhere within the state, any Indian child between six and sixteen years of age, found away from his home and who is then a truant from instruction upon which he is lawfully required to attend within the districts of which such attendance officer has jurisdiction. He shall forthwith deliver a child so arrested either to the person in parental relation to the child, or to the teacher of the school from which said child is then a truant, or in case of habitual or incorrigible truants, shall bring them before a magistrate for commitment to a truant school, as provided in the next section.

Source.—Education L. 1909, § 906, revised from L. 1904, ch. 424, § 8.

§ 952. **Commissioner of education to contract for keeping of truants.**—The commissioner of education may contract with any city or district having a truant school, for the confinement, maintenance and instruction therein of any child who shall be committed to such school as a truant by any magistrate before whom such child shall have been examined upon the charge of truancy. The costs and expenses attending the support and maintenance of any truant, as herein provided, shall be audited by the commissioner of education and paid in the same manner as the expenses of supporting and maintaining the schools on said reservation are paid.

Source.—Education L. 1909, § 907, revised from L. 1904, ch. 424, § 9.

§ 953. **Enumeration.**—The commissioner of education shall cause to be taken a complete enumeration of the Indian inhabitants on said reservation; such enumeration to be taken between the first day of May and the first day of August which shall be tabulated showing the name and age of each Indian person on said reservations and in what school district each of such persons resides. The commissioner of education may require any of the teachers employed in the schools on such Indian reservations or other persons to take such enumeration.

Source.—Education L. 1909, § 908, revised from L. 1904, ch. 424, § 10.

§ 954. **Payment of services herein required.**—Each of the attendance officers herein provided for shall receive such sum per day as shall be fixed by the commissioner of education for each day necessarily employed in

enforcing this article; and each person employed in taking and tabulating the census of the residents of said reservations, shall be entitled to receive such compensation as the commissioner of education shall allow. The compensation of truant officers and the expense in taking the enumeration herein provided for shall be audited by the commissioner of education and paid in the same manner as other accounts for the support and maintenance of the schools on said reservations are now paid.

Source.—Education L. 1909, § 909, revised from L. 1904, ch. 424, § 11.

ARTICLE XXXVIII.

INSTRUCTION OF DEAF-MUTES AND OF THE BLIND.

Section 970. Duties of commissioner of education.

971. Persons eligible as pupils to institutions for instruction of the deaf and dumb.
972. Persons eligible as pupils to institutions for instruction of the blind.
973. Support and term of instruction of state pupils.
974. Regulations for admission.
975. Clothing for state pupils.
976. Aid for blind and deaf students.
977. Indigent deaf-mute children.
978. Deaf-mute children improperly cared for.
979. Maintenance of children.
980. Payment of expenses of tuition and maintenance.

§ 970. Duties of commissioner of education.—All the institutions for the instruction of the deaf and dumb, and blind, and all other similar institutions, incorporated under the laws of the state, or that may be hereafter incorporated, shall be subject to the visitation of the commissioner of education, and it shall be his duty:

1. To inquire into the organization of the several schools and the method of instruction employed therein.
2. To prescribe courses of study and methods of instruction that will meet the requirements of the state for the education of state pupils.
3. To make appointments of pupils to the several schools, to transfer such pupils from one school to another as circumstances may require; to cancel appointments for sufficient reason.
4. To ascertain by a comparison with other similar institutions, whether any improvements in instruction and discipline can be made; and for that purpose to appoint from time to time, suitable persons to visit the schools.
5. To suggest to the directors of such institutions and to the legislature such improvements as he shall judge expedient.
6. To make an annual report to the legislature on all the matters before enumerated, and particularly as to the condition of the schools, the improvement of the pupils, and their treatment in respect to board and lodging.

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Source.—Education L. 1909, § 920, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 40; originally revised from L. 1877, ch. 413, § 2.

Reference.—Visitation by state board of charities, State Charities Law, § 20.

Visitation of institution and supervisory power as to its educational activities do not make an institution for support and education of deaf and blind children wholly educational so as deprive the state board of charities of its constitutional power over charitable institutions. *People ex rel. N. Y. Inst. for the Blind v. Fitch* (1897), 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591.

§ 971. Persons eligible as pupils to institutions for instruction of the deaf and dumb.—All deaf and dumb persons resident in this state and upwards of twelve years of age, who shall have been resident in this state for one year immediately preceding the application, or, if a minor, whose parent or parents, or, if an orphan, whose nearest friend shall have been resident in this state for one year immediately preceding the application, shall be eligible to appointment as state pupils in one of the deaf and dumb institutions of this state, authorized by law to receive such pupils.

Source.—Education L. 1909, § 921, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 41, in part, as amended by L. 1903, ch. 62; originally revised from L. 1864, ch. 555, tit. 1, § 9, as amended by L. 1875, ch. 567; L. 1886, ch. 615; L. 1894, ch. 229.

Institutions for the instruction of the blind are charitable as well as educational. *People ex rel. N. Y. Inst. for Blind v. Fitch* (1897), 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591.

§ 972. Persons eligible as pupils to institutions for instruction of the blind.—All blind persons of suitable age and possessing the other qualifications prescribed for deaf and dumb state pupils under section nine hundred and twenty-one shall be eligible to appointment to the institutions for the blind in the city of New York, or in the village of Batavia, as follows:

1. All such as are residents of the counties of New York, Kings, Queens, Suffolk, Nassau, Richmond, Westchester, Putnam and Rockland, shall be sent to the institution for the blind in the city of New York.

2. All such who reside in other counties of the state shall be sent to the institution for the blind in the village of Batavia. Blind babies and children, not residing in the city of New York, of the age of twelve years and under and possessing the other qualifications prescribed in the preceding section of this chapter and requiring kindergarten training and instruction shall be eligible to appointment as state pupils in one of the homes for blind babies and children maintained by the International Sunshine Society, Brooklyn Home for the Blind, Crippled and Defective Children and the Catholic Institute for the Blind and any such child may be transferred to the institution for the blind in the city of New York or village of Batavia, to which he or she would otherwise be eligible to appointment, upon arriving at suitable age, in the discretion of the commissioner of education. All such appointments, with the exception of those to the institution for the blind in the village of Batavia, shall be made by the

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commissioner of education upon application, and in those cases in which, in his opinion, the parents or guardians of the applicants are able to bear a portion of the expense, he may impose conditions whereby some proportionate share of expense of educating and clothing such pupils shall be paid by their parents, guardians or friends, in such manner and at such times as the commissioner shall designate, which conditions he may modify from time to time, if he shall deem it expedient to do so. (*Amended by L. 1912, ch. 60.*)

Source.—Education L. 1909, § 923, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 41, in part, as amended by L. 1903, ch. 62; originally revised from L. 1864, ch. 555, tit. 1, § 9, as amended by L. 1875, ch. 567; L. 1886, ch. 615; L. 1894, ch. 229.

§ 973. Support and term of instruction of state pupils.—1. Each pupil so received into any of the institutions aforesaid shall be provided with board, lodging and tuition; and the directors of the institution shall receive an annual appropriation for each pupil so provided for, in quarterly payments, to be paid by the treasurer of the state, on the warrant of the comptroller, to the treasurer of said institution, on his presenting a bill showing the actual time and number of such pupils attending the institution, which bill shall be signed by the president and secretary of the institution, and verified by their oaths.

2. The regular term of instruction of such pupils shall be five years; but the commissioner of education may, in his discretion, extend the term of any pupil for a period not exceeding three years. It shall also be lawful for the commissioner of education to continue such pupils as state pupils for an additional period of three years for the purpose of pursuing a course of study in the higher branches of learning. The number of pupils continued each year in such course shall not exceed thirty in any one institution and such pupils must be recommended by the trustees of the institution in which they are attendant, before such extension of time is granted. The pupils provided for in this section and in sections nine hundred and seventy-one and nine hundred and seventy-two of this article shall be designated state pupils; and all the existing provisions of law applicable to state pupils now in said institutions shall apply to pupils herein provided for. (*Subd. 2, amended by L. 1912, chs. 60 and 223.*)

Source.—Education L. 1909, § 923, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 42; originally revised from L. 1864, ch. 555, tit. 1, § 10; L. 1875, ch. 213, § 5.

Amendment of 1912.—The amendment made by ch. 60 provided that the term for instruction of five years should apply only to pupils "upwards of twelve years of age"; also that "the term of kindergarten training and instruction for babies and children of the age of twelve years and under received into any such institution under the provisions of section 972 of this chapter, shall be at the discretion of the Commissioner of Education and shall be paid for at the rate of one dollar per day." This amendment is omitted by ch. 223, and was in effect only from Mch. 22 to Apr. 8.

§ 974. Regulations for admission.—The commissioner of education may

make such regulations and give such directions to parents and guardians, in relation to the admission of pupils into either of the above-named institutions, as will prevent pupils entering the same at irregular periods.

Source.—Education L. 1909, § 924, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 43; originally revised from L. 1864, ch. 555, tit. 1, § 11.

§ 975. **Clothing for state pupils.**—1. The supervisors of any county in this state from which county state pupils may be hereafter appointed to any institution for the instruction of the deaf and dumb, whose parents or guardians are unable to furnish them with suitable clothing, are hereby authorized and required to raise in each year for each such pupil from said county, the sum of thirty dollars.

2. The supervisors of any county in this state from which state pupils shall be sent to and received in the New York institution for the blind, whose parents or guardians shall, in the opinion of the commissioner of education, be unable to furnish them with suitable clothing are hereby authorized and directed, in every year while such pupils are in said institution, to raise and appropriate thirty dollars for each of said pupils, and to pay the sum so raised to the said institution, to be by it applied to furnishing such pupils with suitable clothing while in said institution.

3. If in any case all or any of said moneys are not expended before the expiration of the periods of appointment of such pupils, as provided in the foregoing subdivisions of this section, then the unexpended residue shall go into the general clothing fund of the said institutions, to be devoted to furnishing state pupils with suitable clothing. (*Subd. 3, amended by L. 1917, ch. 179, in effect April 14, 1917.*)

4. If said sums shall not be paid to the said institutions as required in subdivisions one and two of this section, within six months after the annual meeting of the supervisors of any of said counties, the sums so unpaid shall bear interest at the rate of seven per centum per annum, from the expiration of said six months until the same be paid. (*Subd. 4, amended by L. 1917, ch. 179, in effect April 14, 1917.*)

5. The supervisors of any county in this state from whose pauper institutions pupils shall be sent to the said institution for the blind, shall raise, appropriate and pay to the order of the comptroller of the state, towards the expense of educating and clothing such pupils, a sum equal to that which the county would have to pay to support the pupils as paupers at home. This subdivision does not apply to the counties of New York, Kings, Queens, Nassau and Suffolk.

6. The supervisors, or officers corresponding thereto, of the counties of New York, Kings, Queens, Nassau and Suffolk, from which state pupils shall be sent to and received in the New York institution for the blind, whose parents or guardians shall, in the opinion of the commissioner of education, be unable to furnish them with suitable clothing, are hereby authorized and directed, in every year while such pupils are in said institu-

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tion, to raise and appropriate fifty dollars for each of said pupils from said counties, respectively, and to pay the sum so raised to the said institution, to be by it applied to furnishing such pupils with suitable clothing while in said institution.

7. If in any year hereafter there shall be any surplus of the amount above required to be paid yearly by the said counties for clothing for pupils from said counties, respectively, then such surplus shall be deducted pro rata the ensuing year from the amount above required to be paid by the said counties respectively.

Source.—Education L. 1909, § 925, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 43-a, as added by L. 1903, ch. 223; L. 1839, ch. 200, § 5, as amended by L. 1862, ch. 351; L. 1870, ch. 166, §§ 3, 4; L. 1871, ch. 166, § 2.

§ 976. **Aid for blind and deaf students.**—1. Whenever a blind or deaf person, who is a citizen of this state and a pupil in actual attendance at a college, university, technical or professional school located in this state and authorized by law to grant degrees, other than an institution established for the regular instruction of the blind or deaf, shall be designated by the trustees thereof as a fit person to receive the aid hereinafter provided for, there shall be paid by the state for the use of such pupil the sum of three hundred dollars per annum with which to employ persons to read to such blind pupil from text-books and pamphlets used by such pupil in his studies at such college, university or school, or to aid a deaf student in receiving instruction in such studies.

2. Such moneys shall be paid annually, after the beginning of the school year of such institution, by the treasurer of the state on the warrant of the comptroller, to the treasurer of such institution, on his presenting an account showing the actual number of blind or deaf pupils matriculated and attending the institution, which account shall be verified by the president of the institution and accompanied by his certificate that the trustees have recommended the pupils named in said account as hereinbefore provided.

3. The trustees of any of the said institutions shall recommend no blind or deaf person, who is not regularly matriculated, and who is not in good and regular standing, and who is not working for a degree from the institution in which he is matriculated; and no blind or deaf person shall be recommended, who is not doing the work regularly prescribed by the institution for the degree for which he is a candidate. The moneys so paid to any such institution shall be disbursed for the purposes aforesaid by and under the direction of its board of trustees. (*Amended by L. 1913, ch. 175.*)

Source.—Education L. 1909, § 926, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, §§ 43-b, 43-c, as added by L. 1907, ch. 608.

§ 977. **Indigent deaf-mute children.**—Whenever a deaf-mute child under the age of twelve years shall become a charge for its maintenance on

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any of the towns or counties of this state, or shall be liable to become such charge, it shall be the duty of the overseers of the poor of such town or of the board of supervisors of such county to place such child in one of the institutions enumerated in the next section.

Source.—Education L. 1909, § 927, revised from L. 1863, ch. 325, as amended by L. 1870, ch. 180; L. 1871, ch. 548; L. 1875, ch. 213.

Care of deaf-mute at state institution.—Where a deaf-mute was placed in a state institution by a supervisor of the county in which the parents of the child resided, the removal of such parents from such county does not relieve the former county from liability for the expense of maintaining such child in the institution after such change of residence. *Western N. Y. Institution for Deaf Mutes v. The County of Yates* (1904), 94 App. Div. 1, 87 N. Y. Supp. 534.

§ 978. **Deaf-mute children improperly cared for.**—Upon the application of any parent, guardian or friend of a deaf-mute child, within this state, over the age of five years and under the age of twelve years, the overseer of the poor or the supervisor of the town where such child may be, shall place such child in one of the institutions authorized by the laws of eighteen hundred and ninety-two, chapter thirty-six, to receive such pupils, as follows:

1. The New York institution for the deaf and dumb; or,
2. The institution for the improved instruction of deaf-mutes; or,
3. The Le Couteulx Saint Mary's institution for the improved instruction of deaf-mutes in the city of Buffalo; or,
4. The Central New York institution for deaf-mutes in the city of Rome; or,
5. The Albany home school for the oral instruction of the deaf at Albany; or,
6. To any other institution in the state for the education of deaf-mutes as to which the state board of charities shall have filed with the commissioner of education a certificate to the effect that said institution has been duly organized and is prepared for the reception and instruction of such pupils.

Source.—Education L. 1909, § 928, revised from L. 1863, ch. 325, § 2, as amended by L. 1875, ch. 213, L. 1892, ch. 36.

See *Matter of Lansing* (1915), 89 Misc. 312, 153 N. Y. Supp. 639.

§ 979. **Maintenance of children.**—The children placed in said institutions, in pursuance of the last two sections, shall be maintained therein at the expense of the county from where they came, provided that such expense shall not exceed three hundred and fifty dollars each per year, until they attain the age of twelve years, unless the directors of the institution to which a child has been sent shall find that such child is not a proper subject to remain in said institution. (*Amended by L. 1910, ch. 322, and by L. 1917, ch. 179, in effect April 14, 1917.*)

Source.—Education L. 1909, § 929, revised from L. 1883, ch. 325, § 3, as amended by L. 1875, ch. 213, § 3.

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Change of residence of parents does not relieve county of cost of maintenance of child admitted to institution while parents resided in county. *Western N. Y. Institution for Deaf Mutes v. County of Yates* (1904), 94 App. Div. 1, 87 N. Y. Supp. 534.

§ 980. **Payment of expenses of tuition and maintenance.**—The expenses for the board, tuition and clothing for such deaf-mute children, placed as aforesaid in said institutions, not exceeding the amount of three hundred and fifty dollars per year, above allowed, shall be raised and collected as are other expenses of the county from which such children shall be received; and the bills therefor, properly authenticated by the principal or one of the officers of the institution, shall be paid to said institution by the said county; and its county treasurer or chamberlain, as the case may be, is hereby directed to pay the same on presentation, so that the amount thereof may be borne by the proper county. (*Amended by L. 1910, ch. 322, and by L. 1917, ch. 179, in effect April 14, 1917.*)

Source.—Education L. 1909, § 930, revised from L. 1863, ch. 325, § 4, as amended by L. 1875, ch. 213, § 3.

ARTICLE XXXIX.

NEW YORK STATE SCHOOL FOR THE BLIND.

- Section 990. Change of name.
- 991. Requisites for admission.
 - 992. Applicants from without the state.
 - 993. Applications for admission.
 - 994. Object of institution.
 - 995. Appointment and terms of trustees.
 - 996. Filling vacancies.
 - 997. Trustees entitled to mileage; disabilities.
 - 998. General powers of trustees.
 - 999. Officers, committees and seal.
 - 1000. Secretary.
 - 1001. Treasurer's duties and bond.
 - 1002. Appointment of superintendent, instructors and assistants.
 - 1003. Purchase of equipment.
 - 1004. Duty to provide clothing and pay traveling expenses.
 - 1005. Charges against county.
 - 1006. Accounts against counties and payment thereof.
 - 1007. Reimbursement of counties.
 - 1008. Entitled to publications and may receive bequests and donations.
 - 1009. Records and annual reports.
 - 1010. Payments by state treasurer.
 - 1011. Drafts upon state treasury.

§ 990. **Change of name.**—The New York state institution for the blind as the same was authorized to be established by chapter five hundred and eighty-seven of the laws of eighteen hundred and sixty-five and the acts supplemental thereto and renamed the "New York state school for the

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blind'' by laws of eighteen hundred and ninety-five, chapter five hundred sixty-three, shall continue to be known and designated as the "New York state school for the blind."

Source.—Education L. 1909, § 940, revised from L. 1895, ch. 563, § 1.

Consolidators' note.—Matter contained herein has no proper place in the Education Law and is so placed because the scheme of the general laws affords no better place. Beyond the general right of visitation conferred on the Commissioner of Education, as successor of the Superintendent of Public Instruction, by the Consolidated School Law, tit. 15, § 40, the education department has no control over the institution.

References.—Visitation of state board of charities, State Charities Law, § 20. Estimates of expenses and provisions respecting financial management, Id. §§ 40-50.

§ 991. Requisites for admission.—All blind persons of suitable age and capacity for instruction, who are legal residents of the state, shall be entitled to the privileges of the New York state school for the blind, without charge, and for such a period of time in each individual case as may be deemed expedient by the board of trustees of said school; provided, that whenever more persons apply for admission at one time than can be properly accommodated in the school, the trustees shall so apportion the number received, but each county may be represented in the ratio of its blind population to the total blind population of the state; and provided further, that the children of citizens who died in the United States service, or from wounds received therein during the late rebellion, shall take precedence over all others.

Source.—Education L. 1909, § 941, revised from L. 1867, ch. 744, § 1.

§ 992. Applicants from without the state.—Blind persons from without the state may be received into the school upon the payment of an adequate sum, fixed by the trustees, for their boarding and instruction; provided that such applicant shall in no case exclude those from the state of New York.

Source.—Education L. 1909, § 942, revised from L. 1867, ch. 744, § 2.

§ 993. Applications for admission.—Applications for admission into the school shall be made to the board of trustees in such manner as they may direct, but the board shall require such application to be accompanied by a certificate from the county judge or county clerk of the county or the supervisor or town clerk of the town, or the mayor of the city where the applicant resides, setting forth that the applicant is a legal resident of the town, county and state claimed as his residence.

Source.—Education L. 1909, § 943, revised from L. 1867, ch. 744, § 3, as amended by L. 1872, ch. 616.

§ 994. Object of institution.—The primary object of the school shall be, to furnish to the blind children of the state the best known facilities for acquiring a thorough education, and train them in some useful profession or manual art, by means of which they may be enabled to contribute to their own support after leaving school; but it may likewise, through

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its industrial department, provide such of them with appropriate employment and boarding accommodations as find themselves unable, after completing their course of instruction and training, to procure these elsewhere for themselves. It shall, however, be in no sense an asylum for those who are helpless from age, infirmity or otherwise, or a hospital for the treatment of blindness.

Source.—Education L. 1909, § 944, revised from L. 1867, ch. 744, § 4.

§ 995. **Appointment and terms of trustees.**—The governor shall continue, each alternate year, to appoint, by and with the consent of the senate, three trustees who shall serve for a term of six years. Two of the board must be residents of the county of Genesee, and a majority must be residents within fifty miles of said school.

Source.—Education L. 1909, § 945, revised from L. 1867, ch. 744, § 5.

§ 996. **Filling vacancies.**—In case of the declination of any member of said board of trustees to act under his appointment, or of the occurrence of any other casual vacancy in the board, the governor shall forthwith appoint some suitable person to fill such vacancy, and the member so appointed shall serve out the term of his predecessor.

Source.—Education L. 1909, § 946, revised from L. 1867, ch. 744, § 6.

§ 997. **Trustees entitled to mileage; disabilities.**—The trustees shall receive no compensation as such, but they may allow themselves mileage, at the same rate as that paid to members of the legislature, for any distance actually traveled in the service of the school. Nor shall any trustee be pecuniarily interested in any contract for buildings pertaining to the school, or in furnishing supplies therefor.

Source.—Education L. 1909, § 947, revised from L. 1867, ch. 744, § 7.

Reference.—Trustee not to be interested in contracts, State Charities Law, § 48.

§ 998. **General powers of trustees.**—The board of trustees shall have charge of all the affairs of the school, with power to make all necessary by-laws and regulations for their government and the proper management of the school, as well as for the admission of pupils, and to do all else which may be found necessary for the advancement of its humane design.

Source.—Education L. 1909, § 948, revised from L. 1867, ch. 744, § 8.

Reference.—Estimates and general provisions relating to purchases, State Charities Law, §§ 40-46; State Finance Law, §§ 16-24.

§ 999. **Officers, committees and seal.**—They shall elect from their own number a president and treasurer, together with such standing committees as they may deem necessary, and adopt a common seal for the school.

Source.—Education L. 1909, § 949, revised from L. 1867, ch. 744, § 9.

§ 1000. **Secretary.**—The board of trustees may elect a secretary, who shall serve during the pleasure of the board, and who shall not be a

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member thereof, and may fill any vacancy in the said office as often as the same shall occur, and may prescribe his duties and fix his compensation.

Source.—Education L. 1909, § 950, revised from L. 1873, ch. 463, § 2.

§ 1001. **Treasurer's duties and bond.**—1. The treasurer shall have the custody of all the funds of the school, and pay out the same only upon properly authenticated orders of the board or executive committee.

2. Before entering upon the duties of his office, he shall execute and file in the office of the comptroller, a bond with such sureties and in such amount of penalty as the comptroller shall require and approve, conditioned for the faithful discharge of his duties as such treasurer.

Source.—Education L. 1909, § 951, revised from L. 1867, ch. 744, § 10, as amended by L. 1905, ch. 154.

References.—Form of state accounts, State Finance Law, § 16. When and how rendered, Id. §§ 17, 18, 21-23. Annual inventory, Id. § 20. Deposit of money in bank, Id. § 19. Financial supervision by fiscal supervisor, State Charities Law, §§ 40-50.

§ 1002. **Appointment of superintendent, instructors and assistants.**—The trustees shall have power to appoint a competent and experienced superintendent, who shall be the chief executive officer of the school, together with an efficient corps of instructors and other subordinate officers; prescribe the duties and terms of service of the same; fix and pay their salaries, and for just cause, remove any or all of them from office. They shall likewise employ the requisite number of servants and other assistants in the various departments of the school and pay the wages of the same.

Source.—Education L. 1909, § 952, revised from L. 1867, ch. 744, § 11.

§ 1003. **Purchase of equipment.**—They shall purchase all furniture, apparatus and other supplies necessary to the equipment and carrying on of the school in the most efficient manner.

Source.—Education L. 1909, § 953, revised from L. 1867, ch. 744, § 12.

§ 1004. **Duty to provide clothing and pay traveling expenses.**—1. When any blind person shall, upon proper application, be admitted into the school, it shall be the duty of his parents, guardians or other friends, to suitably provide such person with clothing at the time of entrance and during continuance therein, and likewise to defray his traveling expenses to and from the school, at the time of entrance and discharge, as well as at the beginning and close of each session of the school, and at any other time when it shall become necessary to send such person home on account of sickness or other exigency.

2. Whenever it shall be deemed * necessary by the trustees to have such person permanently removed from the school, in accordance with the by-laws and regulations thereof, the same shall be promptly removed upon their order, by his parents, guardians or other friends.

Source.—Education L. 1909, § 954, revised from L. 1867, ch. 744, § 13.

* So in original.

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§ 1005. **Charges against county.**—1. If the friends of any pupil from within the state of New York shall fail through neglect or inability to provide the same with proper clothing or with funds to defray his necessary traveling expenses to and from the school, or to remove him therefrom, as required in the preceding section, the trustee shall furnish such clothing, pay such traveling expenses, or remove such pupil to the care of the overseers of the poor of his township, and charge the cost of the same to the county to which the pupil belongs, provided that the annual amount of such expenditures on account of any one pupil shall not exceed the sum of sixty dollars.

2. And in case of the death of any pupil at the school, whose remains shall not be removed or funeral expenses borne by the friends thereof, the trustees shall defray the necessary burial expenses, and charge the same to his county as aforesaid.

3. Upon the completion of their course of training in the industrial department, the trustees may furnish to such worthy poor pupils as may need it, an outfit of machinery and tools for commencing business, at a cost not exceeding seventy-five dollars each, and charge the same to the proper county as aforesaid.

Source.—Education L. 1909, § 955, revised from L. 1867, ch. 744, § 14, as amended by L. 1873, ch. 463.

§ 1006. **Accounts against counties and payment thereof.**—On the first day of October in each year, the trustees shall cause to be made out against the respective counties concerned, itemized accounts, separate in each case, of the expenditures authorized by the preceding section, and forward the same to the board of supervisors chargeable with the account. The board shall thereupon direct the county treasurer to pay the amount so charged to the treasurer of the school for the blind, on or before the first day of March next ensuing.

Source.—Education L. 1909, § 956, revised from L. 1867, ch. 744, § 15.

§ 1007. **Reimbursement of counties.**—The counties against which the said accounts shall be made out as aforesaid, shall cause their respective treasurers, in the name of their respective counties, to collect the same, by legal process, if necessary, from the parents or estates of the pupils who have the ability to pay, on whose account the said expenditures shall have been made; provided that at least five hundred dollars' value of the property of such parents or estate shall be exempt from the payment of the accounts aforesaid.

Source.—Education L. 1909, § 957, revised from L. 1867, ch. 744, § 16.

§ 1008. **Entitled to publications and may receive bequests and donations.**—The school shall be entitled to receive copies of all books and other publications which are distributed gratuitously by the state to township or county libraries, common schools, academies, colleges and societies. It may also receive in the name of the state, bequests or donations of

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money or any kind of property, but such money or property shall, in all cases, belong to the state, and be subject to its control; provided that the same shall not be diverted from the particular object for which it shall be bequeathed or donated.

Source.—Education L. 1909, § 958, revised from L. 1867, ch. 744, § 17.

§ 1009. **Records and annual reports.**—The board of trustees shall keep full and complete records of their proceedings, and make an annual report of the same to the legislature, at the commencement of the regular session thereof, strictly accounting in detail for their expenditures, on account of the school, during the preceding fiscal year of the state, setting forth the progress and condition of the several departments of the school, making such suggestions concerning its future management as they may deem essential, and submitting proper estimates of the funds needed for its support, as well as for building and all other purposes.

Source.—Education L. 1909, § 959, revised from L. 1867, ch. 744, § 18.

§ 1010. **Payments by state treasurer.**—The state treasurer is hereby directed to pay over to the board of trustees, upon the warrant of the comptroller, all moneys which shall hereafter be appropriated on account of the New York state school for the blind; the general appropriations for the current support of the school, to be paid in equal quarterly instalments, and specific appropriations for building and other purposes, to be paid when needed by the trustees.

Source.—Education L. 1909, § 960, revised from L. 1867, ch. 744, § 19.

§ 1011. **Drafts upon state treasury.**—All drafts upon the state treasury on behalf of the school shall be based upon orders of the board of trustees, signed by the president and secretary of the same, and attested by the common seal of the school.

Source.—Education L. 1909, § 961, revised from L. 1867, ch. 744, § 20.

ARTICLE XXXIX-A.

(Added by L. 1917, ch. 559, in effect May 18, 1917.)

PHYSICALLY DEFECTIVE CHILDREN.

§ 1020. **Physically defective children.**—1. The board of education of each city and of each union free school district, and the board of trustees of each school district shall, within one year from the time this act becomes effective, ascertain, under regulations prescribed by the commissioner of education and approved by the regents of the university, the number of children in such city or district under the age of eighteen years who are deaf, blind, so crippled or otherwise so physically defective as to be unable to attend upon instruction in regular classes maintained in public schools.

2. The board of education of each city and of each union free school

district in which there are ten or more children who are deaf, blind, crippled or otherwise physically defective shall establish such special classes as may be necessary to provide instruction adapted to the mental attainments and physical conditions of such children.

3. The board of education of each city and of each union free school district, and the board of trustees of each school district, which contains less than ten children who are deaf, blind, crippled or otherwise physically defective, is hereby authorized and empowered to contract with the board of education of another city or school district for the education of such children in special classes organized in the schools of the city or district with which such contract is made. (*Added by L. 1917, ch. 559, in effect May 18, 1917.*)

ARTICLE XL.

CORNELL UNIVERSITY.

Section 1030. Cornell university continued.

1031. Trustees; election of trustees.

1032. Extent of farm and grounds; special constables.

1033. Object and powers of the corporation.

1034. Extent to which property may be held.

1035. Trustees shall make reports; university subject to visitation of regents.

1036. Restrictions on alienation of property.

1037. State scholarships at Cornell university.

1038. New York state veterinary college.

1039. New York state college of agriculture.

§ 1030. Cornell university continued.—The corporation known as Cornell university, located at Ithaca, is continued with all the rights, and subject to all the liabilities contained in the act of incorporation, being laws of eighteen hundred and sixty-five, chapter five hundred and eighty-five, as amended.

Source.—Education L. 1909, § 1120.

Revenue from investment of proceeds of sale of lands donated to state for colleges.—The following acts relate to the application of revenue received from the sale of lands donated to the state for colleges:

L. 1863, ch. 511.—An act to appropriate the income and revenue which may be received from the investment of the proceeds of the sales of the lands granted to the state by the act of congress, entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2, 1862, passed May 14, 1863.

§ 1. The income and revenue which may be received from the investment of the proceeds of the sale of lands, or any part of them, granted to this state by the act of congress entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, shall be disposed of, as hereinafter directed.

§ 2. The said interest, income and vails of the said investment are hereby appropriated to, and shall, from time to time, as the same shall be received, be paid

over to the trustees of the People's College, located at Havana, in the county of Schuyler, for its use and behoof, in the mode and for the purposes in said act of congress defined; provided, however, such payments shall not be made unless the said trustees shall show to the satisfaction of the regents of the university of this state, and so to be certified by them within three years from the passage of this act, that the said trustees are prepared with at least ten competent professors to give instruction in such branches of learning as are related to agriculture and the mechanic arts, including military tactics, as required by the said act of congress, and that they, the said trustees, own and are possessed of suitable college grounds and buildings, properly arranged and furnished, for the care and accommodation of at least two hundred and fifty students, with a suitable library, philosophical and chemical apparatus, and cabinets of natural history, and also a suitable farm, for the practical teaching of agriculture, of at least two hundred acres, with suitable farm buildings, farming implements and stock; and also suitable shops, tools, machinery, and other arrangements for teaching the mechanic arts, all of which property must be held by the said trustees absolutely, and be fully paid for; and provided, further, that the said college shall be subject to the visitation of the said regents; and provided further that the said payment shall cease whenever, in the opinion of the said regents, the said college shall neglect to fulfill the conditions of this appropriation; and that whenever the proceeds of the investment or investments aforesaid shall be in excess of the needs of said college, the regents of the university, who shall have power to determine the amount of such excess, shall notify the comptroller, and he shall thereafter withhold the same from said college; and provided further, that the said People's College shall conform to the act of congress aforesaid in making an annual report, and transmitting copies thereof to the secretary of the interior at Washington and to other colleges.

§ 3. From and after the time the said trustees of the said college shall have become entitled to the benefits of this act as aforesaid, the said college grounds, farm, workshops, fixtures, machinery, apparatus, cabinets and library shall not be incumbered, aliened or otherwise disposed of by the said trustees; and any attempt by the said trustees so to do, shall be utterly void, and of no effect. But such machinery, apparatus, cabinets and library, or any part thereof, may at any time be disposed of by said trustees, on reasonable cause therefor being shown, to the satisfaction of the regents, and on such terms as the said regents may approve.

§ 4. From the commencement of the year one thousand eight hundred and sixty-eight, or whenever in the opinion of the regents of the university, the income arising from the investments provided for in this act shall warrant the same, the People's College shall receive students from each county in this state, and shall give and furnish to them instructions in any or all the prescribed branches of study pursued in any department of said institution, free from any tuition fee or any incidental charges to be paid to said college; and the regents of the university shall, from time to time, designate the number of students to be so educated, but they shall be selected, or cause to be selected, by the chancellor of the university and the superintendent of public instruction, who shall jointly publish such rules and regulations in regard thereto as will, in their opinion, secure proper selections and stimulate competition in the academies, public and other schools in this state. From and after the same time, also, the said regents of the university shall each year, in accordance with the income of the college, determine the number of youth of the State of New York whom the faculty of the college, after due examination and with the approbation of the trustees thereof, shall admit as properly qualified students, who shall be exempt from any payment for board, tuition or room rent; but in the selection of students preference shall be given to the sons of those who shall have died in the military or naval service of the United States.

§ 5. The remainder of the income and revenues mentioned in the first section of this act, not appropriated to the People's College, as aforesaid, shall be paid over from time to time, in such manner and proportions as the said regents shall determine, to such of the colleges of this state as shall be willing to comply in their arrangements and instruction to the requisitions of the act of congress aforesaid, and in such manner as in the judgment of the said regents shall best carry out the true intent and meaning of the said act, having reference in such selection and division to the existing arrangements of such colleges respectively, for instruction in agriculture and the mechanic arts, and giving preference as far as may be to such institution as shall receive endowments after the passage of this act, for the purpose of advancing instruction in agriculture and the mechanic arts. The provisions of the third section of this act shall apply to the institution so selected as aforesaid.

§ 6. All payments to be made under this act, shall be made by the treasurer, on the warrant of the comptroller, out of the special or trust fund on deposit with the treasurer, arising from the receipt of the income and revenue mentioned in the first section of this act.

§ 7. The legislature might at any time alter, amend, or repeal this act.

L. 1880, ch. 317.—“An act to transfer to Cornell University the securities, moneys and contracts constituting and relating to the Cornell endowment fund.”

Comptroller to transfer securities.—§ 1. The comptroller of the state is hereby authorized and directed upon request of Cornell University, to assign, transfer, pay and deliver unto said Cornell University all moneys, securities, stocks, bonds and contracts, constituting a part of or relating to the fund known as the Cornell endowment fund, now held by the state for the use of said university.

L. 1891, ch. 56.—“An act to provide for the payment of moneys arising from the grants by the United States of public lands and funds for the endowment, support and maintenance of colleges, for the benefit of agriculture and the mechanic arts, to the Cornell University.”

Treasurer designated to receive moneys.—§ 1. The treasurer of the state is hereby designated as the officer of the state to receive the grants of moneys to be paid to the treasurer, or other officer designated by the laws of the state, in pursuance of an act of the congress of the United States, entitled “An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture, and the mechanic arts established under the provisions of an act of congress, approved July second, eighteen hundred and sixty-two,” approved August thirtieth, eighteen hundred and ninety; and the assent of this state is hereby given to the purpose of said grants, and to all the terms and conditions thereof, as specified in such act of congress.

Separate fund; payments when made to the university.—§ 2. The treasurer of this state shall keep the account of all moneys hereafter received by him in pursuance of such act of congress, in a separate fund to the credit of the Cornell University, and shall pay all such sums of money immediately upon the receipt thereof by him, to the treasurer of the Cornell University, upon the warrant of the comptroller, issued upon the order of the trustees of the Cornell University in pursuance of said act of congress.

§ 1031. Trustees; election of trustees.—1. The board of trustees of said Cornell university shall hereafter be made up and constituted as follows: the governor, the lieutenant-governor, the speaker of the house of assembly, the commissioner of education, the president of the state agricultural society, the commissioner of agriculture, the librarian of the Cornell library and the president of the said university, shall be trustees thereof

ex-officio, and the eldest lineal male descendant of Ezra Cornell shall be a trustee thereof during his life. To fill the vacancies in the board existing among the elective trustees prior to this enactment, the governor shall appoint five trustees subject to confirmation by the senate, one of whom shall be appointed to serve for one year, one for two years, one for three years, one for four years, and one for five years, the term of office of each of whom shall commence at the beginning of the commencement week next succeeding his appointment. Prior to the expiration of the term of office of the trustee appointed for one year as above provided and annually thereafter, the governor shall appoint, subject to confirmation by the senate, one trustee for the term of five years, whose term of office shall begin at the expiration of the term of the retiring trustee. In the event of a vacancy occurring among the trustees appointed by the governor, by death or otherwise, the governor, subject to confirmation by the senate, as provided aforesaid, shall appoint a trustee to fill the vacancy for the unexpired term. There shall also be twenty-six elective trustees, fifteen of whom shall be elected by the board of trustees, and ten by the alumni of said university, and one each year by the executive committee of the New York state grange to be elected at the time of the annual meeting of said grange, such trustee so elected to be elected for a term of one year, his term of office to commence at the beginning of the first commencement week subsequent to his election; but at no time shall a majority of the board be of any one religious sect or of no religious sect.

2. The board of trustees shall elect each year three trustees, and as many more as may be necessary to fill vacancies, among members elected by them caused by resignation or death. The alumni of said university shall meet annually in Ithaca, on the day within the seven days before commencement, designated by the directors of the Associate Alumni of Cornell University at their regular preceding November meeting. In case the directors at such meeting fail to designate a day, the meeting shall be had upon the same day prior to commencement as that on which it was held in the preceding year. At the meeting of the alumni at each annual commencement said alumni shall elect two trustees, and as many more as may be necessary to fill vacancies arising from resignations or deaths among the number previously elected by them. Except as herein otherwise provided the term of office of each elective trustee shall be five years from the annual commencement at which he is elected; but if elected by the board of trustees at a meeting thereof during the academic year, his term shall then be five years from the commencement immediately preceding his election; but every trustee shall hold over until his successor is elected or appointed as above provided. *Subd. 2, amended by L. 1912, ch. 248, and L. 1913, ch. 423.*)

3. The election of trustees by the board shall be by ballot, and fifteen ballots shall concur before any one is elected; and twelve shall constitute a quorum for the transaction of business. Who shall be alumni of said

university shall be prescribed by its board of trustees. The election of trustees by the alumni shall be by ballot, and shall be conducted in the following manner and under the following provisions: A register of the signature and address of each of the said alumni of the said university shall be kept by the treasurer of the said university at his business office. Any ten or more alumni may file with the treasurer, on or before the first day of April in each year, written nominations of the trustees to be elected by the alumni at the next commencement. Forthwith after such first day of April a list of such candidates shall be mailed by said treasurer to each of the alumni at his address. Such list shall state the vacancies, if any, then existing in the alumni membership of the board of trustees; and the vacancies that will occur by expiration of term at the next ensuing commencement. Each alumnus may vote by transmitted ballot for trustees to be elected by the alumni at any commencement, in accordance with such regulations as to the method and time of voting as may be prescribed by the alumni and approved by the trustees of the university or its executive committee. The candidates to the extent of the number of places to be filled having the highest number of votes upon the first ballot shall be declared elected, provided that each of said candidates has received the votes of at least one-third of all the alumni voting at said election. Of the alumni trustees thus elected, the two receiving the highest number of votes shall fill the vacancies occurring by expiration of term; the others thus elected shall be allotted to fill vacancies, if any, existing otherwise than by expiration of term; the order of allotment to be in the order of the number of votes cast, the candidate receiving the highest number of votes to be allotted the longer unexpired term; but if there shall be a failure to fill all or one or more of the vacancies, caused by expiration of term or otherwise, by reason of the fact that one or more candidates having the highest number of votes as above fail to receive the votes of at least one-third of the alumni voting, then and in that event such vacancies shall be filled by the alumni personally present at said meeting, the election being limited to candidates not elected on the first ballot, if there is a sufficient number thereof, having the highest pluralities, not exceeding two candidates for each place thus to be filled. If any vacancy occur in the alumni membership of the board of trustees, between the last day fixed herein for the filing of nominations with the university treasurer, and the time of the annual meeting of the alumni, herein provided for, then such vacancy shall not be filled for the unexpired term until the next following year, and shall then be filled by nomination and election in the manner hereinbefore prescribed for the election of alumni trustees. (*Subd. 3, amended by L. 1912, ch. 248.*)

Source.—Education L. 1909, § 1121, revised from L. 1865, ch. 585, § 2, as amended by L. 1895, ch. 87; L. 1896, ch. 238; L. 1905, ch. 97; L. 1906, ch. 1.

§ 1032. **Extent of farm and grounds; special constables.**—The farm and grounds occupied by said corporation, whereupon its buildings are erected,

L. 1910, ch. 140.

Cornell University.

§§ 1033-1035.

or shall be erected in such manner and to such extent as the trustees may from time to time direct and provide for, shall consist of not less than two hundred acres. For the protection of the grounds, farm buildings and property of the university, the supervisor of the town of Ithaca may appoint, upon the recommendation of the board of trustees of said Cornell university, not more than three suitable persons, as special constables, who shall have and exercise within the boundaries of such university grounds, the powers and duties of constables of towns, and whose compensation shall be regulated and paid by said board of trustees of the university.

Source.—Education L. 1909, § 1122, revised from L. 1865, ch. 585, § 3, as amended by L. 1882, ch. 147.

§ 1033. **Objects and powers of the corporation.**—The leading object of said corporation shall be to teach such branches of learning as are related to agriculture and the mechanic arts, including military tactics, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. But such other branches of science and knowledge may be embraced in the plan of instruction and investigation pertaining to the university as the trustees may deem useful and proper. Said university is authorized to establish faculties, departments and branches and carry on its work at any places in this state and to confer any and all literary, scientific, technical and professional degrees, and in testimony thereof award certificates and diplomas. Persons of every religious denomination, or of no religious denomination, shall be equally eligible to all offices and appointments.

Source.—Education L. 1909, § 1123, revised from L. 1865, ch. 585, § 4, as amended by L. 1898, ch. 223.

Reference.—Payments to Cornell University on account of the college land script fund, State Finance Law, § 97.

§ 1034. **Extent to which property may be held.**—The said corporation may take and hold real and personal property to such an amount as may be or become necessary for the proper conduct and support of the several departments of education heretofore established or hereafter to be established by its board of trustees, and such property real and personal as has been, or may hereafter be given to said corporation by gift, grant, devise or bequest in trust or otherwise, for the use and purposes permitted by its charter, and in cases of trusts so created, the several trust estates shall be kept distinct, and the interest or income shall be faithfully applied to the purposes of such trust, in accordance with the provisions of the act or instrument by which the respective trusts were created.

Source.—Education L. 1909, § 1124, revised from L. 1865, ch. 585, § 5, as amended by L. 1882, ch. 147.

§ 1035. **Trustees shall make reports; university subject to visitation of regents.**—The trustees of said university shall make all the reports and perform such other acts as may be necessary to conform to the act of

§§ 1036, 1037.

Cornell University.

L. 1910, ch. 140.

congress entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts" approved July second, eighteen hundred and sixty-two. The said university shall be subject to visitation of the regents of the university of the state of New York.

Source.—Education L. 1909, § 1125, revised from L. 1865, ch. 585, § 7, as amended by L. 1867, ch. 763.

§ 1036. Restrictions on alienation of property.—The said university grounds, farm, work-shops, fixtures, machinery, apparatus, cabinets and library, shall not be incumbered, aliened or otherwise disposed of by the said trustees, or by any other person, except on terms such as the legislature of the state of New York shall have approved, and any act of the said trustees, or that of any other person which shall have that effect, shall be void.

Source.—Education L. 1909, § 1126, revised from L. 1865, ch. 585, § 8.

§ 1037. State scholarships in Cornell university.—The several departments of study in Cornell university shall be open to applicants for admission thereto at the lowest rates of expense consistent with its welfare and efficiency, and without distinction as to rank, class, previous occupation or locality. But, with a view to equalize its advantages to all parts of the state, the institution shall receive students to the number of one each year from each assembly district in this state, to be selected as hereinafter provided, and shall give them instruction in any or in all the prescribed branches of study in any department of said institution, free of any tuition fee or of any incidental charges to be paid to said university, unless such incidental charges shall have been made to compensate for materials consumed by said students or for damages needlessly or purposely done by them to the property of said university. The said free instruction shall, moreover, be accorded to said students in consideration of their superior ability, and as a reward for superior scholarship in the academies and public schools of this state. Said students shall be selected as the legislature may from time to time direct, and until otherwise ordered as follows:

1. A competitive examination, under the direction of the education department, shall be held at the county court-house in each county of the state, upon the first Saturday in June, in each year, by the city superintendents and the school commissioners of the county.

2. None but pupils of at least sixteen years of age and of six months' standing in the common schools or academies of the state, during the year immediately preceding the examination, shall be eligible.

3. Such examination shall be upon subjects designated by the president of the university and upon question papers prepared under the direction of the commissioner of education.

4. The city superintendents and school commissioners of each county

shall immediately after the close of the examination forward to the commissioner of education all answer papers submitted by candidates in such examination, all statements of candidates and a report of the names of candidates in such form as the commissioner of education shall require.

5. In case any candidate who may become entitled to a scholarship shall fail to claim the same, or shall fail to pass the entrance examination at such university, or shall die, resign, absent himself without leave, be expelled or, for any other reason, shall abandon his right to or vacate such scholarship either before or after entering thereupon, then the candidate certified to be next entitled in the same county shall become entitled to the same. In case any scholarship belonging to any county shall not be claimed by any candidate resident in that county, the commissioner of education may fill the same by appointing thereto some candidate first entitled to a vacancy in some other county. In any such case, the president of the university shall at once notify the commissioner of education and that officer shall immediately notify the candidate next entitled to the vacant scholarship of his right to the same.

6. Any state student who shall make it appear to the satisfaction of the president of the university that he requires leave of absence, for the purpose of earning funds with which to defray his living expenses * which in attendance, may, in the discretion of the president, be granted such leave of absence, and may be allowed a period not exceeding six years from the commencement thereof for the completion of his course at said university.

7. In certifying the qualifications of the candidates, preference shall be given, where other qualifications are equal, to the children of those who have died in the military or naval service of the United States.

8. Notices of the time and place of the examinations shall be given in all the schools having pupils eligible thereto, prior to the first day of January in each year, and shall be published once a week, for three weeks, in at least two newspapers in each county immediately prior to the holding of such examinations. The cost of publishing such notices and the necessary expenses of such examination shall be a charge upon each county, respectively, and shall be audited and paid by the board of supervisors thereof.

9. The commissioner of education shall attend to the giving and publishing of the notices hereinbefore provided for. He may, in his discretion, direct that the examination in any county may be held at some other time and place than that above specified, in which case it shall be held as directed by him. He shall keep full records in his department of all candidates attending such examinations and shall notify candidates of their rights under this chapter. He shall determine any controversies which may arise under the provisions of this chapter. He is hereby charged with the general supervision and direction of all matters in connection with the filling of such scholarships. Students enjoying the privileges of free

* So in original.

scholarships shall, in common with the other students of said university, be subject to all the examinations, rules and requirements of the board of trustees or faculty of said university, except as herein provided.

Source.—Education L. 1909, § 1127, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 12, § 1; originally revised from L. 1865, ch. 585.

§ 1038. **New York state veterinary college.**—1. The state veterinary college, established by chapter one hundred and fifty-three of the laws of eighteen hundred and ninety-four, shall continue to be known as the New York state veterinary college. The object of said veterinary college shall be: To conduct investigations as to the nature, prevention and cure of all diseases of animals, including such as are communicable to man and such as cause epizootics among live stock; to investigate the economical questions which will contribute to the more profitable breeding, rearing and utilization of animals; to produce reliable standard preparations of toxins, antitoxins and other products to be used in the diagnosis, prevention and cure of diseases and in the conducting of sanitary work by approved modern methods; and to give instruction in the normal structure and function of the animal body, in the pathology, prevention and treatment of animal diseases, and in all matters pertaining to sanitary science as applied to live stock and correlatively to the human family.

2. All buildings, furniture, apparatus and other property heretofore or hereafter erected or furnished by the state for such veterinary college shall be and remain the property of the state. The Cornell university shall have the custody and control of said property, and shall, with whatever state moneys may be received for the purpose, administer the said veterinary college, with authority to appoint investigators, teachers and other officers, to lay out lines of investigation, to prescribe the requirements for admission and the course of study and with such other power and authority as may be necessary and proper for the due administration of such veterinary college.

3. Said university shall receive no income, profit or compensation therefor, but all moneys received from state appropriations for the said veterinary college or derived from other sources in the course of the administration thereof, shall be kept by said university in a separate fund from the moneys of the university, and shall be used exclusively for said New York state veterinary college. Such moneys as may be appropriated to be paid to the Cornell university by the state in any year, to be expended by said university in the administration of said veterinary college, shall be payable to the treasurer of Cornell university in three equal payments to be made on the first day of October, the first day of January, and the first day of April in such year, and within thirty days after the expiration of the period for which each instalment is received the said university shall furnish the comptroller of the state of New York satisfactory vouchers for the expenditure of such instalment.

4. The said university shall expend such moneys and use such property

of the state in administering said veterinary college, and shall report to the governor during the month of January in each year, a detailed statement of such expenditures and of the general operations of the said veterinary college.

5. No tuition fee shall be required of a student pursuing the regular veterinary course, who for a year or more immediately preceding his admission to said veterinary college shall have been a resident of this state. The tuition fees charged to other students and all other fees and charges in said veterinary college shall be fixed by Cornell university, and the moneys so received shall be expended for the current expenses of the said veterinary college.

Source.—Education L. 1909, § 1128, revised from L. 1897, ch. 689, § 1.

Veterinary College established by L. 1894, ch. 153. Buildings and equipment are property of state.

§ 1039. **New York state college of agriculture.**—The state college of agriculture, established by chapter six hundred and fifty-five of the laws of nineteen hundred and four, shall continue to be known as the New York state college of agriculture at Cornell university. The object of said college of agriculture shall be to improve the agricultural methods of the state, to develop the agricultural resources of the state in the production of crops of all kinds, in the rearing and breeding of live-stock, in the manufacture of dairy and other products, in determining better methods of handling and marketing such products, and in other ways; and to increase intelligence and elevate the standards of living in the rural districts. For the attainment of these objects the college is authorized to give instruction in the sciences, arts and practices relating thereto, in such courses and in such manner as shall best serve the interests of the state; to conduct extension work in disseminating agricultural knowledge throughout the state by means of experiments and demonstrations on farms and gardens, investigations of the economic and social status of agriculture, lectures, publication of bulletins and reports, and in such other ways as may be deemed advisable in the furtherance of the aforesaid objects; to make researches in the physical, chemical, biological and other problems of agriculture, the application of such investigations to the agriculture of New York, and the publication of the results thereof. All buildings, furniture, apparatus and other property heretofore or hereafter erected or furnished by the state for such college of agriculture shall be and remain the property of the state. The Cornell university shall have the custody and control of said property, and shall, with whatever state moneys may be received for the purpose, administer the said college of agriculture, with authority to appoint investigators, teachers and other officers and employees, to lay out lines of investigation, to prescribe the requirements for admission and the course of study and with such other power and authority as may be necessary and proper for the due administration of such college of agriculture. Said university shall receive no income, profit or compensation

therefor, but all moneys received from state appropriations for the said college of agriculture or derived from other sources in the course of the administration thereof, shall be credited by said university to a separate fund, and shall be used exclusively for said New York state college of agriculture. Such moneys as may be appropriated to be paid to the Cornell university by the state in any year, to be expended by said university in the administration of said college of agriculture, shall be payable to the treasurer of Cornell university in three equal payments to be made on the first day of October, the first day of January, and the first day of April in such year, and within sixty days after the expiration of the period for which each instalment is received the said university shall furnish the comptroller vouchers approved by the commissioner of agriculture for the expenditures of such instalment. The said university shall expend such moneys and use such property of the state in administering said college of agriculture as above provided, and shall report to the commissioner of agriculture in each year on or before the first day of December, a detailed statement of such expenditures and of the general operations of the said college of agriculture for the year ending the thirtieth day of September then next preceding. Fees and charges in said college of agriculture shall be fixed by Cornell university, and the moneys received from these sources and from the sales of products shall be credited to a separate fund and shall be used for the current expenses of the said college of agriculture.

Source.—Education L. 1909, § 1129, revised from L. 1906, ch. 218, § 1.

ARTICLE XL-A.

(Art. 40-A, added by L. 1917, ch. 207, in effect April 19, 1917.)

AGRICULTURAL SCHOOLS.

Section 1040. Courses of study; instruction.

1041. Recommendations as to appropriations; expenditures.

§ 1040. Courses of study; instruction.—The instruction of pupils attending the schools of agriculture established under the provisions of articles forty-one, forty-one-a, forty-two, forty-two-a, forty-three and forty-five-a of this chapter shall be under the general supervision of the commissioner of education. The commissioner of education is hereby authorized to approve the courses of study to be followed in such schools of agriculture and in the extension work carried on by such schools, including the training of teachers of agriculture. Such directions shall be given by the commissioner to the board of directors or trustees, as the case may be, of each agricultural school, and such board of directors or trustees shall, upon receiving such directions as to such courses of study, cause the same to be followed and the subjects therein prescribed to be taught in such schools. (Added by L. 1917, ch. 207, in effect April 19, 1917.)

L. 1910, ch. 140. School of agriculture; St. Lawrence University §§ 1050-1052.

§ 1041. **Recommendations as to appropriations; expenditures.**—The commissioner of education shall recommend annually to the legislature the amount of appropriations approved by him as necessary for the maintenance of such agricultural schools and for carrying into effect the purposes for which they were established. The amounts appropriated for the support and maintenance of such schools shall be paid out by the state treasurer upon the warrant and audit of the comptroller and upon vouchers approved by the commissioner of education. The provisions of this article shall not apply to the New York State College of Agriculture at Cornell University. (*Added by L. 1917, ch. 207, in effect April 19, 1917.*)

ARTICLE XLI.

STATE SCHOOL OF AGRICULTURE AT SAINT LAWRENCE UNIVERSITY.

Section 1050. Corporate name.

1051. Objects and purposes of school.

1052. Supervision and control of school.

1053. Maintenance.

§ 1050. **Corporate name.**—The school of agriculture established by chapter six hundred and eighty-two of the laws of nineteen hundred and six shall continue to be known as the New York state school of agriculture of The St. Lawrence university. (*Amended by L. 1910, ch. 443.*)

Source.—Education L. 1909, § 1140.

§ 1051. **Objects and purposes of school.**—Such school shall have for its objects and purposes:

1. The elementary and practical instruction of pupils attending such school in agriculture and allied subjects.

2. The giving of instruction by means of schools, lectures and other university extension methods for the promotion of agricultural knowledge.

3. The conducting of investigations and experiments for the purpose of ascertaining the best method of fertilization of fields, gardens and plantations and the best modes of tillage and farm management and improvement of live-stock.

4. The printing of leaflets and the dissemination of agricultural knowledge by means of lectures and otherwise; the printing and free distribution of the results of such investigations and experiments, and the publication of bulletins containing such information as may be deemed desirable and profitable in promoting the agricultural interests of the state, such work to be conducted as far as practicable in harmony with the college of agriculture at Cornell university.

Source.—Education L. 1909, § 1141, revised from L. 1906, ch. 682, § 2, as amended by L. 1908, ch. 202.

§ 1052. **Supervision and control of school.**—The board of trustees of

§ 1053. School of agriculture; St. Lawrence University L. 1910, ch. 140.

The St. Lawrence university shall have the general care, supervision and control of such school, and of all its affairs, and to carry out its objects and purposes shall:

1. Employ and at pleasure remove officers, teachers, clerks, assistants, and such other persons at it shall deem necessary to the proper conduct of said school; and fix their compensation.

2. Adopt rules not inconsistent with law controlling the affairs of such school.

3. Prescribe the courses of instruction and the methods of investigation and experiments to be followed in such school.

4. Acquire by deed, gift, devise, or lease, real property suitable for practical and experimental agriculture, horticulture and forestry, and manage the same for the benefit of said school, devoting any income that may be derived therefrom to the maintenance thereof, provided, however, that no land shall be purchased with funds furnished by the state, unless a special appropriation is made therefor. (*Amended by L. 1910, ch. 443.*)

Source.—Education L. 1909, § 1142, revised from L. 1906, ch. 682, § 4.

§ 1053. Maintenance.—1. Prior to the first day of July in each year the treasurer of the Saint Lawrence University shall file with the comptroller his bond, with an incorporated surety company authorized to do business in the state of New York as surety, in a penalty equal to one-fourth of the amount appropriated by the legislature for the maintenance of said agricultural school for the succeeding year, conditioned that he will faithfully account for all moneys received by him during the next state fiscal year. After the filing of said bond, the comptroller shall pay over to the said treasurer on the first days of each of the months of July, October, January, and April next succeeding, one-fourth part of said appropriation.

2. All bills for the maintenance of said school shall be examined and audited by the executive committee of said board of trustees; and when so audited and properly certified by the president and secretary of said board, and the audit approved by the commissioner of education, the amount thereof shall be credited by the comptroller against the funds theretofore advanced to said treasurer as above provided. (*Added by L. 1910, ch. 443, and amended by L. 1917, ch. 207, in effect April 19, 1917.*)

ARTICLE XLI-A.

(Added by L. 1913, ch. 675.)

STATE SCHOOL OF AGRICULTURE AND DOMESTIC SCIENCE AT DELHI

Section 1055. Establishment of school.

1056. Management and control.

1057. Powers and duties of board of control.

1058. Objects and purposes of school.

L. 1910, ch. 140.

School of agriculture; Delhi.

§§ 1055-1058.

1059. Tuition and fees.

1060. Reports.

§ 1055. **Establishment of school.**—There is hereby established an agricultural and domestic science school, to be located at Delhi, Delaware county, and which shall be designated as the State School of Agriculture and Domestic Science at Delhi. (*Added by L. 1913, ch. 675.*)

§ 1056. **Management and control.**—The care, management and control of said school, property and premises shall be exercised by a board of control, composed of seven trustees. The state commissioner of agriculture and the director of the New York State Agricultural School at Cornell University shall, *ex officio*, be members of such board. The other five trustees shall be appointed by the governor by and with the consent of the senate. At least two of such trustees shall be residents of the county of Delaware and one of such trustees shall be a person recommended by the state grange, if such recommendation be made. Two of such appointed trustees shall be appointed for a term of two years each and three for a term of four years each. Upon the expiration of the terms of office of such appointed trustees their successors shall be appointed for a term of four years each. Such trustees shall serve for the terms for which they are respectively appointed and until their successors have been appointed and qualified. In case of any vacancy in the office of any trustee his successor shall be appointed for the unexpired term for which he was appointed. Such trustees shall serve without compensation. (*Added by L. 1913, ch. 675.*)

§ 1057. **Powers and duties of board of control.**—The board of control so appointed by the governor shall have the general care, supervision and control of such school and its management and all of its property and affairs, and, to carry out its objects and purposes, shall:

1. Employ and remove teachers, experts, chemists and all necessary clerks, employees and assistants.
2. Adopt rules not inconsistent with the law controlling the affairs of such school.
3. Adopt rules not inconsistent with the law for their own government.
4. Prescribe the course of instruction and the methods of investigation and experiments to be followed in such school. (*Added by L. 1913, ch. 675.*)

§ 1058. **Objects and purposes of school.**—The said school shall have for its objects and purposes:

1. The practical instruction of pupils attending such school in agriculture and allied subjects.
2. The practical instruction of pupils attending such school in domestic science and allied subjects.
3. The giving of an elementary and preparatory course of instruction

§§ 1059, 1060, 1070, 1071. School of agriculture; Alfred University. L. 1910, ch. 140.

in agriculture and agricultural science in preparation for the advanced courses in the State School of Agriculture at Cornell University, and also the giving of a more advanced course of practical instruction for the carrying on of agricultural pursuits to such as do not desire to take a course at said university.

4. The conducting of investigations and experiments in southeastern New York for the purpose of ascertaining the best methods of fertilizing fields, gardens and farms, the best methods of tillage and farm management, the best methods of caring for and improving live stock, the best methods of raising the standard of milk production, and for the purpose of stimulating agricultural pursuits and dairying interests and increasing knowledge by which such industries may be successfully carried on. (*Added by L. 1913, ch. 675.*)

§ 1059. Tuition and fees.—Students who have been bona fide residents of the state of New York for one year preceding the date of their admission to said school shall be entitled to free tuition. Other fees, if any, in the said school, and any moneys received for tuition from students not residents of the state of New York, or from the sale of products, or from any other source, shall be reported and forwarded monthly to the state treasurer as required by the state finance law, and may be reappropriated toward the maintenance of said school. (*Added by L. 1913, ch. 675.*)

§ 1060. Reports.—The board of control shall report to the commissioner of education annually, on or before the first day of December, a detailed statement of all expenditures and of the general operations of the said school for the year ending the thirtieth day of June then next preceding; and a copy of such report shall be transmitted to the legislature. (*Added by L. 1913, ch. 675, and amended by L. 1916, ch. 118, and L. 1917, ch. 207, in effect April 19, 1917.*)

L. 1913, ch. 675, §§ 2 and 3 appropriated \$50,000 for the acquisition of a site and the erection of buildings.

ARTICLE XLII.

STATE SCHOOL OF AGRICULTURE AT ALFRED UNIVERSITY.

Section 1070. Corporate name.

1071. Objects and purposes of school.

1072. Supervision and maintenance of school.

§ 1070. Corporate name.—The school of agriculture established by chapter two hundred of the laws of nineteen hundred and eight shall continue to be known as the New York state school of agriculture at Alfred university.

Source.—Education L. 1909, § 1160.

§ 1071. Objects and purposes of school.—The objects of the New York

L. 1910, ch. 140.

School of agriculture; Alfred University.

§ 1072.

state school of agriculture at Alfred university shall be to give elementary and practical instruction in agriculture and kindred subjects; to conduct, for the improvement of such instruction, investigations and experiments in agricultural methods and resources in western New York, and in means and methods for the care and improvement of live stock; to stimulate agricultural pursuits, and to increase knowledge by which such industry may be successfully carried on; such work shall be co-ordinated so far as practicable with that at the New York state college of agriculture at Cornell university; and furnish both a practical training for the pursuit of agriculture, and complemental training, preliminary to advanced courses in said state college of agriculture at Cornell university.

Source.—Education L. 1909, § 1161, revised from L. 1908, ch. 200, § 3.

§ 1072. **Supervision and maintenance of school.**—Alfred University shall have the custody and control of the property of said New York State School of Agriculture, and shall, with whatever moneys may be received for the purpose, administer the said school of agriculture with authority to appoint teachers, investigators, and other officers and employees, to prescribe the requirements for admission, and the courses of study to be pursued, and with such other power and authority as will secure necessary and adequate administration of such school. And in order to secure unity and harmony in education in agriculture in the state of New York, the state commissioner of agriculture, the commissioner of education, the director of the New York State College of Agriculture at Cornell University, and a person to be annually elected or appointed by the state grange, shall be ex officio members of the board of managers to be appointed annually by the trustees of Alfred University, to have immediate management of the said state school of agriculture. Alfred University shall receive no income, profit or compensation therefor, but all moneys received from appropriations for the said school of agriculture shall be credited by said university to a separate fund, and shall be used exclusively for said New York State School of Agriculture. Such moneys as may be appropriated by the state to Alfred University, for said state school of agriculture, shall be payable to the treasurer of Alfred University upon vouchers furnished to the comptroller. The said university shall expend such moneys and use such property of the state in administering said school of agriculture as above provided, and shall report to the commissioner of education annually, on or before the first day of December, a detailed statement of such expenditures and of the general operations of the said school of agriculture for the year ending the thirtieth day of June, then next preceding; and a copy of such report shall be transmitted to the legislature. Students bona fide residents of the state of New York for one year preceding the date of their admission shall be entitled to free tuition. Other fees and charges if any in the said school of agriculture, and any moneys received from tuitions paid by students not residents of

§§ 1075-1077.

School of agriculture; Cobleskill.

L. 1910, ch. 140.

the state of New York, and from the sales of products shall be reported and forwarded monthly to the state treasurer as required by the state finance law, and may be reappropriated toward the maintenance of said school of agriculture. (*Amended by L. 1917, ch. 207, in effect April 19, 1917.*)

Source.—Education L. 1909, § 1162, revised from L. 1908, ch. 200, § 3.

ARTICLE XLII-A.

(Added by L. 1911, ch. 852.)

STATE SCHOOL OF AGRICULTURE AT COBLESKILL.

Section 1075. Establishment and corporate name.

1076. Objects and purposes of school.

1077. Management and control of school.

1078. Powers and duties of board of trustees.

§ 1075. **Establishment and corporate name.**—There is hereby established in the town of Cobleskill, Schoharie county, a school of agriculture to be known as the Schoharie State School of Agriculture. (*Added by L. 1911, ch. 852.*)

§ 1076. **Objects and purposes of school.**—Such school shall have for its objects and purposes:

1. The instruction of pupils attending such school in agriculture, mechanic arts and home making.

2. The giving of instruction throughout the state by means of schools, lectures and other university extension methods for the promotion of agricultural knowledge.

3. The conducting of investigations and experiments for the purpose of ascertaining the best methods of fertilization of fields, gardens and plantations and the best modes of tillage, farm management and improvement of live stock.

4. The printing of leaflets and the dissemination of agricultural knowledge by means of lectures and otherwise; printing and free distribution of the results of such investigations and experiments, and the publication of bulletins containing such information as may be deemed desirable and profitable in promoting the agricultural interests of the state. (*Added by L. 1911, ch. 852.*)

§ 1077. **Management and control of school.**—The care, management and control of the school, property and premises shall be exercised by a board of seven trustees of which the commissioner of education and the commissioner of agriculture shall be ex officio members, with the same powers and duties as other members thereof. The other five trustees shall be appointed by the governor. At least three of the trustees so appointed shall be residents of the county of Schoharie and one of them shall be

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School of agriculture; Morrisville.

§§ 1078, 1090.

a resident of the town of Cobleskill. Trustees first appointed hereunder shall be appointed for such terms that the term of one trustee shall expire each year and their terms shall be designated by the governor in their certificates of appointment. A successor to any such trustees shall be appointed for a full term of five years. A vacancy in the office of trustee shall be filled for the remainder of the unexpired term. Such trustees shall serve without compensation. (*Added by L. 1911, ch. 852.*)

§ 1078. **Powers and duties of board of trustees.**—The board of trustees of such school shall have the general care, supervision and control of such school and of its affairs, and to carry out its objects and purposes shall:

1. Employ and at pleasure remove teachers, experts, chemists and all necessary clerks and assistants;
2. Adopt rules not inconsistent with law controlling the affairs of such school and regulating the meetings and organization of such board;
3. Prescribe the course of instruction and the methods of investigation and experiments to be followed in such school.

The board of trustees shall report to the commissioner of education annually, on or before the first day of December, a detailed statement of such expenditures and of the general operations of the said school of agriculture for the year ending the thirtieth day of June then next preceding, and a copy of such report shall be transmitted to the legislature. Students, bona fide residents of the state of New York for one year preceding the date of their admission, shall be entitled to free tuition. Other fees and charges, if any, in the said school of agriculture, and any moneys received from tuition paid by students not residents of the state of New York, and from the sale of products, shall be reported and forwarded monthly to the state treasurer as required by the state finance law. (*Added by L. 1911, ch. 852, and amended by L. 1916, ch. 118, § 34, and L. 1917, ch. 207, in effect April 19, 1917.*)

L. 1911, ch. 852, §§ 2, 3 provided for the appointment of trustees and authorized the acquisition of lands and the erection of buildings thereon, appropriating \$50,000 therefor.

ARTICLE XLIII.

STATE SCHOOL OF AGRICULTURE AT MORRISVILLE.

Section 1090. **Corporate name.**

1091. **Objects and purposes of school.**

1092. **Management and control of school.**

1093. **Powers and duties of board of trustees.**

1094. **Power to acquire real estate; proceedings therefor.**

§ 1090. **Corporate name.**—The school of agriculture established by chapter two hundred one of the laws of nineteen hundred and eight shall continue to be known as the New York state school of agriculture at Morrisville.

§§ 1091-1093.

School of agriculture; Morrisville.

L. 1910, ch. 140.

Source.—Education L. 1909, § 1180, revised from L. 1908, ch. 201, § 1.

References.—See also L. 1908, ch. 201, §§ 1, 5, 6, as amended by L. 1909, ch. 108, relating to the State School of Agriculture at Morrisville, and not repealed by the Education Law.

§ 1091. Objects and purposes of school.—Such school shall have for its objects and purposes:

1. The elementary and practical instruction of pupils attending such school in agriculture and all allied subjects, including domestic science.

2. The giving of instruction in agriculture and agricultural science preparatory to the more advanced courses in the state college of agriculture at Cornell to which end the work shall be conformed as far as practicable with that of the last named institution and also the giving of elementary and practical instruction for the carrying on of agricultural pursuits to such as do not desire the more advanced course.

3. The conducting of investigations and experiments in central New York for the purpose of ascertaining the best methods of fertilizing fields, gardens and plantations and the best modes of tillage and farm management and the care and improvement of live stock.

Source.—Education L. 1909, § 1181, revised from L. 1908, ch. 201, § 2.

§ 1092. Management and control of school.—The care, management and control of said school, property and premises shall be exercised by a board of eight trustees. The state commissioner of agriculture, the commissioner of education and the director of the New York State College of Agriculture at Cornell University, shall, ex officio, be members of the board of trustees. The other five trustees shall be appointed by the governor by and with the consent of the senate. At least two of such trustees shall be residents of the county of Madison. One of such trustees shall be a person recommended by the state grange, if such recommendation be made. Two of such appointed trustees shall be appointed for a term of two years each and three for a term of four years each. Upon the expiration of the terms of office of such appointed trustees their successors shall be appointed for a term of four years each. Such trustees shall serve for the terms for which they are respectively appointed and until their successors have been appointed and qualified. In case of any vacancy in the office of any trustees his successor shall be appointed for the unexpired term for which he was appointed. Such trustees shall serve without compensation as such, except that there shall be allowed to said board for clerical and other assistance that may be required in the discharge of their duties, a sum not to exceed fifteen hundred dollars per annum, which may be paid in whole or in part to one of the appointed members of said board, to act as secretary and clerk of said board until said school shall be organized. (*Amended by L. 1917, ch. 207, in effect April 19, 1917.*)

Source.—Education L. 1909, § 1182, revised from L. 1908, ch. 201, § 3.

§ 1093. Powers and duties of board of trustees.—The board of trustees

L. 1910, ch. 140.

School of agriculture; Morrisville.

§ 1094.

so appointed by the governor shall have the general care, supervision and control of such school and all its affairs and to carry out its objects and purposes:

1. Employ and remove teachers, experts, chemists and all necessary clerks and assistants.

2. Adopt rules not inconsistent with the law controlling the affairs of such school, including provisions for the bonding of officers and employees.

3. Prescribe the course of instruction and the methods of investigation and experiments to be followed in such school.

The board of trustees shall report to the commissioner of education annually, on or before the first day of December, a detailed statement of such expenditures and of the general operations of the said school of agriculture for the year ending the thirtieth day of June then next preceding, and a copy of such report shall be transmitted to the legislature. Students bona fide residents of the state of New York for one year preceding the date of their admission shall be entitled to free tuition. Other fees and charges, if any, in the said school of agriculture, and any moneys received from tuition paid by students not residents of the state of New York, and from the sale of products, shall be reported and forwarded monthly to the state treasurer as required by the state finance law. (*Amended by L. 1916, ch. 118, § 35, and L. 1917, ch. 207, in effect April 19, 1917.*)

Source.—Education L. 1909, § 1183, revised from L. 1908, ch. 201, §§ 4–7.

§ 1094. **Power to acquire real estate; proceedings therefor.**—The trustees of said New York State School of Agriculture at Morrisville are hereby authorized to enter upon, take possession of and use the lands and premises known as the "Field" property, in the village of Morrisville, in the county of Madison, being a lot measuring about thirty feet by ninety-four feet, adjoining the grounds of such school and lying to the east of the buildings of such school heretofore acquired by the state from the county of Madison. An accurate survey and map of all such lands shall be made and said trustees shall annex thereto their certificate that the lands therein described have been appropriated for the use of said school. Such map, survey and certificate shall be filed in the office of the county clerk of the county of Madison. The said trustees shall thereupon cause to be served upon the reputed owner or owners of any real property so appropriated, and upon the actual occupant or occupants thereof, if any, a notice of the filing and of the date of filing of such map, survey and certificate in the office of the county clerk, which notice shall also specifically describe the portion of such real property belonging to the owner or owners which has been so appropriated, if less than the entire estate therein is to be taken. The trustees may, and if the owner or owners of such property or any of them shall be non-residents of the state, or unknown, or if the notice cannot for any

§ 1095. Retirement fund for teachers; state institutions. L. 1910, ch. 140.

reason be personally served upon the owners or all owners within the state, the trustees shall serve the same by publication thereof, once in each week for four consecutive weeks in any newspaper published in the county of Madison. From the time the service of such notice is complete, the entry upon and the appropriation by the State School of Agriculture at Morrisville of the real property therein described for the uses and purposes of said school shall be deemed complete, and such notice, when personally served or published, or both, in substantial compliance with the provisions of this section, shall be conclusive evidence of such entry and appropriation and of the quantity and boundaries of the lands appropriated. The trustees of the school shall cause a duplicate copy of such notice, with an affidavit of due service or publication thereof, or both, as the case may be, to be recorded in the books used for recording deeds in the office of the county clerk of Madison county, and the record of such notice and such proofs of service or publication shall be prima facie evidence of the due service or publication thereof. The failure or neglect to serve personally on any person shall not impair or affect the entry upon or appropriation of such property, if the notice be published. The court of claims shall have jurisdiction to determine the amount of compensation for lands, structures and water so appropriated. (*Added by L. 1912, ch. 27.*)

ARTICLE XLIII-A.

RETIREMENT FUND FOR TEACHERS IN STATE INSTITUTIONS.

(Added by L. 1910, ch. 441.)

- Section 1095. Retirement of certain teachers in state institutions and institutions receiving state pupils.
1096. Certificate of retirement upon application.
1097. Retirement upon recommendation of governing body of institution where teacher is employed.
1098. Amount to be paid to such retired teacher.
1099. Time and manner of payments.
- 1099-a. Employment of teachers who have retired.

§ 1095. Retirement of certain teachers in state institutions and institutions receiving state pupils.—Every teacher in a state institution and in an institution for the instruction of the deaf and dumb and the blind, receiving state pupils whose instruction and support are paid for by the state, who, for a period of ten years immediately preceding, has been employed as a teacher in any college, school, institution or teachers' institutes maintained and supported by the state, or in any such institution for the instruction of the deaf and dumb and the blind and who shall have been engaged in teaching in some college, university, school, academy, institution, teachers' institutes or in the public schools of this state or elsewhere during a period aggregating thirty years must, at his request, or may, on

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the order of the commissioner of education, be retired from such employment. (*Added by L. 1910, ch. 441, and amended by L. 1912, ch. 293, and L. 1915, ch. 614.*)

§ 1096. Certificate of retirement upon application.—Every such person desiring to be retired under the provisions of section ten hundred and ninety-five of this chapter shall present to and file with the commissioner of education an affidavit signed by himself, or, in case he is mentally or physically incapable of making such affidavit, the affidavit of some person or persons acquainted with the facts, setting forth the number of years of such employment, the place or places where employed, the salary received by the applicant at the last place of employment, and upon the filing of said affidavits, the commissioner of education, if he shall be satisfied of the truth of the affidavit, shall issue to such applicant a certificate that such applicant has been retired from active service as a teacher. (*Added by L. 1910, ch. 441.*)

§ 1097. Retirement upon recommendation of governing body of institution where teacher is employed.—Upon the recommendation of a majority of the members of the board or governing body having in charge any such college, school or institution, that a member of the teaching force be retired on account of mental or physical incapacity for the performance of duty, the commissioner of education may retire such person and issue to such person the certificate set forth in section ten hundred and ninety-six of this chapter, provided such person has been employed for ten years as a teacher in any college, school or institution maintained and supported by the state, or in any such institution for the instruction of the deaf and dumb and the blind and has been engaged in teaching in some college, university, school, academy or institution or in the public schools of this state or elsewhere during a period aggregating twenty years. (*Added by L. 1910, ch. 441, and amended by L. 1912, ch. 293, and L. 1915, ch. 614.*)

§ 1098. Amount to be paid to such retired teacher.—Every person who shall be retired under the provisions of this article shall be entitled to receive from the state one-half the salary which such person was receiving at the date of such retirement, not to exceed, however, one thousand dollars per annum. In no case shall the payment to any person retired hereunder, be less than the sum of three hundred dollars. (*Added by L. 1910, ch. 441, and amended by L. 1912, ch. 293.*)

§ 1099. Time and manner of payments.—The payment of the amounts provided in this article to be paid shall be made by the state treasurer on the warrant of the comptroller on the audit of the commissioner of education. Payments shall be made quarterly commencing with the first quarter after the date of issue of the certificate of such retirement. The commissioner of education shall make and enforce such rules and regulations, not inconsistent with the provisions of this article, as he shall

§ 1099-a. Retirement fund for teachers; state institutions. L. 1910, ch. 140.

deem necessary for properly safeguarding all payments thereunder, including vouchers to be signed by the person to whom such payment is made. (*Added by L. 1910, ch. 441.*)

§ 1099-a. **Employment of teachers who have retired.**—Any person who shall have heretofore been or shall hereafter be employed for a period of ten years by the state of New York, as an instructor in any college, school, institute or other educational institution, maintained and supported by the state and who shall have, prior to the expiration of said period of ten years, been employed as an instructor in some college, university, school, academy or other educational institution, in this state or elsewhere for the term of thirty years in the aggregate, and who shall have honorably retired from the service of the state prior to June eighth, nineteen hundred and ten, and who shall have attained the age of seventy years, if a man, and sixty years, if a woman, shall be entitled, upon application to the commissioner of education, to appointment as a substitute in the position which such person shall have last held in the service of the state which position as substitute such person shall thereafter hold for the term of his or her life. The said commissioner of education may hereafter assign any such person to suitable work for the state in any educational institution maintained by the state and no such person shall receive any compensation for any such work so performed other than as hereinafter specified.

Each person so appointed shall be entitled to receive from the state compensation as follows: For the time such person shall be actively so employed two-thirds the salary which such person was receiving from the state in the position wherein such person was employed by the state at the time of his or her retirement from such service; for such time as such person shall not be actively so employed pursuant to such assignment by the commissioner of education, one-half such previous salary; provided, however, that when not so employed actively, no such persons shall receive compensation at a greater rate than one thousand dollars per annum nor at a lesser rate than three hundred dollars per annum. (*Added by L. 1913, ch. 631.*)

ARTICLE XLIII-B.

(*Added by L. 1911, ch. 449.*)

STATE TEACHERS' RETIREMENT FUND FOR PUBLIC SCHOOL TEACHERS.

Section 1100. Definitions.

- 1101. Establishment of state teachers' retirement fund.
- 1102. State teachers' retirement fund board.
- 1103. Vacancies; resignations; removal from office.
- 1104. Officers of board; salaries and expenses; meetings.
- 1105. State treasurer ex-officio treasurer of fund; investments.
- 1106. Powers of board.
- 1107. Rules of board.

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1108. Contributions to fund; deductions from salaries.

1108-a. Method of payment into state treasury.

1109. Retirement of teachers.

1109-a. Payment of annuities.

1109-b. Application of article to certain counties, cities and districts; voluntary contributions.

1109-c. Service as school commissioner to be counted.

§ 1100. **Definitions.**—The word “teacher” as used in this article includes teachers and principals employed in public schools of the cities and school districts of the state and in schools on the Indian reservations, and shall also include superintendents employed as provided by law in cities and union free school districts having a population of five thousand or more, and district superintendents of schools appointed as provided by law in the supervisory districts of the several counties of the state. Services as such district superintendents or as school commissioners shall be deemed to be teaching in the public schools within the meaning of this article. The words “retirement fund” as used in this article shall mean the New York state teachers’ retirement fund for public school teachers as established by this article. The term “school commissioner” as used in any section of this article shall be deemed to mean the district superintendent of schools. (*Added by L. 1911, ch. 449, and amended by L. 1913, ch. 511.*)

§ 1101. **Establishment of state teachers’ retirement fund.**—There is hereby established the New York state teachers’ retirement fund for public school teachers which shall consist of:

1. All contributions made by teachers, school districts and cities, as hereinafter provided.

2. The income or interest derived from the investment of the moneys contained in such fund.

3. All donations, legacies, gifts and bequests which shall be made to such fund, and all moneys which shall be obtained from other sources for the increase of such fund.

4. Appropriations made by the state legislature from time to time to carry into effect the purposes of such fund, and which appropriations when made shall be paid into such fund and may be expended in the same manner as other moneys belonging thereto. (*Added by L. 1911, ch. 449, and amended by L. 1914, ch. 44.*)

§ 1102. **State teachers’ retirement fund board.**—The state teachers’ retirement fund board shall consist of five members to be appointed by the commissioner of education as hereinafter provided. One of such members shall be, at the time of his appointment, a superintendent of schools in a city or district; one shall be at the time of his appointment an academic principal, and one shall be at the time of his appointment a teacher engaged in teaching in an elementary school. At least one of such members shall be a woman teacher in the public schools. Such appointments shall be

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made within ten days after this act takes effect. The members of such board first appointed shall hold office for terms of one, two, three, four and five years from January first, nineteen hundred and twelve, to be designated by the commissioner of education when he appoints such members. Their successors shall be appointed for terms of five years. A vacancy occurring in the office of any member shall be filled for the unexpired term. (*Added by L. 1911, ch. 449.*)

§ 1103. **Vacancies; resignations; removal from office.**—A vacancy in the office of a member of the board shall be created by death, resignation, refusal to serve, removal from office, or absence from the state for a period of one year. A member of such board may resign by written resignation submitted to the commissioner of education and accepted by him. The commissioner of education may remove a member of such board for cause, after service upon him of written charges and an opportunity to be heard in defense thereof. (*Added by L. 1911, ch. 449.*)

§ 1104. **Officers of board; salaries and expenses; meetings.**—There shall be a president, vice-president and secretary of such board, to be elected by a majority vote of the members of the board. The president and vice-president shall be elected for terms of one year. The term of office of the secretary shall be fixed by the board. The secretary need not be a member of the board. His salary or compensation shall be prescribed by the board, not exceeding two thousand dollars a year, subject to the approval of the commissioner of education. The members of the board shall serve without compensation, but they shall be entitled to their expenses actually incurred in attending the meetings of the board and in performing services as members thereof.

The board shall meet annually in the education building at Albany, on the second Wednesday in January, and shall have stated meetings at the same place, at least once in each three months, as determined by the regulations of the board. If a member of the board be absent from two consecutive stated meetings without a reasonable excuse for such absence, accepted by the board, his office shall be declared vacant by the commissioner of education, upon notice being received by him of such unexcused absences, and such vacancy shall be filled as hereinbefore provided. (*Added by L. 1911, ch. 449.*)

§ 1105. **State treasurer ex-officio treasurer of fund; investments.**—The state treasurer shall be ex-officio treasurer of the retirement fund and shall be the custodian thereof. The moneys belonging thereto shall be deposited by him in banks or trust companies and the law relating to the deposit of state funds in such banks and trust companies shall apply so far as may be to the deposit of moneys belonging to the said retirement fund. The state teachers' retirement fund board shall determine from time to time as to what portion of the retirement fund shall be perma-

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nently invested. Such fund shall only be invested in those securities in which the trustees of a savings bank may invest the moneys deposited therein, as provided by section one hundred and forty-six of the banking law. When such board shall determine that any portion of said fund should be so invested, it shall by resolution, duly adopted by a majority vote of the members of the board, direct the treasurer to invest such portion of the fund in any of said securities. (*Added by L. 1911, ch. 449.*)

§ 1106. **Powers of board.**—The state teachers' retirement fund board, subject to the provisions of this article and of any other statute, shall have power:

1. To appoint and employ such officers and employees as may be necessary to carry into effect the provisions of this article, and fix their compensation.
2. To prescribe the duties of its secretary and other officers and employees.
3. To conduct investigations into all matters relating to the operation of this article, and subpoena witnesses and compel their attendance to testify before it in respect to such matters, and any member of the board may administer oaths or affirmations to such witnesses.
4. To require boards of education, trustees, and other school authorities, and all officers, having duties to perform in respect to contributions by teachers to the retirement fund, to report to the board from time to time, as to such matters pertaining to the payment of such contributions, as it shall deem advisable, and may prescribe the form of such reports.
5. To draw its warrants upon the state treasurer for the payment of annuities to teachers who have been retired as provided in this article, and for the purchase of such securities as the board shall have decided to purchase as provided in this article. No payments shall be made from the teachers' retirement fund except by warrant signed by the president of the board, drawn after resolution duly adopted at a meeting of the board by a majority of its members, which adoption shall be attested by the secretary of the board. (*Added by L. 1911, ch. 449.*)

§ 1107. **Rules of board.**—The state teachers' retirement fund board shall make rules not inconsistent with the provisions of this article which, when approved by the commissioner of education, shall have the force and effect of law. Such rules shall

1. Provide for the conduct and regulation of the meetings of the board and the transaction of the business thereof.
2. Provide for the enforcement and carrying into effect of the provisions of this article.
3. Prescribe the manner of payment of contributions by teachers to the retirement fund, and the payment of annuities therefrom.

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4. Establish a system of accounts showing the condition of such fund, and receipts and expenditures.

5. Prescribe the method of making payments from such fund to annuitants and giving receipts for such payments.

6. Prescribe the forms of warrants, vouchers, receipts, reports and accounts to be used by annuitants and officers having duties to perform in respect to such fund.

7. Regulate the duties of boards of education, trustees, and other officers imposed upon them by this article, in respect to the contributions by teachers to the retirement fund, and the deduction of such contributions from teachers' salaries. (*Added by L. 1911, ch. 449.*)

§ 1108. **Contributions to fund; deductions from salaries.**—All teachers employed in the public schools in this state except in those counties, districts or cities in which provision is already made by statute for the retirement of public school teachers and the payment of annuities or pensions to such teachers, who enter into contracts for such employment after the date on which this act takes effect, shall contribute to the teachers' retirement fund one per centum of the salaries to be paid to such teachers annually according to the terms of such contracts. District superintendents of schools shall contribute to such funds one per centum of the salaries received by them for their services, either from the state or from the towns comprising their supervisory districts, as provided by law. On and after such date all such contracts shall be deemed to have been made subject to the provisions of this article, and the requirement as to such contribution shall become a part of and enter into all such contracts. All school districts and cities shall contribute to such fund an amount equal to that contributed, as above provided, by the teachers employed in the public schools of such districts and cities, to be deducted from the public moneys apportioned thereto by the commissioner of education.

Boards of education, trustees and other school authorities having duties to perform in respect to the payment of salaries to public school teachers in their district or cities, shall cause to be deducted from each warrant or order issued to any of such teachers for the payment of the salary of such teachers, the amount due by such teacher to the teachers' retirement fund. The commissioner of education shall cause to be deducted from the salaries paid to teachers employed in schools on the Indian reservations and to district superintendents of schools the amount required to be contributed by them to the teachers' retirement fund, and shall cause the same to be paid into such fund. (*Added by L. 1911, ch. 449, and amended by L. 1913, ch. 511, and L. 1914, ch. 44.*)

§ 1108-a. **Method of payment into state treasury.**—1. The district superintendent of each supervisory district shall include in his annual report to the commissioner of education, a statement showing the amount required

to be deducted from the salaries of teachers in each school district under his supervision, under section eleven hundred and eight of this act.

2. The superintendent of schools of each city shall also include in his annual report to the commissioner of education, a statement showing the amount required to be deducted under the provisions of section eleven hundred and eight of this act from the salaries of teachers employed in such city.

3. The district superintendent of each supervisory district and the superintendent of each city shall file with the treasurer of the county in which such supervisory district or city is located, a statement showing the amount respectively reported by them to the commissioner of education as provided in subdivisions one and two of this section as being the amount required to be deducted from the salaries of teachers in their respective supervisory districts and cities under the provisions of section eleven hundred and eight of this act. Such statements to the county treasurer shall also respectively show the aggregate amount required to be so deducted from the salaries of teachers employed in each town in such supervisory district and from the salaries of teachers employed in each city.

4. The district superintendent of each supervisory district shall file with the supervisor of each town within such supervisory district at the time he files his certificate of apportionment of public school moneys, a statement showing the amount required to be deducted from the salaries of the teachers employed in each school district in such town. The superintendent of each city shall file with the chamberlain or treasurer of such city a duplicate of the certificate which he is required to file with the county treasurer under subdivision three of this section.

5. When the commissioner of education apportions the money appropriated by the legislature for the support of common schools to the several counties of the state, he shall cause to be determined from the official reports of district and city superintendents the amount required to be deducted from the salaries of the teachers employed in each county who come under the provisions of this act as required by section eleven hundred and eight, and also the amount to be contributed by the school districts and cities, in which such teachers are employed, as provided by said section eleven hundred and eight.

6. The commissioner of education shall include in the certificate which he files with the comptroller showing the amount of state funds apportioned for the support of common schools to each county, a statement showing the amount required to be deducted from the salaries of teachers in each of such counties, and the amount to be contributed by the school districts and cities in which such teachers are employed, as required under section eleven hundred and eight of this act.

7. The comptroller shall issue his warrant to the state treasurer directing such treasurer to credit to the retirement fund created herein from the appropriation for the support of common schools an amount equal to the

aggregate amount required to be deducted from the salaries of teachers in the several counties of the state, together with the aggregate amount of the contributions required to be made by the school districts and cities in which such teachers are employed, as shown by the certificate of the commissioner of education filed with him as directed in subdivision six of this section.

8. The comptroller, in issuing his warrant to the state treasurer for the payment to each county of that portion of the moneys appropriated for the support of common schools and payable on or before March first of each year, shall deduct therefrom an amount equal to the amount required to be deducted from the salaries of teachers, and the amount required to be contributed by the school districts and cities in which such teachers are employed, as shown by the certificate of the commissioner of education filed with the comptroller as required by subdivision six of this section.

9. The county treasurer of each county when paying to the supervisors of the towns of such county and to the chamberlain or treasurer of a city in such county the first half of the money apportioned annually for the support of common schools shall deduct from the amount apportioned to each town and city an amount equal to the amount to be deducted from the salaries of the teachers in such town or city, and the amount to be contributed by the school districts or city, as shown by the certificate of the district and city superintendents filed with such treasurer as directed by subdivision three of this section.

10. The supervisor of each town shall pay to the collector or treasurer of each school district in such town or to the teachers employed in such districts toward their salaries on the order of the trustees of such districts the amount apportioned to such districts respectively less the amount required to be deducted from the salaries of the teachers in such districts, and the amount to be contributed by the school districts in such towns, as shown by the certificate of the district superintendent filed with such supervisors as directed by subdivision four of this section. (*Added by L. 1911, ch. 449, and amended by L. 1914, ch. 44.*)

§ 1109. Retirement of teachers.—1. A teacher who has taught in public schools for a period of twenty-five years, at least the last fifteen years of which period shall have been taught in the public schools in this state shall, upon his retirement from actual service as such teacher, as hereinafter provided, be entitled to an annuity of a sum equal to one-half of the average annual salary of such teacher for the period of five years prior to the time of such retirement, provided that no annuity shall exceed the sum of six hundred dollars.

2. A teacher who has taught in public schools for a period of fifteen years, at least the last nine of which were taught in the public schools in this state who is either physically or mentally incapable of teaching may be retired, and shall, upon his retirement, be entitled to an annuity of as

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many twenty-fifths of the full annuity for twenty-five years as said teacher has taught years.

3. Such retirement may be had on the request of the teacher, or upon the request of a board of education in a city or union free school district. A request for retirement shall be made in writing addressed to state teachers' retirement fund board, accompanied by evidence showing that the teacher named therein is entitled to retirement, and that he has complied with the provisions of this article and the rules of the board relating to the payment of annuities. The board shall pass upon all requests for retirement, and shall determine whether such requests shall be granted.

4. All determinations of the board relative to such requests and the payment of annuities to teachers shall be subject to appeal to the commissioner of education. The provisions of article thirty-four of the education law, relative to appeals, shall apply to appeals from such determination. (*Added by L. 1911, ch. 449, and amended by L. 1914, ch. 44.*)

Appeals from findings of board.—Application for retirement upon the ground of physical disability denied. Com. of Educ. Decisions (1916), 8 State Dept. Rep. 608.

The determination of the Retirement Board will not be disturbed on appeal unless it is shown by preponderance of proof that the Board has exercised its discretion unfairly and to the detriment of the rights of the teacher. Com. of Educ. Decision (1916), 9 State Dept. Rep. 591.

§ 1109-a. **Payment of annuities.**—1. A teacher shall not be entitled to an annuity who has not contributed to the retirement fund an amount equal to at least fifty per centum of his annuity. But a teacher who is otherwise entitled to retirement and an annuity under this article, may become an annuitant and entitled to an annuity by making a cash payment to the retirement fund of an amount which when added to his previous contributions to such fund, will equal fifty per centum of his annuity.

2. In case a teacher who shall retire or be retired, is unable to pay in advance the sum required to make up the said fifty per centum of the annuity, the payment of such annuity may be withheld until the portion of the annuity withheld shall equal the sum required to make up said fifty per centum of the annuity.

3. Annuities shall be paid quarterly to the teachers entitled thereto, upon the warrants or orders signed by the president and secretary of the state teachers' retirement fund board. Vouchers or receipts shall be signed in duplicate by annuitants upon receiving the money paid to them. Such duplicate receipts shall be returned to the secretary of the board, and one of them shall be retained in his office and the other shall be filed in the office of the state treasurer.

4. Each annuity shall date from the time when the state teachers' retirement board shall take action upon the request made as herein provided for the retirement of the annuitant.

5. In case an annuity shall be paid hereunder to a teacher who has contributed to a teachers' retirement or pension fund in a city, county or dis-

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trict in accordance with a special or local act applicable thereto, the amount so contributed shall be paid on the order of the state teachers' retirement fund board by the custodian of such local retirement or pension fund into the state retirement fund, and the amount so paid shall be credited to such teacher as a contribution to the state fund. In case an annuity is paid to a teacher who has contributed to the state retirement fund as provided in this article, under a special or local act, applicable to the retirement of teachers in a city, county or district, the amount of such contributions shall be paid by the treasurer of the state teachers' retirement fund into the teachers' retirement or pension fund of such city, county or district, and such amount shall be credited to such teacher as a contribution to such fund. (*Added by L. 1911, ch. 449, and amended by L. 1914, ch. 44.*)

§ 1109-b. Application of article to certain counties, cities and districts; voluntary contributions.—This article shall not apply to any county, city or district in which the teachers in the public schools thereof are required or authorized to contribute to a teachers' retirement fund, or in which such teachers are entitled to annuities or pensions, in accordance with any special or local act applicable to such county, city or district. Provided, that whenever the state teachers' retirement fund board is satisfied that more than two-thirds of all the teachers employed in the public schools of any such county, city or district are willing to become subject to this article, as shown by a petition duly signed and verified by such teachers, such board shall issue its order directing that on and after the date thereof this article shall apply to such county, city or district. A copy of such order shall be mailed to the several teachers employed in the county, city or district to which such order relates and to the boards of education, trustees or other school authorities therein, and thereupon the provisions of this article shall apply to such county, city or district to the same extent and for the same purposes as to the other counties, cities and districts of the state. Thereupon the organization or society created under the said local or special act applicable to a county, city or district shall be dissolved and discontinued and the treasurer or other custodian of the funds of such organization or society shall pay into the state treasury any funds in his possession belonging to the said organization or society, after paying any outstanding obligations other than annuities. Such funds shall be credited to the retirement fund provided for herein. All persons who had been placed upon the retired list pursuant to the provisions of such local or special act, previous to the date when such local organization or society determined to come under the provisions of this act, shall become annuitants under this act and shall be entitled to receive the same amount which they would have been entitled to receive under the provisions of their retirement under said local or special act had such organization or society created thereunder not been dissolved and discontinued. Upon the execution and service of such order the teachers employed in the

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county, city or district to which such order relates, shall contribute one per centum of their salaries to the retirement fund and they shall be entitled to all the privileges thereof, under the conditions and restrictions imposed by this article and the rules of the board. (*Added by L. 1911, ch. 449.*)

This article is constitutional.—The Legislature in this statute has made use of its power to abrogate all local or special acts and to bring all of the teachers of the State within a single statute. *Bristol v. Board of Trustees* (1916), 173 App. Div. 545, 160 N. Y. Supp. 410.

Mandamus to compel city board to turn over funds.—Where the members of a local teachers' organization have petitioned to come within the provisions of the general act, the State board may, by a peremptory writ of mandamus, command the local society to turn over the funds in its possession. The fact that under a local organization janitors and registrars were admitted to membership and are excluded from the terms of the general act, does not offer a serious obstacle to the application of the statute, especially where such persons evidence their willingness to receive their contributions with interest and to retire from participation in the fund. *Bristol v. Board of Trustees* (1916), 173 App. Div. 545, 160 N. Y. Supp. 410, *affg.* (1916), 93 Misc. 158 N. Y. Supp. 503.

§ 1109-c. Service as school commissioner to be counted.—In computing the term of service of a teacher for the purpose of granting an annuity to such teacher under the provisions of this article, the time during which any such teacher shall have filled the office of school commissioner as defined in section three hundred of the education law, being chapter twenty-one of the laws of nineteen hundred and nine, and which office was abolished by chapter six hundred and seven of the laws of nineteen hundred and ten, prior to the time this amendment takes effect, shall be included. (*Added by L. 1913, ch. 509.*)

ARTICLE XLIV.

LIBRARIES.

Section 1110. State library, how constituted.

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- 1139. Transfer of property not in charge of librarian.
- 1140. Provision for change to free public library.
- 1141. Penalty for disobedience to library law, rules or orders.

§ 1110. **State library, how constituted.**—All books, pamphlets, manuscripts, records, archives and maps, and all other property appropriate to a general library, if owned by the state and not placed in other custody by law, shall be in charge of the regents and constitute the state library.

Source.—Education L. 1909, § 1020, revised from former Univ. L. (L. 1892, ch. 378) § 15; originally revised from L. 1881, ch. 120.

§ 1111. **State medical library.**—The state medical library shall be a part of the New York state library under the same government and regulations and shall be open for consultation to every citizen of the state at all hours when the state library is open and shall be available for borrowing books to every accredited physician residing in the state of New York, who shall conform to the rules made by the regents for insuring proper protection and the largest usefulness to the people of the said medical library.

Source.—Education L. 1909, § 1021, revised from L. 1891, ch. 377, § 2.

§ 1112. **Manuscript and records "on file."**—Manuscript or printed papers of the legislature, usually termed "on file," and which shall have been on file more than five years in custody of the senate and assembly clerks, and all public records of the state not placed in other custody by a specific law shall be part of the state library and shall be kept in rooms assigned and suitably arranged for that purpose by the trustees of public buildings. The regents shall cause such papers and records to be so classified and arranged that they can be easily found. No paper or record shall be removed from such files except on a resolution of the senate and assembly withdrawing them for a temporary purpose, and in case of such removal a description of the paper or record and the name of the person removing the same shall be entered in a book provided for that purpose, with the date of its delivery and return.

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Source.—Education L. 1909, § 1022, revised from former Univ. L. (L. 1892, ch. 378) § 16; originally revised from L. 1859, ch. 321, §§ 1-4.

Reference.—Custody of legislative papers and documents by clerks of senate and assembly, Legislative Law, § 22.

§ 1113. **State library, when open; use of books.**—The state library shall be kept open not less than eight hours every week day in the year except the legal holidays known as Independence day, Thanksgiving day and Christmas day, and members of the legislature, judges of the court of appeals, justices of the supreme court, and heads of state departments may borrow from the library books for use in Albany, but shall be subject to such restrictions and penalties as may be prescribed by the regents for the safety or greater usefulness of the library. Others shall be entitled to use or borrow books from the library only on such conditions as the regents shall prescribe.

Source.—Education L. 1909, § 1023, revised from former Univ. L. (L. 1892, ch. 378) § 17, as amended by L. 1907, ch. 184; originally revised from L. 1880, ch. 529, tit. 1, § 17.

§ 1114. **Duplicate department.**—The regents shall have charge of the preparation, publication and distribution, whether by sale, exchange or gift, of the colonial history, natural history and all other state publications not otherwise assigned by law. To guard against waste or destruction of state publications, and to provide for the completion of sets to be permanently preserved in American and foreign libraries, the regents shall maintain a duplicate department to which each state department, bureau, board or commission shall send not less than five copies of each of its publications when issued, and after completing its distribution, any remaining copies which it no longer requires. The above, with any other publications not needed in the state library, shall be the duplicate department, and rules for sale, exchange or distribution from it shall be fixed by the regents, who shall use all receipts from such exchanges or sales for expenses and for increasing the state library.

Source.—Education L. 1909, § 1024, revised from former Univ. L. (L. 1892, ch. 378) § 19, as amended by L. 1895, ch. 859; L. 1901, ch. 507; originally revised from L. 1889, ch. 529, tit. 1, § 18.

References.—Delivery of documents and reports of state departments and offices to library, State Printing Law, § 11. Distribution of documents and session laws to other states and libraries, Legislative Law, §§ 46, 47.

§ 1115. **Transfers from state officers.**—The librarian of any library owned by the state, or the officer in charge of any state department, bureau, board, commission or other office may, with the approval of the regents, transfer to the permanent custody of the state library or museum any books, papers, maps, manuscripts, specimens or other articles which, because of being duplicates or for other reasons, will in his judgment be more useful to the state in the state library or museum than if retained in his keeping.

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Source.—Education L. 1909, § 1025, revised from former Univ. L. (L. 1892, ch. 378) § 20.

§ 1116. **Other libraries owned by the state.**—The report of the state library to the legislature shall include a statement of the total number of volumes or pamphlets, the number added during the year, with a summary of operations and conditions, and any needed recommendation for safety or usefulness for each of the other libraries owned by the state, the custodian of which shall furnish such information or facilities for inspection as the regents may require for making this report. Each of these libraries shall be under the sole control now provided by law, but for the annual report of the total number of books owned by or bought each year by the state, it shall be considered as a branch of the state library and shall be entitled to any facilities for exchange of duplicates, inter-library loans or other privileges properly accorded to a branch.

Source.—Education L. 1909, § 1026, revised from former Univ. L. (L. 1892, ch. 378) § 21.

§ 1117. **Public and free libraries and museums.**—All provisions of this section and of sections eleven hundred and eighteen to eleven hundred and thirty-four inclusive shall apply equally to libraries, museums, and to combined libraries and museums, and the word “library” shall be construed to include reference and circulating libraries and reading-rooms.

Source.—Education L. 1909, § 1027, revised from former Univ. L. (L. 1892, ch. 378) § 35.

§ 1118. **Establishment.**—By majority vote at any election, any county, city, village, town, school district, or other body authorized to levy and collect taxes, or by vote of its common council, or by action of a board of estimate and apportionment or other proper authority, any city, or by vote of its trustees, any village, may establish and maintain a free public library, with or without branches, either by itself or in connection with any other body authorized to maintain such library. Whenever twenty-five tax-payers shall so petition, the question of providing library facilities shall be voted on at the next election or meeting at which taxes may be voted, provided that due public notice shall have been given of the proposed action. A municipality or district named in this section may raise money by tax to establish and maintain a public library or libraries, or to provide a building or rooms for its or their use, or to share the cost as agreed with other municipal or district bodies, or to pay for library privileges under a contract therefor. It may also acquire real or personal property for library purposes by gift, grant, devise or condemnation, and may take, buy, sell, hold and transfer either real or personal property and administer the same for public library purposes. A board of supervisors of a county may contract with the trustees of a public library within such county or with any other municipal or district body having control of such a library to furnish library privileges to the people of

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the county, under such terms and conditions as may be stated in such contract. The amount agreed to be paid for such privileges under such contract shall be a charge upon the county and shall be paid in the same manner as other county charges. (*Amended by L. 1911, ch. 815.*)

Source.—Education L. 1909, § 1028, revised from former Univ. L. (L. 1892, ch. 378) § 36, in part, as amended by L. 1895, ch. 859, § 5; L. 1902, ch. 185; L. 1909, ch. 606; originally revised from L. 1889, ch. 529, tit. 3, § 4.

Reference.—Establishment of free public libraries by municipalities, General Municipal Law, § 79.

Qualifications of voters.—Voters upon the question of providing or maintaining a library should possess the same qualifications as voters at district meetings. Rept. of Atty. Genl. (1903), 397.

Contract with city library.—Board of supervisors (prior to the amendment of 1911), has no authority under this section to contract with a city library for the use of such library. Rept. of Atty. Genl. (1911) 110.

§ 1119. **Acceptance of conditional gift.**—By majority vote at any election any municipality or district or by three-fourths vote of its council, any city, or any public library in the university, or any designated branch thereof, if so authorized by such vote of a municipality, district, or council, or of any combination of such voting bodies, may accept gifts, grants, devises or bequests for public library purposes on condition that a specified annual appropriation shall thereafter be made, by the municipality or district or combination so authorizing such acceptance, for maintenance of such library or branches thereof. Such acceptance, when approved by the regents of the university under seal and recorded in its book of charters, shall be a binding contract, and such municipality and district shall levy and collect yearly the amount provided in the manner prescribed for other taxes, and shall maintain any so accepted gift, grant, devise or bequest, intact and make good any impairment thereof.

Source.—Education L. 1909, § 1029, revised from former Univ. L. (L. 1892, ch. 378) § 36, as amended by L. 1895, ch. 859; L. 1902, ch. 185; L. 1907, ch. 606; originally revised from L. 1889, ch. 529, tit. 3, § 4.

Appropriation of a fixed sum continues as an annual appropriation. Rept. of Atty. Genl. (1903) 514.

§ 1120. **Subsidies.**—By vote similar to that required by sections eleven hundred and eighteen and eleven hundred and nineteen money may be granted toward the support of libraries not owned by the public but maintained for its welfare and free use; provided, that such libraries shall be subject to the inspection of the regents and registered by them as maintaining a proper standard, that the regents shall certify what number of the books circulated are of such a character as to merit a grant of public money, and that the amount granted yearly to libraries on the basis of circulation shall not exceed ten cents for each volume of the circulation thus certified by the regents.

Source.—Education L. 1909, § 1031, revised from former Univ. L. (L. 1892, ch. 378) § 37, in part, as amended by L. 1900, ch. 481.

§ 1121. **Closing of museum; admission fee during certain hours.**—The trustees of any institution supported under this chapter by public money, in whole or in part, may, so far as consistent with free use by the public at reasonable or specified hours, close any of its museum collections at certain other hours, for study, to meet the demands of special students or for exhibition purposes, and may charge an admission fee at such hours, provided that all receipts from such fees shall be paid into the treasury and be used for the maintenance or enlargement of the institution.

Source.—Education L. 1909, § 1031, revised from former Univ. L. (L. 1892, ch. 378) § 37, in part, as amended by L. 1900, ch. 481.

§ 1122. **Taxes.**—Taxes, in addition to those otherwise authorized, may be voted by any authority named in section eleven hundred and eighteen and for any purpose specified in sections eleven hundred and eighteen to eleven hundred and twenty inclusive, and shall, unless otherwise directed by such vote, be considered as annual appropriations therefor till changed by further vote, and shall be levied and collected yearly, or as directed, as are other general taxes; and all money received from taxes or other sources for such library shall be kept as a separate library fund and expended only under direction of the library trustees on properly authenticated vouchers.

Source.—Education L. 1909, § 1032, revised from former Univ. L. (L. 1892, ch. 378) § 38.

§ 1123. **Trustees.**—Free public libraries established by action of the voters or their representatives shall be managed by trustees who shall have all the powers of trustees of other educational institutions of the university as defined in this chapter; provided, unless otherwise specified in the charter, that the number of trustees shall be five; that they shall be elected by the legal voters, except that in cities they shall be appointed by the mayor with the consent of the common council, from citizens of recognized fitness for such position; that the first trustees determine by lot whose term of office shall expire each year and that a new trustee shall be elected or appointed annually to serve for five years.

Source.—Education L. 1909, § 1033, revised from former Univ. L. (L. 1892, ch. 378) § 39.

§ 1124. **Incorporation.**—Within one month after taking office, the first board of trustees of any such free public library shall apply to the regents for a charter in accordance with the vote establishing the library.

Source.—Education L. 1909, § 1034, revised from former Univ. L. (L. 1892, ch. 378) § 40.

Reference.—Application for, and grant of charter, Education Law, §§ 60-62.

§ 1125. **Use of free public libraries.**—Every library established under section eleven hundred and eighteen of this chapter shall be forever free

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to the inhabitants of the locality which establishes it, subject always to rules of the library trustees, who shall have authority to exclude any person who wilfully violates such rules; and the trustees may, under such conditions as they think expedient, extend the privileges of the library to persons living outside such locality.

Source.—Education L. 1909, § 1035, revised from former Univ. L. (L. 1892, ch. 378) § 42, as amended by L. 1895, ch. 859.

§ 1126. **Reports.**—Every library or museum which receives state aid or enjoys any exemption from taxation or other privilege not usually accorded to business corporations shall make the report required by section fifty-eight of this chapter, and such report shall relieve the institution from making any report now required by statute or charter to be made to the legislature, or to any department, court or other authority of the state. These reports shall be summarized and transmitted to the legislature by the regents with the annual reports of the state library and state museum.

Source.—Education L. 1909, § 1036, revised from former Univ. L. (L. 1892, ch. 378) § 41.

§ 1127. **Injuries to property.**—Whoever intentionally injures, defaces or destroys any property belonging to or deposited in any incorporated library, reading-room, museum or other educational institution, shall be punished by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

Source.—Education L. 1909, § 1037, revised from former Univ. L. (L. 1892, ch. 378) § 43.

Reference.—Removal of books in libraries and injuries to books, works of art, etc., in libraries and museums, a misdemeanor, Penal Law, §§ 1427, 1428.

§ 1128. **Detention.**—Whoever wilfully detains any book, newspaper, magazine, pamphlet, manuscript or other property belonging to any public or incorporated library, reading-room, museum or other educational institution, for thirty days after notice in writing to return the same, given after the expiration of the time which by the rules of such institution, such article or other property may be kept, shall be punished by a fine of not less than one nor more than twenty-five dollars, or by imprisonment in the jail not exceeding six months, and the said notice shall bear on its face a copy of this section.

Source.—Education L. 1909, § 1038, revised from former Univ. L. (L. 1892, ch. 378) § 44.

§ 1129. **Transfer of libraries.**—Any corporation, association, school district or combination of districts may, by legal vote duly approved by the regents, transfer, conditionally as provided in section eleven hundred and nineteen of this article, or otherwise, the ownership and control of its library, with all its appurtenances, to any municipality, or district, or

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public library in the university, or any designated branch thereof, and thereafter such transferee shall be entitled to receive any money, books or other property from the state or other sources, to which the transferring body would have been entitled but for such transfer, and the trustees or body making the transfer shall thereafter be relieved of all responsibility pertaining to property thus transferred.

Source.—Education L. 1909, § 1039, revised from former Univ. L. (L. 1892, ch. 378) § 45, as amended by L. 1907, ch. 606.

§ 1130. **Local neglect.**—If the local authorities of any library supported wholly or in part by state money, fail to provide for the support and public usefulness of its books, the regents shall in writing notify the trustees of said library what is necessary to meet the state's requirements, and on such notice all its rights to further grants of money or books from the state shall be suspended until the regents certify that the requirements have been met; and if said trustees shall refuse or neglect to comply with such requirements within sixty days after service of such notice, the regents may remove them from office and thereafter all books and other library property wholly or in part paid for from state money shall be under the full and direct control of the regents who, as shall seem best for public interests, may appoint new trustees to carry on the library, or may store it, or distribute its books to other libraries.

Source.—Education L. 1909, § 1040, revised from former Univ. L. (L. 1892, ch. 378) § 46.

§ 1131. **Loans of books from state.**—Under such rules as the regents may prescribe, they may lend from the state library, duplicate department, or from books specially given or bought for this purpose, selections of books for a limited time to any public library in this state under visitation of the regents, or to any community not yet having established such library, but which has conformed to the conditions required for such loans.

Source.—Education L. 1909, § 1051, revised from former Con. Sch. L. (L. 1894, ch. 378) § 47.

§ 1132. **Advice and instruction from state library officers.**—The trustees or librarian or any citizen interested in any public library in this state shall be entitled to ask from the officers of the state library any needed advice or instruction as to a library building, furniture and equipment, government and service, rules for readers, selecting, buying, cataloguing, shelving, lending books, or any other matter pertaining to the establishment, reorganization or administration of a public library. The regents may provide for giving such advice and instruction either personally or through printed matter and correspondence, either by the state library staff or by a library commission of competent experts appointed by the regents to serve without salary. The regents may, on request, select or buy books, or furnish them instead of money apportioned, or

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may make exchanges and loans through the duplicate department of the state library. Such assistance shall be free to residents of this state as far as practicable, but the regents may, in their discretion, charge a proper fee to nonresidents or for assistance of a personal nature or for other reason not properly an expense to the state, but which may be authorized for the accommodation of users of the library.

Source.—Education L. 1909, § 1042, revised from former Univ. L. (L. 1892, ch. 378) § 48.

§ 1133. **Apportionment of public library money.**—Such sum as shall have been appropriated by the legislature as public library money shall be paid annually by the treasurer, on the warrant of the comptroller, from the income of the United States deposit fund, according to an apportionment to be made for the benefit of free libraries by the regents in accordance with their rules and authenticated by their seal; provided, that none of this money shall be spent for books except those approved or selected and furnished by the regents; that no locality shall share in the apportionment unless it shall raise and use for the same purpose not less than an equal amount from taxation or other local sources; that for any part of the apportionment not payable directly to the library trustees the regents shall file with the comptroller proper vouchers showing that it has been spent in accordance with law exclusively for books for free libraries or for proper expenses incurred for their benefit; and that books paid for by the state shall be subject to return to the regents whenever the library shall neglect or refuse to conform to the ordinances under which it secured them.

Source.—Education L. 1909, § 1043, revised from former Univ. L. (L. 1892, ch. 378) § 50.

§ 1134. **Abolition.**—Any library established by public vote or action of school authorities, or under section eleven hundred and eighteen of this chapter, may be abolished only by a majority vote at a regular annual election, ratified by a majority vote at the next annual election. If any such library is abolished its property shall be used first to return to the regents, for the benefit of other public libraries in that locality, the equivalent of such sums as it may have received from the state or from other sources as gifts for public use. After such return any remaining property may be used as directed in the vote abolishing the library, but if the entire library property does not exceed in value the amount of such gifts it may be transferred to the regents for public use, and the trustees shall thereupon be free from further responsibility. No abolition of a public library shall be lawful till the regents grant a certificate that its assets have been properly distributed and its abolition completed in accordance with law.

Source.—Education L. 1909, § 1044, revised from former Univ. L. (L. 1892, ch. 378) § 51, as amended by L. 1895, ch. 859.

§ 1135. **Use and care of school library.**—The school library shall be a part of the school equipment and shall be kept in the school building at all times. Such library shall be devoted to the exclusive use of the school except as otherwise provided by the rules of the commissioner of education and except in a district where there is no free public library, in which case such school library shall be a circulating library for the use of the residents of the district.

The commissioner of education shall prescribe rules regulating

1. The purchase, recording, safekeeping and loaning of books in school libraries, and the use of such books by pupils and teachers in the public schools.

2. The conditions under which books in a school library in a district in which a public library is situated, may be used by the public.

3. The management of school libraries and their use as circulating libraries by the residents of the districts in which they are situated.

4. The contents and submission of reports of school librarians, teachers and other school authorities as to school libraries. (*Amended by L. 1914, ch. 51.*)

Source.—Education L. 1909, § 1045, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 13, § 2; originally revised from L. 1892, ch. 573, § 2.

§ 1135-a. **Librarians of school libraries.**—In a city or a union free school district * maintaining an academic department or high school the board of education may employ, and fix the compensation of, a person to act as school librarian who may be engaged for all or a part of the time in performance of the duties of the position as may be directed by the said board. The person so employed may be the librarian of the free public library. If possessed of the qualifications prescribed by the commissioner of education a teacher's quota shall be apportioned to such city or union free school district on account of the employment of such librarian. In all other districts the trustees or board of education may appoint a competent person to act as librarian. In case of a failure of a city or union free school district maintaining an academic department or high school to employ a librarian as above provided, the teacher of English in such school shall be the librarian. In case of a failure to appoint a librarian in any other district the teacher, or if there be more than one teacher, the principal teacher, shall act as librarian. The trustees or board of education shall report to the commissioner of education the name and address of the person employed or appointed as librarian. (*Added by L. 1914, ch. 51.*)

§ 1136. **Existing rules continued in force.**—All existing provisions of law and rules established by the superintendent of public instruction or by the commissioner of education for the management of district libraries shall hold good as to the management of school libraries till altered by or in pursuance of law.

* So in original.

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Source.—Education L. 1909, § 1046, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 13, § 3; originally revised from L. 1892, ch. 573, § 3.

§ 1137. Authority to raise and receive money for school library.—Each city and school district in the state is hereby authorized to raise moneys by tax in the same manner as other school moneys are raised, or to receive moneys by gift or devise, for starting, extending or caring for the school library.

Source.—Education L. 1909, § 1047, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 13, § 4; originally revised from L. 1892, ch. 573, § 4.

§ 1138. Authority to transfer school library property to free public library.—Any board of education in any city or union free school district, or any duly constituted meeting in any other district, is hereby authorized to give any or all of its books or other library property to any township or other free public library under state supervision, or to aid in establishing such free public library, provided it is free to the people of such city or district. A receipt from the officers of the said free public library, and an approval of the transfer under seal by the regents of the university, shall forever thereafter relieve the said school authorities of further responsibility for the said library and property so transferred.

Source.—Education L. 1909, § 1048, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 13, § 5; originally revised from L. 1892, ch. 573, § 5.

§ 1139. Transfer of property not in charge of librarian.—Any books or other library property belonging to any district library, and which have not been in direct charge of a librarian duly appointed within one year, may be taken and shall thereafter be owned by any public library under state supervision, which has received from the regents of the university written permission to collect such books or library property, and to administer the same for the benefit of the public; provided, that said books or other library property shall be found in the territory for which such public library is maintained, as defined in its charter or in the permission granted by the regents; and further provided, that, on written request of the school authorities, any dictionaries, cyclopedias and pedagogic books shall be placed in the school library of the district to which such books originally belong.

Source.—Education L. 1909, § 1049, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 13, § 6; originally revised from L. 1892, ch. 573, § 6.

§ 1140. Provision for change to free public library.—In any district in which the school library is a circulating library, within the provisions of section eleven hundred and thirty-five, the school authorities, in their discretion, may appoint five trustees who shall apply to the regents for a library charter and upon incorporation, the school authorities may transfer to the custody of said trustees for the purposes of a circulating library any of their library property as provided in section eleven hundred and thirty-eight. (*Amended by L. 1914, ch. 51.*)

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Source.—Education L. 1909, § 1050, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 13, § 7; originally revised from L. 1892, ch. 573, § 7.

§ 1141. **Penalty for disobedience to library law, rules or orders.**—The commissioner of education is hereby authorized to withhold its share of public school moneys from any city or district which uses school library moneys for any other purpose than that for which they are provided, or for any wilful neglect or disobedience of the law or the rules or orders of said commissioner in the premises.

Source.—Education L. 1909, § 1051, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 13, § 8; originally revised from L. 1892, ch. 573, § 8.

ARTICLE XLV.

COURT LIBRARIES.

- Section 1160. Court of appeals libraries.
- 1161. Court of appeals judges' law libraries.
 - 1162. Appellate division libraries.
 - 1163. Appellate division library, first department.
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 - 1165. Supreme court libraries.
 - 1166. Supreme court library at New York.
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 - 1168. Supreme court library at Newburgh.
 - 1169. Joseph F. Barnard memorial library at Poughkeepsie.
 - 1170. Supreme court library at Kingston.
 - 1171. Supreme court library at Saratoga.
 - 1172. Supreme court library at Utica.
 - 1173. Supreme court library at Binghamton.
 - 1174. Supreme court library at Delhi.
 - 1175. Supreme court library at Elmira.
 - 1176. David L. Follett memorial library at Norwich.
 - 1177. Supreme court library at Buffalo.
 - 1178. Supreme court library at White Plains.
 - 1179. Supreme court library at Troy.
 - *1180. Supreme court library in Queens county.
 - *1180. City court of the city of New York.
 - 1180-b. Law library for the county officials of the county of Bronx.
 - 1181. Supreme court library at Watertown.
 - 1182. Supreme court law library at Riverhead.
 - 1182. Hamilton Odell library at Monticello.

§ 1160. **Court of appeals libraries.**—1. The consultation library of the court of appeals is continued. Said library shall be under the exclusive supervision of that court and the chief judge may add thereto from any funds available.

2. The library of the court of appeals, located at the city of Syracuse, is continued. The regents of the university shall appoint a suitable

* Two sections numbered 1180 were added to this article by the acts referred to.

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person to be librarian of the said library, who shall receive an annual salary of three thousand dollars, to be paid by the comptroller in monthly instalments, upon the certificate of a justice of the supreme court residing in the city of Syracuse, which said amount shall be levied and assessed by the comptroller, one-half upon the county of Onondaga, and the residue thereof upon the several remaining counties constituting the fifth judicial district, in proportion to the assessed valuation of the real and personal property in said counties. Said librarian shall appoint an assistant librarian and such other assistants as shall be determined by the board of supervisors of said county of Onondaga, who shall be paid by said county of Onondaga a salary or salaries to be fixed by said board of supervisors of said county. The said library shall be maintained as a free public library for the use of the people of the state, the supreme court of the fifth judicial district and the local courts of the county of Onondaga and city of Syracuse. Such library shall be kept in the courthouse of Onondaga county and without expense to the state, except for the purchase of books, binding and repair of books. The regents of the university shall frame and establish suitable rules and regulations for the use of the books in such library, and shall add to and amend the same as shall be necessary.

Source.—Education L. 1909, § 1052. Subd. 1 derived from L. 1849, ch. 300; subd. 2, derived from L. 1849, ch. 300, § 3, as amended by L. 1908, ch. 482; and § 5, as added by L. 1908, ch. 482.

§ 1161. Court of * appeals' judges' law libraries.—The law libraries of the judges of the court of appeals are continued. Each judge has sole custody and control of the library assigned to him and on expiration of his term of office shall deliver it to his successor. He may add to it from any funds available.

Source.—Education L. 1909, § 1053. See L. 1849, ch. 300.

§ 1162. Appellate division libraries.—The libraries heretofore established for the appellate divisions of the supreme court are continued. They are under exclusive supervision of the respective appellate divisions. The justices of the court shall be trustees thereof who shall continue to be vested with all the powers with regard thereto now possessed by said justices.

Source.—Education L. 1909, § 1054. See L. 1865, ch. 722; L. 1898, ch. 649; L. 1897, ch. 185; L. 1896, ch. 434; L. 1900, ch. 490, § 3; L. 1907, ch. 496, § 4.

§ 1163. Appellate division library, first department.—The law library of the appellate division of the first department shall be kept in the courthouse thereof, and shall be in the care and custody and under the control of the justices of the appellate division of said first department, who shall be the trustees thereof. The said trustees may make rules and regulations for the management and protection of said library and prescribe penalties

* So in original.

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for the violation thereof. They may sue for and recover such penalties and may maintain actions for injury to said library. They may appoint a librarian and an assistant librarian and fix their salaries, the former at not to exceed the sum of four thousand dollars per annum, and the latter at not to exceed the sum of three thousand dollars per annum. The said librarian shall, in addition to the duties now performed by him, perform such duties in relation to the custody and distribution of stationery and other supplies furnished for the use of the appellate division of said first department as said justices of said appellate division shall direct. The said trustees may procure furniture for said library and shall defray all the expenses incidental to its care and management. They shall yearly ascertain the amount necessary for the aforesaid purposes and certify it to the board of estimate and apportionment, who shall provide for raising and paying the same. (*Amended by L. 1911, ch. 832.*)

Source.—Education L. 1909, § 1055, revised from L. 1865, ch. 722; L. 1882, ch. 410, § 1095; L. 1895, ch. 553, as amended by L. 1898, ch. 649; L. 1900, ch. 490; L. 1907, ch. 496.

§ 1164. Appellate division library, fourth department.—The law library of the appellate division of the fourth department shall be kept in the court-house of Monroe county and without expense to the state for heat, light, janitor service, furniture, stationery supplies, binding and repair of books, which shall be provided by said county. This library shall be maintained as a free public library for the use of the people of the state, the appellate division of the supreme court in the fourth judicial department, the supreme court of the seventh judicial district and the local courts at Rochester. The consultation library heretofore provided for the appellate court shall be a part of this library but shall remain in the justices' chambers for their own personal use. The librarian of said library and an assistant librarian and their successors shall be appointed and may be removed at pleasure by the justices of the appellate division of the supreme court in the fourth judicial department. The librarian shall be paid an annual salary of three thousand dollars, to be paid in monthly instalments by the state comptroller which shall be levied and assessed by him upon the counties constituting the fourth judicial department, and the assistant librarian shall be paid by the county of Monroe a salary to be fixed by the board of supervisors of said county. A certificate of the appointment of the librarian, signed by the presiding justice of the fourth judicial department, shall be filed with the comptroller of the state.

Source.—Education L. 1909, § 1056, revised from L. 1900, ch. 258, §§ 2, 3, 4, as amended by L. 1907, ch. 186.

§ 1165. Supreme court libraries.—The following supreme court law libraries are continued:

1. In the first judicial district the library formed by the consolida-

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tion of the libraries of the superior court of the city of New York and the court of common pleas of said city and county.

2. In the second judicial district the libraries at the borough of Brooklyn and at Newburgh and the Joseph F. Barnard memorial law library at Poughkeepsie.

3. In the third judicial district the library at Kingston and the library at Troy.

4. In the fourth judicial district the library at Saratoga Springs.

5. In the fifth judicial district the library at Utica.

6. In the sixth judicial district the libraries at Binghamton, Delhi and Elmira, and the David L. Follett memorial library at Norwich.

7. In the eighth judicial district the library at Buffalo.

8. In the ninth judicial district the library at White Plains.

Source.—Education L. 1909, § 1057.

§ 1166. **Supreme court library at New York.**—The law libraries of the superior court of the city of New York and of the court of common pleas of said city and county as consolidated, and the books therein, shall be the law library of the supreme court in the first judicial district and shall be in the care and custody and under the control of the justices of the supreme court in said judicial district, or a majority of them, not designated as justices of the appellate division, who shall be the trustees thereof. The said trustees may make rules and regulations for the management and protection of said library and prescribe penalties for the violation thereof. They may sue for and recover such penalties and may maintain actions for injury to said library. They may appoint a librarian and fix his salary at not to exceed the sum of four thousand dollars per annum. They may also appoint an assistant librarian and two telephone operators and fix their salaries. They may procure proper furniture for said library, purchase books therefor and defray all the expenses incidental to its care and management. They shall yearly ascertain the amount necessary for the aforesaid purposes and certify it to the board of estimate and apportionment, who shall provide for raising and paying the same. (*Amended by L. 1911, ch. 832, L. 1913, ch. 512, and L. 1917, ch. 377, in effect May 5, 1917.*)

Source.—Education L. 1909, § 1058, revised from L. 1898, ch. 649, § 1, in part, as amended by L. 1900, ch. 490; L. 1907, ch. 496.

§ 1167. **Supreme court library in borough of Brooklyn.**—The supreme court library in the borough of Brooklyn shall be under the care and management of the trustees of the law library of the borough of Brooklyn; subject, however, to such orders, rules and regulations, touching the same, as may be made, from time to time, by a majority of the justices of the supreme court, residing in said district. All appropriations made for said library, shall be paid to the said trustees, to be by them disbursed in the purchase of books for said library. The said trustees may make

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rules and regulations for the management and protection of said library, and prescribe penalties for the violation thereof; they may sue for and recover such penalties, and may maintain actions for injuries to said library, and may procure proper furniture for said library, hire suitable rooms, employ a librarian, provide fuel and lights, and defray all the incidental expenses of the care and management of said library; they shall yearly ascertain the amount necessary for the aforesaid purposes, and certify it to the board of estimate and apportionment of the city of New York, who shall pay the same. They shall yearly make a report to the regents of the university, of the additions made to said library during the preceding year.

Source.—Education L. 1909, § 1059, revised from L. 1863, ch. 463, § 2.

§ 1168. **Supreme court library at Newburgh.**—The ninth judicial district law library at Newburgh shall be in charge of and under the care of the trustees of the Orange county reference law library association, and shall be governed by such rules as said trustees with the approval of a justice of the supreme court of the ninth judicial district may prescribe. The board of supervisors of Orange county shall, subject to the approval of a justice of the supreme court of said district, provide suitable and proper rooms in which said library shall be placed and kept, and the annual rent of said rooms and the necessary expense of care for said library shall be a county charge payable by the treasurer of said county upon vouchers approved by a justice of the supreme court of said district.

The said trustees shall appoint a librarian for such library, who shall hold office during their pleasure. Such librarian shall receive an annual salary not to exceed nine hundred dollars, which shall be paid to him monthly by the treasurer of the county of Orange, out of money appropriated for the court expenses in said county.

It shall be the duty of said trustees to effect an insurance upon said library, the cost whereof shall be paid by the comptroller of the state of New York from the appropriations that may be from time to time made for said library. Such insurance shall be made in the name of the people of the state of New York, and in case of loss the amount thereof shall be expended in the purchase of new books for said library, in the same manner that the original appropriations were used for that purpose. (*Amended by L. 1917, ch. 514, in effect May 16, 1917.*)

Source.—Education L. 1909, § 1060, revised from L. 1893, ch. 63, §§ 1-4.

§ 1169. **Joseph F. Barnard memorial library at Poughkeepsie.**—The Joseph F. Barnard memorial library located in the Dutchess county court-house at Poughkeepsie shall be under the care and management of a board of trustees, which board shall consist of five members. The trustees now in office shall continue to serve for the terms for which they were appointed. At the expiration of such terms the governor shall appoint their successors, each of whom shall serve for five years and until

his successor is appointed. Such appointment shall be made from among the members of the Dutchess county bar who shall have practiced law for at least ten years. Said board of trustees shall have power to receive by gift or bequest any property for the purpose of a law library and hold and manage the same, and may make rules and regulations for the management and protection of said library and prescribe penalties for the violation thereof. They may sue for and recover such penalties and may maintain actions for any injury to said library or property connected therewith. They may procure proper furniture for said library and defray all the expenses of the care and management of said library, including insurance, and the amounts required therefor shall be paid by the treasurer of the county of Dutchess upon the certificate of a justice of the supreme court of the second judicial district or of the county judge of Dutchess county, out of the moneys raised in said county for court and jury expenses, which sums as well as the salary of the librarian hereinafter specified shall be a county charge upon the county of Dutchess. All appropriations made for said library shall be paid by the treasurer of the state to said trustees to be by them or by a majority of them disbursed for the purchase of books for said library and for the necessary re-binding of the same.

The librarian of the Joseph F. Barnard memorial law library shall be appointed by said board and shall hold office at the pleasure of said board. The salary of said librarian shall be fixed by the board of supervisors of the county of Dutchess and shall be paid quarterly on the first days of January, April, July and October in each year by the treasurer of the county of Dutchess out of the moneys raised in said county for court and jury expenses upon the certificate of the Dutchess county judge. Said librarian shall be subject to the direction of the said board and shall be governed by such rules as it shall from time to time establish.

Source.—Education L. 1909, § 1061, revised from L. 1904, ch. 254, §§ 1-3.

§ 1170. **Supreme court library at Kingston.**—The justice of the supreme court residing in the city of Kingston is hereby authorized from time to time to appoint a librarian to take charge of the law library of the third judicial district, located at Kingston, who shall be paid a salary of six hundred dollars per year, the amount to be payable upon the certificate of said justice out of the moneys raised in the county of Ulster for court expenses by the treasurer thereof, upon the presentation of such certificate.

It shall also be the duty of said justice, so residing at Kingston, to effect an insurance upon said library, the cost whereof shall be paid in like manner by the comptroller of the state of New York upon a like certificate. Such insurance shall be made in the name of the people of the state of New York, and in case of loss the amount thereof shall be expended in the purchase of new books for said library, in the same manner that the original appropriations were used for that purpose.

Source.—Education L. 1909, § 1062, revised from L. 1876, ch. 318, §§ 1, 2.

§ 1171. **Supreme court library at Saratoga.**—The justices of the supreme court of the fourth judicial district for the time being shall be ex officio trustees of the supreme court library at Saratoga, and the same shall be under the care and management of the said trustees; and it shall be the duty of the said justices, by a majority of their said number, from time to time to make orders, rules and regulations touching the care, management, protection and due preservation of the said library, and prescribe penalties for the violation thereof, and they may sue for and recover such penalties for violation thereof, and may maintain actions for injuries to said library. They may procure proper furniture for said library, hire suitable rooms, appoint a suitable librarian, provide fuel and lights, and defray all incidental expenses of the care and management of the said library.

All appropriations made for said library shall be paid to said trustees, to be by them disbursed in the purchase of books for said library. The said trustees shall report annually to the trustees of the state library the catalogue of books in the said library, and the state and condition thereof. The trustees of the state library are hereby authorized to place in said library any duplicates of books in their possession not needed in the state library.

Source.—Education L. 1909, § 1063, revised from L. 1866, ch. 882, §§ 2, 3.

§ 1172. **Supreme court library at Utica.**—A justice of the supreme court residing in the city of Utica, if there be a resident justice in said city, and if not, a justice of the supreme court residing in the county of Oneida, is hereby authorized to appoint from year to year beginning September first, nineteen hundred and eight, a librarian to take charge of the law library in the fifth judicial district, located in the city of Utica, who shall be paid a salary to be fixed by said judge not exceeding one thousand dollars per year. The said judge may also appoint an assistant librarian if in his judgment such assistant is necessary, who shall hold office during the pleasure of said judge, and who shall be paid a salary fixed by him not exceeding six hundred dollars per year. Said salaries shall be payable on the certificate of the said justice of the supreme court residing in the city of Utica, if there be such justice, and if not, on the certificate of a justice of the supreme court residing in the fifth judicial district, out of the moneys raised in the county of Oneida for court expenses by the treasurer thereof, upon the presentation of such certificate.

Source.—Education L. 1909, § 1064, revised from L. 1877, ch. 94, § 1, as amended by L. 1887, ch. 14; L. 1904, ch. 37; L. 1908, ch. 476.

§ 1173. **Supreme court library at Binghamton.**—All books purchased for supreme court library, located at Binghamton, under and in pursuance of the laws of the state relating thereto shall be purchased by the justice of the supreme court residing at that place, or if there be no justice there,

then by the justice residing nearest to the city of Binghamton. The books so purchased shall be paid for on the order of such justice.

The librarian of such library shall be appointed by said justice, and shall hold office during his pleasure. The salary of said librarian shall be paid monthly in each year, and the amount thereof shall be fixed in the month of October in each year for the following year by said justice, which shall be paid by the county of Broome, but shall not exceed six hundred dollars in any one year. Said librarian shall be subject in all respects to the direction of said justice, and shall be governed by such rules and regulations as he shall make from time to time.

The board of supervisors of Broome county shall provide a suitable room or rooms and suitable cases in the court-house at Binghamton for said supreme court library. The contingent expenses of said library, except for the purchase of books, shall be paid as heretofore by the county of Broome; which contingent expenses must be first certified to be correct by one of said justices or by the county judge of said county. Said court may have said library insured for the benefit of said library and the policies made payable to the clerk of the county of Broome and any insurance money received shall be invested and shall be paid out by said clerk under the orders of the justice of the supreme court charged with the purchase of books for said library, in restoring said library, in purchasing additional books therefor and in paying expenses necessarily incurred by reason of a fire in removing and caring for said library and in adjustment of the loss under the policies of insurance thereon.

The librarian of said library shall, upon the written request of any justice of the supreme court of such district, send to said justice any of the books contained in said library, and pay the charges for sending and returning the same. The sum so paid by him shall be repaid to him out of any moneys appropriated for the support or maintenance of said library, upon being duly certified by a majority of the justices of the supreme court of said district.

Source.—Education L. 1909, § 1065, revised from L. 1872, ch. 392, § 4, in part; L. 1893, ch. 58, §§ 1, 2, 3, as amended by L. 1908, ch. 499; L. 1859, ch. 230, § 9, as amended by L. 1897, ch. 482; L. 1883, ch. 270.

§ 1174. **Supreme court library at Delhi.**—The justices of the supreme court of the sixth judicial district, or a majority of them, shall appoint a librarian for the supreme court library, located at Delhi, Delaware county, which librarian shall hold his office during the pleasure of said justices. Such appointment shall be in writing and signed by a majority of said justices and filed in the office of the clerk of Delaware county. The salary of such librarian shall be seven hundred dollars per annum, and shall be paid in quarterly payments on the last day of each of the months of March, June, September and December of each year, by the county treasurer of the county of Delaware, from the funds in his hands as such treasurer. Said librarian shall be subject to the directions of said justices,

§§ 1175, 1176.

Court libraries.

L. 1910, ch. 140.

and shall be governed by such rules and regulations as they shall make from time to time. (*Amended by L. 1917, ch. 267, in effect April 27, 1917.*)

Source.—Education L. 1909, § 1066, revised from L. 1882, ch. 51, §§ 1, 2, 4, and 3, as amended by L. 1906, ch. 64.

§ 1175. **Supreme court library at Elmira.**—The supreme court library at Elmira shall be under the care and management of a board of trustees which board shall consist of three members who shall be appointed by the governor from among the members of the Chemung county bar who shall have practiced law for at least ten years. At the expiration of the terms of the trustees now in office the governor shall appoint their successors, each of whom shall serve for three years and until his successor is appointed. All appropriations made for said library shall be paid to said trustees, to be by them or a majority of them disbursed in the purchase of books for said library. The said trustees may make rules and regulations for the management and protection of said library and prescribe penalties for the violation thereof. They may sue for and recover such penalties, and may maintain actions for injuries to said library. They may procure proper furniture for said library; hire suitable rooms; provide fuel and lights; and defray all the incidental expenses of the care and management of said library, including the insurance thereof. The amounts required therefor shall be paid by the treasurer of the county of Chemung, upon the certificate of the resident justice of the supreme court, if there be one, and if not, upon the certificate of any justice of the supreme court of the district, out of the moneys raised in said county for court expenses, which sums, as well as the salary of the librarian hereafter specified, shall be a county charge upon said county of Chemung.

The librarian of said library shall be appointed by said board, and shall hold office during the pleasure of said board. The salary of said librarian shall be paid quarterly on the first days of January, April, July and October in each year and the amount thereof shall be fixed in the month of October in each year for the following year by said board, but such salary shall not exceed six hundred dollars in any year, and the same shall be paid by the treasurer of the county of Chemung out of the moneys raised in said county for court expenses, upon the certificate of the resident justice of the supreme court, if there be one, and if not, upon the certificate of any justice of the supreme court in the district. Said librarian shall be subject to the directions of said board and shall be governed by such rules as it shall from time to time make.

Source.—Education L. 1909, § 1067, revised from L. 1895, ch. 231, as amended by L. 1905, ch. 119.

§ 1176. **David L. Follett memorial library at Norwich.**—The supreme court library at Norwich, known as “The David L. Follett Memorial Library” shall be under the care and management of a board of trustees

which board shall consist of five members who shall be appointed by the governor from among the members of the Chenango county bar who shall have practiced law for at least ten years. At the expiration of the terms of the trustees now in office the governor shall appoint their successors, each of whom shall serve for five years and until his successor is appointed. The said board of trustees shall have power to receive by gift or devise, any property conveyed for the purpose of a law library and hold and manage the same and may make rules and regulations for the management and protection of said library and prescribe penalties for the violation thereof. They may sue for and recover such penalties and may maintain actions for any injury to said library or its property. They may procure proper furniture for said library; hire suitable rooms; provide fuel and lights, and defray all the incidental expenses of the care and management of said library, including the proper insurance thereof. The amounts required therefor shall be paid by the treasurer of the county of Chenango, upon the certificate of a resident justice of the supreme court, if there be one, and if not, upon the certificate of any justice of the supreme court of the sixth judicial district, out of the moneys raised in said county for court expenses, which sums as well as the salary of the librarian hereinafter specified, shall be a county charge upon said county of Chenango. All appropriations made for said library shall be paid by the treasurer of the state to said trustees, to be by them or by a majority of them disbursed in the purchase of books for said library and for the necessary rebinding of the same.

The librarian of the said library shall be appointed by said board, and shall hold office during the pleasure of said board. The salary of said librarian shall be paid quarterly on the first days of January, April, July and October in each year and the amount thereof shall be fixed in the month of October in each year for the following year by said board, but such salary shall not exceed five hundred dollars in any year, and the same shall be paid by the treasurer of the county of Chenango out of the moneys raised in said county for court expenses upon the certificate of the resident justice of the supreme court, if there be one; and if not upon the certificate of any justice of the supreme court in said district. Said librarian shall be subject to the direction of the said board and shall be governed by such rules as it shall from time to time establish and ordain.

Source.—Education L. 1909, § 1068, revised from L. 1902, ch. 32.

§ 1177. **Supreme court library at Buffalo.**—The supreme court library at Buffalo shall be under the care and management of the present trustees and their successors in office; who shall be known as the trustees of the law library of the eighth judicial district. In case of a vacancy in said board of trustees it shall be filled at a term of the appellate division of the supreme court of the fourth judicial department, by the judges thereof, who shall appoint to such vacancy either a justice of the supreme court re-

siding in the eighth judicial district or an attorney and counsellor at law residing in the eighth judicial district and of at least ten years' standing at the bar; provided, however, that at all times at least four of the trustees of said library shall be residents of the county of Erie. All appropriations made for said library shall be paid to the said trustees, to be by them disbursed in the purchase of books, and in the repair of books, for said library. The said trustees shall appoint a suitable person librarian of said library, who shall receive an annual salary, to be fixed by them, of not to exceed four thousand dollars, to be paid by the comptroller in monthly instalments, upon the certificate of the treasurer of the trustees of said library, which said amount shall be levied and assessed by the comptroller, one-half upon the county of Erie, and the residue thereof upon the several remaining counties constituting the eighth judicial district, in proportion to the assessed valuation of the real and personal property in said counties. The said trustees may make rules and regulations for the management and protection of said library, and prescribe penalties for the violation thereof; and may sue for and recover such penalties, and may maintain actions for injuries to said library; they may procure proper furniture for said library, hire suitable rooms, employ assistants to said librarian, provide fuel and lights, and defray all the incidental expenses of the care and management of said library; they shall yearly ascertain the amount necessary for the aforesaid purposes and certify it to the board of supervisors of Erie county, who shall pay the same. They shall yearly make a report to the regents of the university of the state of said library. The said library shall be maintained as a free public library for the use of the people of the state, the supreme court of the eighth judicial district, and the local courts of the county of Erie and of the city of Buffalo. (*Amended by L. 1911, ch. 58, and L. 1917, ch. 458, in effect May 14, 1917.*)

Source.—Education L. 1909, § 1069, revised from L. 1863, ch. 401, as amended by L. 1871, ch. 747; L. 1893, ch. 706.

§ 1178. **Supreme court library at White Plains.**—The supreme court library at White Plains shall be under the care and management of a board of trustees, which board shall consist of five members, who shall be appointed by the governor, from among the members of the Westchester county bar, who have practiced law for at least ten years. At the expiration of the terms of the members of said board of trustees now in office the governor shall appoint successors to said trustees, who shall serve for five years and until their successors have been appointed. The said board of trustees shall have power to receive by gift, devise or bequest any property given or conveyed for the purpose of a law library, and hold and manage the same, and may make rules and regulations for the management and protection of said library and prescribe penalties for the violation thereof. They may sue for and recover such penalties and

may maintain actions for any injury to said library or its property. They may procure proper furniture for said library; hire suitable rooms, provide fuel and lights and defray all the incidental expenses of the care and management of said library including the proper insurance thereof. The amounts required therefor shall be paid by the treasurer of the county of Westchester, upon the certificate of a resident justice of the supreme court, if there be one, and if not, upon the certificate of any justice of the supreme court of the ninth judicial district, out of the moneys raised in said county for court expenses, which sums, as well as the salary of the librarian hereinafter specified, shall be a county charge upon said county of Westchester. All appropriations made by the state for said library for purposes not hereinbefore otherwise provided for shall be paid by the treasurer of the state, upon the warrant of the comptroller, to said trustees to be by them, or a majority of them, disbursed in the purchase of books for said library and for maintenance and supplies. The librarian of said library, who shall be a regularly admitted attorney and counselor-at-law who has practiced law for at least five years, shall be appointed by said board of trustees and shall hold office during the pleasure of said board. The amount of the salary of said librarian shall be fixed by said board of trustees, and shall be paid in monthly instalments by the treasurer of the county of Westchester out of the moneys raised in said county for court expenses, upon the certificate of a resident justice of the supreme court, if there be one, and if not, upon the certificate of any justice of the supreme court of the ninth judicial district. Said librarian shall be subject to the direction of the said board of trustees and shall be governed by such rules as it shall from time to time establish and ordain.

Source.—Education L. 1909, § 1070, revised from L. 1908, ch. 304, §§ 2, 3.

§ 1179. **Supreme court library at Troy.**—The supreme court library at Troy shall be under the care and management of a board of trustees, which board shall consist of three members, who shall be appointed by the governor from among the members of the Rensselaer county bar, who shall have practiced law in said county for at least ten years. At the expiration of the terms of the members of said board of trustees now in office the governor shall appoint successors to said trustees who shall serve for three years and until their successors have been appointed. The said board of trustees shall have power to receive, by gift or devise, any property conveyed for the purpose of a law library and hold and manage the same and may make rules and regulations for the management and protection of said library and prescribe penalties for the violation thereof. They may sue for and recover such penalties and may maintain actions for any injury to said library or its property. They may procure proper furniture for said library; and defray all the incidental expenses of the care and management of said library, including insurance thereof and telephone service. The amounts required therefor shall be paid by the

treasurer of the county of Rensselaer, upon the certificate of a resident justice of the supreme court, if there be one, and if not upon the certificate of any justice of the supreme court of the third judicial district, out of the moneys raised in said county for court expenses, which sums as well as the salary of the librarian hereinafter specified, shall be a county charge upon said county of Rensselaer. All appropriations made for said library shall be paid by the treasurer of the state to said trustees to be by them or by a majority of them disbursed in the purchase of books for said library and for the necessary rebinding of the same. The board of supervisors of Rensselaer county shall provide within the court house in the city of Troy, suitable rooms for said library, and shall provide heat and light therefor. The librarian of the supreme court library at Troy shall be appointed by said board, and shall hold office during the pleasure of said board. The salary of said librarian shall be paid quarterly on the first days of January, April, July and October in each year and the amount thereof shall be fixed in the month of October in each year for the following year by said board, and the same shall be paid by the treasurer of the county of Rensselaer out of the moneys raised in said county for court expenses upon the certificate of the resident justice of the supreme court, if there be one; and if not upon the certificate of any justice of the supreme court in said district. Said librarian shall be governed by such rules as it shall from time to time establish and ordain.

Source.—Education L. 1909, § 1071, revised from L. 1908, ch. 79, §§ 2, 3.

§ 1180. **Supreme court library in Queens county.**—There is hereby established a law library in the second judicial district, to be located in the county of Queens in the borough of Queens in the city of New York, which shall be designated as the supreme court library in the county of Queens. The said library shall be under the care and management of a board of trustees which shall consist of five members who shall be appointed by the resident supreme court justice or justices of the county of Queens from among the members of the Queens county bar who have practiced law for at least ten years. If there shall be no resident supreme court justice in the county of Queens, then the appointment of the trustees shall be made by a majority of the justices of the appellate division of the supreme court for the second judicial department. Upon the passage of this act there shall be appointed in the manner above mentioned, one member of said board of trustees who shall serve until the thirty-first day of December, nineteen hundred and eleven; one member who shall serve until the thirty-first day of December, nineteen hundred and twelve; one member who shall serve until the thirty-first day of December, nineteen hundred and thirteen; one member who shall serve until the thirty-first day of December, nineteen hundred and fourteen; and one member who shall serve until the thirty-first day of December,

nineteen hundred and fifteen. At the expiration of such terms there shall be appointed in the manner above mentioned, successors to said trustees, each of whom shall serve for five years and until his successor shall be appointed. The said board of trustees shall have power to receive by gift, devise or bequest any property given or conveyed for the purpose of a law library and hold and manage the same and may make rules and regulations for the management and protection of said library and prescribe penalties for the violation thereof. They may sue for and recover such penalties and may maintain actions for any injury to the said library or its property. They may procure proper furniture for said library; hire suitable rooms; provide fuel and lights and defray all incidental expenses of the care and management of said library, including the proper insurance thereof, and employ and appoint such persons as they may think necessary for the proper care, management and maintenance of said library, said appointees and employees to be selected from the appropriate civil service eligible list as required by law. They shall yearly ascertain the amount necessary for the aforesaid purposes and certify it to the board of estimate and apportionment of the city of New York, which shall include in the annual budget such sums as said board of estimate shall deem advisable, which sums shall be paid by the city of New York. All appropriations made by the state for the said library for purposes not otherwise herein provided for shall be paid by the treasurer of the state upon the warrant of the comptroller to the said trustees, to be by them, or a majority of them, disbursed in the purchase of books for said library. (*Added by L. 1911, ch. 557.*)

§ 1180. City court of the city of New York.—The law library of the city court of the city of New York shall be kept in the court house thereof, and shall be in the care and custody and under the control of the justices of the said court, who shall be the trustees thereof. The said trustees may make rules and regulations for the management and direction of the said library and prescribe penalties for the violation thereof. They may sue for and recover said penalties and may maintain actions for injury to said library. They may appoint a librarian, whose salary shall be fixed by the board of estimate and apportionment of said city. The said librarian shall, in addition to the duties of taking care of the books of the library, also perform such duties in relation to the custody and distribution of the stationery and other supplies furnished for the use of the city court, and such other duties, as the justices direct. The said trustees may procure furniture for said library and shall defray all the expenses incidental to its care and management. They shall yearly ascertain the amount necessary for the aforesaid purposes and certify it to the board of estimate and apportionment of the city of New York, which shall include in the annual budget such sums as said board may deem advisable, which sums shall be paid by the city of New York. (*Added by L. 1911, ch. 824.*)

§ 1180-b. **Law library for the county officials of the county of Bronx.**—The law library for the county officials of the county of Bronx shall be kept wherever designated by the trustees thereof and shall be in the care and custody and under the control of the surrogate, county judge and the district attorney, who shall be the trustees thereof. The said trustees may make rules and regulations for the management and direction of the said library and prescribe penalties for the violation thereof. They may sue for and recover said penalties and maintain actions for injury to said library. They may appoint and at pleasure remove a librarian, whose salary shall be fixed by the board of estimate and apportionment of the city of New York and shall be a county charge. The said librarian shall, in addition to the duties of taking care of the books of the library, also perform such duties in relation to the custody and distribution of the stationery and other supplies furnished for the use of said library and such other duties as the trustees direct. The said trustees may procure furniture for said library and shall defray all expenses incidental to its care and management. They shall yearly ascertain the amount necessary for the aforesaid purposes and certify it to the board of estimate and apportionment of the city of New York, which shall include in the annual budget such sums as said board may deem advisable, which sums shall be paid by the city of New York, and shall be a county charge. (*Added by L. 1914, ch. 385.*)

§ 1181. **Supreme court library at Watertown.**—The supreme court law library at Watertown, New York, in and for the fifth judicial district, shall be in charge of and under the care of the trustees of the Watertown law library and shall be governed by such rules as the trustees thereof may prescribe. The board of supervisors of Jefferson county shall provide suitable and proper rooms in which said library shall be kept. The county judge, with the consent of a majority of the said trustees, may appoint and at pleasure, with like consent, remove a librarian who shall also act as clerk to the county judge and whose salary shall be six hundred dollars per annum and payable by the treasurer of said county out of the moneys appropriated for court expenses in said county. The said trustees may effect an insurance upon said library payable to the state of New York or any other parties in whom the title to any part of said books shall be vested. In case of loss insurance moneys may be expended by said trustees in the purchase of books to replace those destroyed. Insurance effected for the state of New York shall be paid by the comptroller upon a certificate of said trustees from appropriations applicable thereto. (*Added by L. 1914, ch. 343, as amended by L. 1915, ch. 108.*)

§ 1182. **Supreme court law library at Riverhead.**—The supreme court law library at Riverhead, New York, in and for the second judicial district, shall be under the care and management of a board of three trustees who shall be members of the Suffolk county bar and who shall be selected by

the justice of the supreme court residing in Suffolk county. Such trustees shall have power to receive by gift, devise or bequest any property given or conveyed for the purpose of a law library. The foundation of such law library shall be the law books and other library property now belonging to the Suffolk county bar association when the same shall be conveyed to such trustees by such bar association. It shall be the duty of such trustees to hold and manage the property of such library and to make rules and regulations for the management and protection of the same, and to prescribe penalties for the violation thereof. They may sue for and recover such penalties and maintain actions for any injury to such library or its property. They may procure proper furnishings, provide rooms, fuel and lights for such library and defray all incidental expenses for the care and management of same as well as the salary of a librarian. The amounts required therefor shall be paid by the treasurer of the county of Suffolk upon the certificate of a resident justice of the supreme court of the second judicial district, out of the moneys raised in such county for court expenses, which amounts shall be a county charge upon such county of Suffolk. The librarian shall be appointed by such board of trustees and shall hold office during their pleasure. Such trustees shall fix the salary of such librarian, which shall not exceed six hundred dollars per annum, and such salary shall be paid in equal monthly payments. (*Added by L. 1916, ch. 231.*)

§ 1183. **Hamilton Odell library at Monticello.**—There is hereby established a law library in and for the third judicial district, at Monticello, New York, which shall be designated and known as the Hamilton Odell library. Said library shall be under the care and management of a board of three trustees who shall be members of the Sullivan county bar and who shall be selected by the justice of the supreme court residing in Ulster county. Such trustees shall have power to receive by gift, devise or bequest any property given or conveyed for the purpose of a law library. The foundation of such law library shall be the law books and other library property now belonging to the Sullivan County Bar Association when the same shall be conveyed to such trustees by such bar association. It shall be the duty of such trustees to hold and manage the property of such library and to make rules and regulations for the management and protection of the same, and to prescribe penalties for the violation thereof. They may sue for and recover such penalties and maintain actions for any injury to such library or its property. They may procure proper furnishings, provide rooms, fuel and lights for such library and defray all incidental expenses for the care and management of same as well as the salary of a librarian. The amounts required therefor shall be paid by the treasurer of the county of Sullivan upon the certificate of a justice of the supreme court of the third judicial district, out of the moneys raised in such county for court expenses, which amounts shall be a county

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charge upon such county of Sullivan. The librarian shall be appointed by such board of trustees and shall hold office during their pleasure. Such trustees shall fix the salary of such librarian which shall not exceed six hundred dollars per annum, and such salary shall be paid in equal monthly payments. (*Added by L. 1917, ch. 216, in effect April 29, 1917.*)

ARTICLE XLV-A.

STATE SCHOOL OF AGRICULTURE ON LONG ISLAND.

(*Added by L. 1912, ch. 319.*)

Section 1185. Establishment and control.

1186. Immediate supervision and management.

1187. Instruction and other operations.

1188. Establishment of an advisory board. (*Repealed by L. 1915, ch. 422.*)

§ 1185. **Establishment and control.**—There shall be established on Long Island an institution to be known as the New York State School of Agriculture on Long Island. The commissioner of education shall have the same general powers and duties in respect thereto as possessed by such commissioner concerning the schools and institutions mentioned in subdivisions two, three and four of section ninety-four of this chapter. (*Added by L. 1912, ch. 319.*)

L. 1912, ch. 319, §§ 2, 3 provided for the appointment of members of the board of trustees, authorized the acquisition of a site and the erection of buildings thereon, and appropriated \$50,000 for such purpose.

§ 1186. **Immediate supervision and management.**—Such school and the school property shall be under the immediate supervision, care and management of a board of nine trustees, of whom the governor shall appoint one from each of the five boroughs of the city of New York, two from the county of Nassau and two from the county of Suffolk. They shall be so appointed that the terms of office of three trustees shall expire each year. All trustees shall serve without pay. The board of trustees shall have the power to employ, and to fix the compensation of a director, teachers and such other persons as it may deem necessary for the welfare of the school, and on charges duly proven to the satisfaction of the said board of trustees, a director or teacher may be discharged and removed, provided it shall be so voted by two-thirds of the members of the board, and any such removal shall have the endorsement and approval of the state commissioner of education. The board of trustees shall have power to do all other things lawful and necessary to carry into effect the objects and purposes of this article; subject, however, to such advisory co-operation of the state commissioner of education, as may be deemed necessary. Students bona fide residents of the state shall have free tuition. All moneys received for the school, except moneys from the state treasury and donations,

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shall be reported and forwarded monthly to the state treasurer. Unless otherwise provided by statute moneys appropriated for maintenance, or any item of maintenance, of such school shall be paid out by the state treasurer on the warrant of the comptroller on the order of the board of trustees upon vouchers approved by such board and by the commissioner of agriculture. (*Added by L. 1912, ch. 319, and amended by L. 1915, ch. 482.*)

§ 1187. **Instruction and other operations.**—Such school shall furnish instruction and training in agricultural science, manual arts and domestic science; courses for public school teachers and others; winter courses for farmers and others, and such other operations as may be approved by the trustees and the commissioner of education. The provisions of section six hundred and seven of this chapter apply to such school. (*Added by L. 1912, ch. 319.*)

§ 1188. **Establishment of an advisory board.**—(*Added by L. 1912, ch. 319, and repealed by L. 1915, ch. 482.*)

ARTICLE XLVI.

(Article added by L. 1913, ch. 424.)

DIVISIONS OF HISTORY AND PUBLIC RECORDS.

- Section 1190. Divisions created.
- 1191. Functions of the division of history.
 - 1192. Powers of regents in respect to public records and historical documents, et cetera.
 - 1193. General duties of supervisor of public records.
 - 1194. What are public records.
 - 1195. Functions of the division of public records.
 - 1196. Safeguarding of public records.
 - 1197. Destruction of public records.
 - 1198. Penalty.

§ 1190. **Divisions created.**—The division of public records and the division of history in the education department, and the offices of supervisor of public records and state historian, as created and continued by chapter three hundred and eighty of the laws of nineteen hundred and eleven, are hereby continued as so constituted, with the powers and duties herein prescribed. Such divisions and officers and the employees thereof shall be subject to the same provisions of law and rules as the other divisions and employees of the education department. (*Added by L. 1913, ch. 424.*)

§ 1191. **Functions of the division of history.**—It shall be the function of the division of history, subject to the regulations of the regents, to collect, collate, compile, edit and prepare for publication all official records,

memoranda, statistics and data relative to the history of the colony and state of New York.

It shall also be the function of the division of history in collaboration with the division of public records, when authorized by the commissioner of education so to do, to collate, compile, edit and prepare for publication as above, the official records, archives or papers of any of the civil subdivisions of the state.

And it shall further be the function of the division of history to collate, compile, edit and prepare for publication as above such archives, records, letters and manuscripts, belonging to the state or any of its officers or departments, or to any historical or patriotic society or association chartered by the regents or by statute law, or any other archives, records, papers and manuscripts, as in the judgment of the state historian but by authority of the commissioner of education, it shall be deemed for the best interests of the state to publish, for the preservation of the state's history. (*Added by L. 1913, ch. 424.*)

§ 1192. Powers of regents in respect to public records and historical documents, et cetera.—The education department, pursuant to the education law, shall, on and after October first, nineteen hundred and eleven, have general and exclusive supervision, care, custody and control of all public records, books, pamphlets, documents, manuscripts, archives, maps and papers of any public office, body, board, institution or society now extinct, or hereafter becoming extinct, the supervision, care, custody and control of which are not already or shall not hereafter be otherwise provided for by law.

Such department shall take such action as may be necessary to put the records hereinabove specified, except as aforesaid, in the custody and condition contemplated by the various laws relating thereto and shall provide for their restoration and preservation, and cause copies thereof to be made whenever by reason of age, use, exposure or any casualty, such copies shall in their judgment be necessary. Whenever such copy is made, and after it has been compared with the original, it shall be certified by the official person, board or officer having the legal custody and control of said original, and shall thereafter be considered and accepted as evidence and, for all other purposes, the same as the original could be; provided that the original shall be thereafter cared for and preserved, the same as if no such copy had been made, for such examination as may be directed by an order of court in any action or proceeding in which the accuracy of the copy is questioned.

The officers of any county, city, town or village or other political division of the state or of any institution or society created under any law of the state may transfer to the regents records, books, pamphlets, manuscripts, archives, maps, papers and other documents which are not in general use, and it shall be the duty of the regents to receive the same and

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to provide for their custody and preservation. (*Added by L. 1913, ch. 424.*)

§ 1193. **General duties of supervisor of public records.**—The supervisor of public records shall examine into the condition of the records, books, pamphlets, documents, manuscripts, archives, maps and papers kept, filed or recorded, or hereafter to be kept, filed or recorded in the several public offices of the counties, cities, towns, villages, or other political divisions of the state, and all other public records, books, pamphlets, documents, manuscripts, archives, maps and papers heretofore or hereafter required by law to be kept by any public body, board, institution or society, created under any law of the state in said counties, cities, towns, villages or other political divisions of the state, except where the same conflicts with the present duties and office of the commissioner of records in the county of Kings and the commissioner of records in the county of New York. (*Added by L. 1913, ch. 424.*)

§ 1194. **What are public records.**—In construing the provisions of this chapter and other statutes, the words “public records” shall, unless a contrary intention clearly appears, mean any written or printed book or paper, or map, which is the property of the state, or of any county, city, town or village or part thereof, and in or on which any entry has been made or is required to be made by law, on which any officer or employee of the state or of a county, city, town or village has received or is required to receive for filing.

All public records inscribed by public officials, other than maps shall be entered or recorded in durable ink on linen paper durably made and well finished. (*Added by L. 1913, ch. 424.*)

§ 1195. **Functions of the division of public records.**—It shall be the duty of the division of public records to take all necessary measures for the proper inscription, the retrieval, the care and the preservation of all public records in the various political divisions of the state, except as described in section eleven hundred and ninety-three.

The division of public records shall advise with and recommend to public officers hereinbefore described, as to the methods of inscribing, as to the materials used in, and as to the safety and preservation of all public records. The recommendations of the division of public records may be enforced by an order issued by a justice of the supreme court upon application of the commissioner of education, either with or without notice to the proper public officer, as such justice may require. (*Added by L. 1913, ch. 424.*)

§ 1196. **Safeguarding of public records.**—Every person who has the custody of any public record books of a county, city, town or village shall, at its expense, cause them to be properly and substantially bound. He shall

§§ 1197, 1198, 1190. New York-American Veterinary College.

L. 1910, ch. 140.

have any such books which may have been left incomplete, made up and completed from the files and usual memoranda, so far as practicable.

Officers or boards in charge of the affairs of counties, cities, towns and villages shall provide and maintain fireproof rooms, vaults, safes or other fire-resisting receptacles made of noncombustible materials, of ample size for the safe-keeping of the public records in their care, and shall furnish such rooms only with fittings of noncombustible material, the cost to be a charge against such county, city, town or village. All such records shall be kept in the buildings in which they are ordinarily used, and so arranged that they can be conveniently examined and referred to. When not in use, they shall be kept in the vaults, safes or other fire-resisting receptacles provided for them. (*Added by L. 1913, ch. 424.*)

§ 1197. **Destruction of public records.**—No officer of the state or of any county, city, town or village or other political division of the state, or of any institution or society created under any law of the state, shall destroy, sell or otherwise dispose of any public record, original or copied, or of any archives, in his care or custody or under his control, and which are no longer in current use, without first having advised the commissioner of education of their nature and obtained his consent. (*Added by L. 1913, ch. 424.*)

§ 1198. **Penalty.**—A public officer who refuses or neglects to perform any duty required of him by this chapter or to comply with a recommendation of the commissioner of education under the authority of this act, shall for each month of such neglect or refusal, be punished by a fine of not less than twenty dollars. (*Added by L. 1913, ch. 424.*)

ARTICLE XLVI.*

(*Added by L. 1913, ch. 676.*)

THE NEW YORK-AMERICAN VETERINARY COLLEGE.

Section 1190. The New York-American Veterinary College; to be a state veterinary college.

1191. Objects.

1192. Extent to which property may be held.

1193. Appropriations; report; scholarships; tuition fee.

§ 1190. **The New York-American Veterinary College; to be a state veterinary college.**—The New York-American Veterinary College, one of the schools or departments of the New York University of the city of New York, is hereby adopted as the state veterinary college for the eastern portion of the state, so long as the work of the said veterinary college shall continue to be carried on either at its present location in West Fifty-

* So in original. Article and sections erroneously numbered.

L. 1910, ch. 140.

New York-American Veterinary College.

§§ 1191-1193.

fourth street in the city of New York, or elsewhere in the city of New York. (*Added by L. 1913, ch. 676.*)

§ 1191. **Objects.**—The objects of the said veterinary college shall hereafter embrace the conducting of investigation as to the nature, prevention and cure of all diseases of animals, including such as are communicable to man and such as cause epizootics among live stock; to investigate the economical questions which will contribute to the more profitable breeding, rearing and utilization of animals; to produce reliable standard preparations of toxins, antitoxins and other products to be used in the diagnosis, prevention and cure of diseases and in the conducting of sanitary work by approved modern methods; and to give instruction in the normal structure and function of the animal body, in the pathology, prevention and treatment of animal diseases, and in all matters pertaining to sanitary science as applied to live stock, and correlatively to the human family. (*Added by L. 1913, ch. 676.*)

§ 1192. **Extent to which property may be held.**—All buildings, furniture, apparatus and other property heretofore or hereafter erected or furnished by the state for such veterinary college shall be and remain the property of the state. New York University shall have the custody and control of said property, and shall, with whatever state moneys may be received for the purpose, administer the said veterinary college, with authority to appoint investigators, teachers and other officers, to lay out lines of investigation, to prescribe the requirements for admission and the course of study, and with such other power and authority as may be necessary and proper for the due administration of such veterinary college. Said university shall receive no income, profit or compensation therefor, but all moneys received from state appropriations for the said veterinary college or derived from other sources in the course of the administration thereof shall be kept by said university in a separate fund from the moneys of the university, and shall be used exclusively for said New York-American Veterinary College. (*Added by L. 1913, ch. 676.*)

§ 1193. **Appropriations; report; scholarships; tuition fee.**—The moneys that may be appropriated to be paid to the New York University by the state in any year to be expended by the said university in the administration of said veterinary college shall be payable to the treasurer of the New York University in three equal payments, to be made on the first day of October, the first day of January and the first day of April in such year; and within thirty days after the expiration of the period for which each installment is received the said university shall furnish the comptroller of the state of New York satisfactory vouchers for the expenditure of such installment. The said university shall expend such moneys and use such property of the state in administering said veterinary college, and shall report to the governor during the month of January in

§§ 1200-1202.

Laws repealed.

L. 1910, ch. 140.

each year a detailed statement of such expenditures and of the general operations of the said veterinary college. Tuition shall be given free in this school to one student from each assembly district of the portion of this state lying east of the line drawn from Port Jervis to Utica and thence to Ogdensburg. This free tuition scholarship for each assembly district to be awarded from time to time by the faculty of the school upon competitive examination. The tuition fees charged to other students and all other fees and charges in said veterinary college shall be fixed by the New York University, and the moneys so received shall be expended for the current expenses of the said veterinary college. (*Added by L. 1913, ch. 676.*)

ARTICLE XLVII.

(Former Art. 46 (§§ 1190-1192) renumbered Art. 47 (§§ 1200-1202), by L. 1913, chs. 424 and 676.)

LAWS REPEALED; SAVING CLAUSE; WHEN TO TAKE EFFECT.

Section 1200. Laws repealed.

1201. Saving clause.

1202. When to take effect.

§ 1200. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed. (*Section renumbered by L. 1913, ch. 424, also erroneously renumbered by L. 1913, ch. 676.*)

Source.—Education L. 1909, § 2000.

§ 1201. Saving clause.—Nothing herein contained shall be construed to impair or in any manner affect or change any special law touching the schools or school system of any city or incorporated village unless the same is so stated. (*Section renumbered by L. 1913, ch. 424, also erroneously renumbered by L. 1913, ch. 676.*)

Source.—Education L. 1909, § 2001, revised from former Con. Sch. L. (L. 1894, ch. 556) tit. 15, § 49; originally revised from L. 1864, ch. 555, tit. 13, § 14.

Ch. 555, L. 1864, did not effect a repeal by implication of § 16 of ch. 179, L. 1856, and ch. 414, L. 1883, is a valid provision of law. *People ex rel. Strough v. Canvassers* (1894), 77 Hun 372, 28 N. Y. Supp. 871, *affd.* (1894), 143 N. Y. 84, 37 N. E. 649.

§ 1202. When to take effect.—This chapter shall take effect immediately. (*Section renumbered by L. 1913, ch. 424, also erroneously renumbered by L. 1913, ch. 676.*)

Source.—Education L. 1909, § 2002.

SCHEDULE OF LAWS REPEALED.

Revised Statutes.....	Part 1, chapter 9, title 8	All
Revised Statutes	Part 1, chapter 15, title 1	All
Revised Statutes.....	Part 1, chapter 15, title 2	All

L. 1910, ch. 140.

Laws repealed.

Revised Statutes Part 1, chapter 15, title 3 All
 Revised Statutes Part 1, chapter 15, title 4 All
 Revised Statutes Part 1, chapter 15, title 5 All

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1784	51	All	1830	320	5-7
(7th Sess.)			1831	44	All
1784	15	All	1831	142	All
(8th Sess.)			1831	206	All
1787	82	All	1832	223	All
1791	45	All	1832	299	All
1795	75	All	1832	317	All
1796	49	All	1833	19	All
1797	34	All	1833	109	All
1798	48	All	1834	140	All
1801	189	3	1834	241	All
1801	195	28	1835	34	All
1802	30	All	1835	80	All
1807	135	All	1835	123	All
1808	218	All	1835	138	1
1809	156	4	1835	308	All
1810	85	10	1836	142	All
1811	246	53, 54	1836	226	1-3
1812	131	All	1836	228	2-4
1812	242	All	1836	399	4
1813	52	All	1836	511	3
1813	100	All	1837	200	All
R. L. 1813	59	All	1837	241	All
R. L. 1813	82	17	1837	298	All
1814	27	All	1838	244	All
1814	192	All	1839	177	All
1815	207	All	1839	200	All
1815	252	All	1839	226	All
1816	202	All	1839	315	1, 2
1817	89	All	1839	330	All
1818	276	All	1840	174	2
1819	161	All	1840	366	All
1819	164	All	1840	381	All
1819	239	All	1841	163	All
1820	224	All	1841	260	All
1821	48	All	1842	142	All
1821	61	All	1842	150	4
1821	73	All	1842	273	All
1821	240	2	1843	85	All
1822	234	All	1843	133	All
1822	256	All	1844	234	All
1823	189	All	1844	254	All
1823	193	All	1844	255	All
1823	269	27	1844	261	All
1824	131	All	1844	311	All
1824	239	22	1844	320	50,
1824	276	9	pt. repealing L. 1842, ch. 150.		
1825	166	1-3, 5	1845	14	2
1825	203	All	1845	85	All
1826	30	All	1845	179	All
1827	97	2-4	1846	45	All
1827	293	All	1846	66	All
1828	21	1,	1846	132	All
¶ 227, 267, 282, 411, 418, 442, 500, 524			1846	186	All
(2d meet.)			1846	323	All
1829	287	2-9	1847	50	All
1829	376	5	1847	172	All
1830	170	All	1847	190	All
1830	219	All	1847	208	3
1830	240	16,	1847	211	All
pt. affecting R. S., pt. 1, ch. 15, tit. 2,			1847	212	All
Art. 1, § 3.			1847	273	All
1830	284	2	1847	358	All

Laws repealed.			L. 1910, ch. 140.		
LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1847	361	All	1860	314	All
1847	388	All	1860	402	All
1847	443	All	1860	456	All
1847	480	All	1862	351	All
1847	485	All	1862	384	All
1848	262	2-4	1862	450	All
1848	318	All	1863	325	All
1849	140	All	1863	378	All
1849	175	All	1863	401	All
1849	266	All	1863	418	All
1849	300	All	1863	463	All
1849	382	1-12, 14-16	1864	386	All
1849	388	All	1864	555	All
1849	404	All	1864	556	All
1850	7	All	1864	583	All
1850	51	1	1865	445	All
1850	89	All	1865	585	All
1850	184	All	1865	587	All
1850	261	All	1865	647	All
1850	360	All	1865	722	All
1850	378	All	1866	78	All
1851	151	All	1866	466	All
1851	425	All	1866	520	All
1851	449	All	1866	708	All
1851	500	All	1866	800	All
1851	544	All	1866	882	All
1852	97	All	1867	84	All
1852	333	2-4	1867	406	All
1852	366	All	1867	583	All
1853	78	All	1867	725	All
1853	115	All	1867	744	All
1853	184	All	1867	763	All
1853	185	All	1867	819	All
1853	402	All	1869	18	All
1853	433	All	1870	60	All
1853	491	All	1870	166	All
1854	80	All	1870	180	All
1854	97	All	1870	492	2
1854	167	All	commencing "The local boards" and		
1854	228	All	ending "the respective schools"		
1854	272	1-3	1870	557	All
1855	18	All	1870	565	All
1855	50	All	1871	166	All
1855	91	All	1871	329	All
1855	178	All	1871	359	All
1855	410	All	1871	548	All
1855	471	1-3	1871	711	All
1855	539	1	1871	746	All
pt. relating to indigent blind			1871	747	All
*1856	51	All	1872	392	All
1856	71	All	1872	616	All
1856	168	All	1872	654	All
1856	179	All	1872	670	All
1856	180	All	1873	463	All
1856	186	All	1873	642	4-11
1857	51	3, 4	1874	45	All
1857	527	All	1874	253	All
1858	151	All	1874	421	All
1858	290	All	1874	514	All
1859	230	All	1875	176	All
1859	278	All	1875	213	All
1859	395	All	1875	322	All
1859	426	All	1875	372	All

* "Continuing the Monroe County Mutual Insurance Co.," L. 1856, ch. 54, relating to termination of academic year in academies, evidently intended.

L. 1910, ch. 140.

Laws repealed.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1875	567	All	1885	58	All
1876	50	All	1885	146	1
1876	132	All	1885	340	1-11
1876	318	All	1885	533	All
1876	372	All	1886	121	All
1876	374	All	1886	199	All
1877	33	All	1886	292	All
1877	94	All	1886	413	1,
1877	161	All	beginning "and it shall be the duty of"		
1877	163	All	and ending "of the state."		
1877	219	All	1886	428	All
1877	413	All	1886	493	All
1877	425	1-6	1886	591	All
1878	173	All	1886	595	All
1878	174	All	1886	614	All
1878	248	All	1886	615	All
1879	134	All	1886	655	All
1879	264	All	1887	14	All
1879	289	All	1887	291	All
1879	396	All	1887	318	All
1879	405	All	1887	333	All
1880	9	All	1887	334	All
1880	27	All	1887	335	All
1880	210	All	1887	538	All
1880	348	All	1887	540	All
1880	355	All	1887	592	All
1880	400	3	1887	602	All
1880	455	All	1887	652	All
1880	514	All	1887	672	All
1880	527	All	1887	675	All
1880	549	1,	1887	709	All
so far as amendatory of L. 1879, ch.			1888	27	All
272			1888	196	All
1881	120	All	1888	209	All
1881	223	All	1888	331	All
1881	281	All	1888	334	All
1881	377	All	1888	337	All
1881	492	All	1888	444	All
1881	528	All	1888	533	All
1881	632	All	1889	25	All
1881	675	All	1889	77	1
1882	51	All	1889	90	All
1882	115	All	1889	137	All
1882	116	All	1889	139	All
1882	147	All	1889	142	All
1882	318	All	1889	245	All
1882	319	All	1889	328	All
1882	333	All	1889	333	All
1882	381	All	1889	517	All
1883	75	All	1889	529	All
1883	172	All	1890	73	All
1883	250	All	1890	74	All
1883	270	All	1890	170	All
1883	275	All	1890	175	All
1883	294	All	1890	197	All
1883	328	All	1890	352	All
1883	355	2-4	1890	431	All
1883	413	All	1890	469	All
1883	414	All	1890	524	All
1883	423	All	1890	526	All
1884	30	All	1890	534	All
1884	49	All	1890	548	All
1884	89	All	1891	303	All
1884	179	All	1891	329	All
1884	248	All	1891	377	All
1884	413	All	1892	36	All
1884	427	All	1892	152	All

Laws repealed.			L. 1910, ch. 146.		
LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1892	214	All	1897	294	All
1892	280	All	1897	466	All
1892	352	All	1897	482	All
1892	378	All	1897	495	All
1892	573	All	1897	512	All
1893	6	All	1897	689	All
1893	58	All	1898	122	All
1893	63	All	1898	223	All
1893	484	All	1898	481	All
1893	485	All	1898	649	All
1893	488	All	1899	440	All
1893	500	All	1899	489	All
1893	636	All	1899	540	All
1893	706	All	1900	22	All
1894	127	All	1900	258	All
1894	229	All	1900	301	All
1894	443	All	1900	481	All
1894	488	All	1900	490	All
1894	556	All	1900	492	All
1894	671	All	1901	85	1
1895	87	All	1901	201	All
1895	222	All	1901	343	All
1895	223	All	1901	480	All
1895	231	All	1901	492	All
1895	232	All	1901	498	All
1895	273	All	1901	592	All
1895	274	All	1901	644	1,
1895	337	All	part beginning "All persons" and end-		
1895	341	2	ing "proper regulations"		
1895	362	1, 2	1902	16	All
1895	546	All	1902	32	All
1895	550	All	1902	185	All
1895	553	10	1902	316	All
1895	563	All	1902	325	All
1895	577	All	1902	393	All
1895	630	All	1903	62	All
1895	767	All	1903	112	All
1895	768	All	1903	125	All
1895	769	All	1903	175	All
1895	853	All	1903	223	All
1895	859	All,	1903	233	All
except pt. amending L. 1892, ch. 378, §			1903	265	All
19, last two sentences.			1903	289	All
1895	988	All	1903	459	All
1895	1031	All	1903	463	All
1895	1041	All	1903	489	All
1896	71	All	1903	576	All
1896	156	All	1904	37	All
1896	165	All	1904	40	All
1896	177	All	1904	166	All
1896	196	All	1904	254	All
1896	238	All	1904	281	All
1896	264	All	1904	305	All
1896	434	All	1904	322	All
1896	467	All	1904	390	All
1896	493	All	1904	424	All
1896	575	All	1904	427	All
1896	586	All	1904	677	All
1896	606	All	1905	97	All
1896	646	All	1905	119	All
1896	901	All	1905	154	All
1897	97	All	1905	161	All
1897	185	All	1905	252	All
1897	195	All	1905	258	All
1897	224	All	1905	280	All
1897	293	All	1905	311	All

L. 1910, ch. 140.

Laws repealed.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1905	562	All	1908	200	3
1905	563	All	1908	201	2-4, 7
1906	1	All	1908	202	All
1906	58	All	1908	249	All
1906	64	All	1908	263	1-5; 6,
1906	150	All		first sentence; 7	
1906	200	All	1908	304	All
1906	218	All	1908	365	All
1906	682	3, 4	1908	476	All
1906	698	All	1908	482	All
1907	103	All	1908	499	All
1907	184	All	1909	1	All
1907	186	All	1909	141	All
1907	496	4	1909	252	All
1907	585	All	1909	263	All
1907	606	All	1909	404	All
1907	608	All	1909	406	All
1907	609	All	1909	409	All
1908	79	All	1909	415	All

EFFICIENCY AND ECONOMY.

L. 1913, ch. 280, established a department of efficiency and economy. The act was repealed by L. 1915, ch. 17. L. 1913, ch. 281 established a state board of estimate. The act was repealed by L. 1915, ch. 174.

ELECTION LAW.

References.—Penal provisions respecting elections, Penal Law, § 750-782. Freedom of, Civil Rights Law, § 9. Extraordinary term of supreme court to try election cases, Executive Law, § 67.

L. 1909, ch. 22.—An act in relation to the elections, constituting chapter seventeen of the consolidated laws.

[In effect February 17, 1909.]

CHAPTER XVII OF THE CONSOLIDATED LAWS.**ELECTION LAW.**

[Schedule of articles thus amended by L. 1911, ch. 891, § 1, and L. 1913, ch. 800, § 1 (Ext. Sess.), in effect August 13, 1913.]

- Article 1. Short title; application; definitions (§§ 1-3).
2. Enrollment of voters (§§ 4-25).
3. Party organization (§§ 35-43).
4. Party nominations and designations (§§ 45-58).
- 4-a. Conduct of official primary elections; canvass of returns (§§ 70-94).
5. Nominating certificates; emblems; vacancies (§§ 121-137).
6. Registration of voters (§§ 150-184).
7. Boards of elections (§§ 190-209-a).
- 7-a. Commissioner of elections in the county of Monroe (§§ 210-223).
- 7-b. Commissioner of elections in the county of Niagara (§§ 225-238).
8. Times, places, notices, officers and expenses of elections (§§ 290-320).
9. Ballots and stationery (§§ 330-345).
10. Conduct of elections and canvass of votes (§§ 350-382).
11. Voting machines (§§ 390-421).
12. Boards of canvassers (§§ 430-444).
13. Representatives in congress and presidential electors (§§ 450-457).
14. State superintendent of elections (§§ 471-489).
15. Soldiers' and sailors' elections (§§ 500-522).
16. Corrupt practices (§§ 540-562).
17. Laws repealed; when to take effect (§§ 570, 571).

ARTICLE I.

SHORT TITLE; APPLICATION; DEFINITIONS.

- Section 1. Short title.
 2. Application.
 3. Definitions.

[Schedule of article thus amended by L. 1911, ch. 891, § 2.]

§ 1. Short title.—This chapter shall be known as the “Election Law.”

Source.—Former Elec. L. (L. 1896, ch. 909) § 1.

Source of chapter.—Before 1890 the provisions of law relating to elections were for the most part contained in ch. 6 of pt. 1 of the Revised Statutes. In that year the adoption of the system of voting by official ballot (L. 1890, ch. 262), and the requirement for personal registration in cities (L. 1890, ch. 321), greatly modified the existing law. The statutory revision commission revised the law in 1892, ch. 680, and repealed the prior legislation on the subject. This chapter was amended in many respects, especially in relation to primaries and conventions, and by the abolition of the “paster ballot.” The law was revised and re-enacted as a whole in 1896, ch. 909, which, as amended, was revised and re-enacted as L. 1909, ch. 22. Since 1909 radical changes have been made, notably in requiring direct nomination of party candidates, the direct selection of party officers, and the adoption of the so-called Massachusetts ballot for both primaries and elections. It is impracticable to indicate to any great extent the original sources of the law, nor would such indication be of any great value, on account of the complete change which has been made in the system. The source references, therefore, are made only to the act of 1896, or other independent act included by the board of statutory consolidation. See note of consolidators.

Consolidators’ note.—(Rept. of 1908.) The election law as here consolidated includes the following formerly separate laws, as amended to January 1, 1908:

Primary Election Law, L. 1899, ch. 473 (amending throughout L. 1898, ch. 179),

Town Enrollment Act, L. 1902, ch. 195,

Soldiers’ and Sailors’ Election Law, L. 1898, ch. 674,

Metropolitan Elections District Law, L. 1905, ch. 689 (amending throughout L. 1898, ch. 676),

Act creating a Commissioner of Elections in Erie County, L. 1904, ch. 394,

Act creating a Commissioner of Elections in Westchester County, L. 1907, ch. 255.

Certain provisions relating to elections in towns, villages and school districts, appearing heretofore in the Town, Village and School Laws, and closely involved in provisions of those laws more analogous to certain parts of the Constitution and the Legislative Law than to the Election Law, have been left in the Town, Village and School Laws where they were. The penal provisions already in the Election Law have been allowed to remain, instead of being placed in the Penal Code with the considerable body of provisions there concerning crimes against the elective franchise. But otherwise, and excepting also

the constitutional provisions, all the existing statute law of a general nature relating to elections, including certain exceptions to the general scheme, which are in one sense special or local, but without which the general law would be incomplete, e. g., the special provisions for a board of elections in New York City, and for the commissioners of elections in Erie and Westchester counties, are included.

ARRANGEMENT OF LAW.

An effort has been made to follow the chronological order of the election process so far as a fairly close adherence to the form of the old law permitted, beginning with the primaries and enrollment in parties, continuing through registration for elections, the proceedings in preparation for and upon election day, the proceedings of the boards of canvassers, and coming finally to the proceedings of the presidential electors in presidential years. To these have been added the provisions which have no special relation to the others in order of time, or which are incapable of adaptation to such an arrangement without fundamental change in the form of the law. The several laws here consolidated were themselves more or less consistently arranged upon the chronological plan, and accordingly the various main divisions of this consolidated law will be found to conform within themselves in greater or less degree to the chronological principle.

EDITING.

The rearrangement incidental to the consolidation has made necessary an entire renumbering of the sections of the law. Advantage has been taken of this opportunity to simplify the arrangement by eliminating the "subdivisions" of sections wherever they occurred in the old laws, the division here being into *sections* only. At the same time many of the old sections and subdivisions, sometimes of inordinate length and not wholly homogeneous in character, have been cut into two or more sections. The sectional numbers run consecutively within the articles, but gaps are left between the articles for new sections. It is conceivable, indeed, that subdivision of sections may be wisely resorted to in certain instances in making further amendments, rather than renumbering; but it was deemed advisable, especially in a law which is subject to such continual amendment as this, to begin with a clean slate.

For convenience of consultation, many of the sections have been divided into paragraphs, but without numbers or other designation. No notice of this is taken in the special notes relating to the sections.

The consolidation of several laws herein and the renumbering of the sections have necessitated changes in many references throughout the law, e. g., "the Election Law" becomes "this chapter," "this act" frequently becomes "this article." New section headings have been supplied where necessary, and the old ones amended; new analyses have likewise been prefixed to the articles where necessary, and the old ones amended.

"Elector," "electors," "an elector," have been changed throughout to "voter," "voters," "a voter," except when used of presidential electors. The several laws consolidated herein, like the Constitution, use both terms indiscriminately—sometimes both appear in the same section—although "elector" largely predominates. The impossibility of any confusion arising out of the use of the word "voter," the everyday use of the word by everybody outside of legal circles, and particularly the desirability of having a distinctive word for presidential electors, determined the consolidators in favor of "voter" rather than "elector," it having been previously determined that the usage should be made uniform throughout, whichever word was adopted.

L. 1909, ch. 22.

Short title; application; definitions.

§§ 2, 3.

The consolidators of this law have spent a large amount of time in merely editing the text. It may be justly charged that such work yields but superficial results in a case where thorough revision is demanded. The consolidators freely concede that such a course was a mere tithing of mint, anise and cummin, while letting go the weightier matters of the law. But under the limitations imposed upon the present work there was no alternative. In no instance has the intent of the law been changed in making these verbal changes.

§ 2. **Application.**—Except as otherwise herein provided, articles two, three, four and four-a of this chapter shall be controlling:

1. On the method of enrolling the voters of a party.
2. On the organization and conduct of party committees.
3. On the method of electing members of state and county committees, and delegates and alternates to national party conventions.
4. On the nomination by parties of all candidates for offices authorized to be filled at a general election, except town, village and school district officers. (*Added by L. 1911, ch. 891 and amended by L. 1913, ch. 820.*)

Town, village and school district officers.—Effect of exception. *People ex rel. Buckholz v. Wortz* (1913), 156 App. Div. 880, 141 N. Y. Supp. 727.

§ 3. **Definitions.**—The terms used in this chapter shall have the signification herein defined unless other meaning is clearly apparent in language or context;

1. The term “general election” means the election held on the Tuesday next succeeding the first Monday in November.
2. The term “official primary” or “official primary election” means a primary election held by a party for the purpose of nominating candidates for office or, electing persons to party positions and conducted by the public officers charged by law with the duty of conducting general elections. An “unofficial primary” or “unofficial primary election” means any other primary or primary election held by a party or independent body.
3. The term “primary day” means the day upon which an official primary election is held, as in this chapter provided.
4. The term “fall primary” means the official primary election held on the seventh Tuesday before the general election.

In 1917 fall primary to be held on Wednesday, Sept. 19, *L. 1917, ch. 776. See Elections.*

5. The term “spring primary” means the official primary election held on the first Tuesday in April in years when a president of the United States is to be elected.
6. The term “unit of representation” means any election district, town, ward of a city, assembly district, or any other political subdivision of the state, respectively, which is the unit from which members of any political committee or delegates to a party convention shall be elected as herein provided.

7. The term "custodian of primary records" means the officer or board whose duty it is by the provisions of this chapter to provide official ballots for general elections.

8. The term "board of elections" shall include a single commissioner of elections in a county having such an officer and the county clerk in any county which by the provisions of this chapter shall have no such board nor commissioner, except as otherwise provided in special provisions relating to any such county.

9. The term "party" means any political organization which at the last preceding election for governor polled at least ten thousand votes for governor.

10. The term "nomination" means the selection in accordance with the provisions of this chapter of a candidate for office authorized to be filled at a general election or at a special election held to fill a vacancy in such office.

11. The term "designation" means any method in accordance with the provisions of this chapter by which candidates for party nominations, or for election as party committeemen or delegates, may be named in order that they may be placed upon the official ballot for any official primary election.

12. The term "official primary ballot" means the ballot prepared, printed and supplied for use at an official primary election in accordance with the provisions of this chapter.

13. The term "party position" means membership in a party committee or the position of delegate or alternate to a national party convention.

14. The term "committee" means any committee chosen, in accordance with the provisions of this chapter, to represent the members of a party in any political subdivision of the state.

15. The term "independent body" means any organization or association of citizens which, by independent certificate, nominates candidates for office to be voted for at a general, special or village election, or town meeting, and which, if such independent body nominated a candidate for governor at the preceding general election of a governor, did not poll at least ten thousand votes for its candidate for such office.

16. The term "party nomination" means the selection by a party of a candidate for an office authorized to be filled at a general election, or at a special election held to fill a vacancy in such office, or at a town meeting.

17. The term "independent nomination" means the selection of a candidate by an independent body for an office authorized to be filled at a general election, or at a special election held to fill a vacancy in such office, or at a town meeting.

18. The term "party candidate" or "party nominee" means a person who is selected by a party to be its candidate for an office authorized to

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Short title; application; definitions.

§ 3.

be filled at a general election, or at a special election held to fill a vacancy in such office, or at a town meeting.

19. The term "independent candidate" or "independent nominee" means a person who is selected by an independent body to be its candidate for an office authorized to be filled at a general election, or at a special election held to fill a vacancy in such office, or at a town meeting.

20. The term "enrollment books," when applied to those used in a city of over one million inhabitants, means registers of electors in which party enrollments of voters are entered or provided for in additional columns. (*Amended by L. 1911, ch. 649, renumbered and amended by L. 1911, ch. 891, amended by L. 1913, ch. 820, L. 1915, ch. 678, L. 1916, ch. 537, § 1.*)

"Party."—The National Progressive party is clearly a political party within the definition of that term as contained in this subdivision. *People ex rel. Bonheur v. Christ* (1913), 208 N. Y. 6, 101 N. E. 846. Sub. 9 (formerly sub. 8), cited in *O'Brien v. Hasbrouck*, 206 N. Y. 694, 99 N. E. 1111.

"Nomination" and "designation" distinguished. *Matter of King* (1913), 155 App. Div. 720, 140 N. Y. Supp. 914.

"Committee" as defined in this subdivision applies only to parties which have participated in the party primaries or have had an opportunity to do so. *People ex rel. Robinson v. O'Connell* (1913), 155 App. Div. 428, 140 N. Y. Supp. 140.

Section cited.—*Matter of O'Brien* (1912), 206 N. Y. 694, 99 N. E. 1111; *Schieffelin v. Britt* (1912), 150 App. Div. 568, 135 N. Y. Supp. 62, *affd.* (1912), 206 N. Y. 677, 99 N. E. 1117; *Matter of Deltz* (1914), 87 Misc. 610, 150 N. Y. Supp., *revd.* (1914), 165 App. Div. 298, 151 N. Y. Supp. 261.

§ 65.)

ARTICLE II.

[Schedule of sections amended by L. 1911, ch. 891, § 4.]

ENROLLMENT OF VOTERS.

- Section 4. Delivery of enrollment books.
5. Enrollment books.
 6. Voting booths and enrollment boxes.
 7. Enrollment blanks and envelopes.
 8. Delivery of enrollment blanks to voters who register personally.
 9. Delivery of enrollment blanks to voters where registration is not personal.
 10. Enrollment by voters.
 11. Examination, sealing and custody of enrollment boxes.
 12. Certification and secrecy of enrollment where registration is personal.
 13. Certification and secrecy of enrollment where registration is not personal.
 14. Opening of enrollment box and completion of enrollment.
 - 14-a. Correction of enrollment lists.
 - 14-b. Special enrollment upon becoming of age.
 - 14-c. Special enrollment for certain voters failing to enroll on election or registration days in 1916.
 15. Enrollment for a new political party.
 16. Duplicate enrollment books.

17. Use of duplicate enrollment books at unofficial primaries.
18. Use of original enrollment books at official primaries.
19. Right to enroll and vote at primaries.
- 19-a. Special enrollment after moving.
20. New or amended enrollment books for changed districts.
21. Enrollment books to be public records; transcripts of enrollment.
22. Publication of enrollment.
23. Judicial review of enrollment.
24. Correction of enrollment with respect to persons not in sympathy with party.
25. Investigation of enrollment.

§ 4. **Delivery of enrollment books where registers do not include enrollments.**—In any political subdivision in which the registers of electors do not provide for entries of party enrollments, the custodian of primary records shall cause to be prepared on or before the fifteenth day of September in each year, original enrollment books to the number of two for each election district. Such enrollment books shall be so arranged that the names of all voters of the election district may be inscribed therein alphabetically. Said books shall be delivered by the custodian of primary records to the election inspectors of the respective election districts immediately before the first day of registration in each year and also in districts wholly outside of a city or village having five thousand inhabitants or more, to the town clerk at least twenty-four hours before the first day of registration, who shall deliver such enrollment books to the inspectors of election of the respective election districts in his town one-half hour before the opening of the polls. (*Former § 22, renumbered and amended by L. 1911, ch. 891, § 5, and amended by L. 1915, ch. 678, § 2.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 1, as amended by L. 1900, ch. 225, § 1; L. 1903, ch. 111, § 1; L. 1905, ch. 674, § 1; L. 1908, ch. 456, § 1.

§ 5. **Enrollment books where registers do not include enrollments.**—In a political subdivision referred to in the preceding section, the enrollment books shall be so arranged and printed that there shall be twelve columns on each page; the first for the enrollment numbers of the voters; the second for the surnames of the voters; the third for the christian names of the voters; the fourth for their residence addresses; the fifth for the word "yes"; the sixth for the name of the party, if any, with which the voter shall enroll; the seventh for the word "voted" in case the voter votes at the spring primary; the eighth for a record as to challenges in case he is challenged thereat; the ninth and tenth columns for similar entries in case he votes at the fall primary; and the eleventh and twelfth columns for similar entries in case there be a third official primary election or an unofficial primary election.

References, in this chapter, to a particular column, by number, of the enrollment books shall mean, when applied to a city having more than one million inhabitants, the appropriate column of the registers of electors.

L. 1909, ch. 22.

Enrollment of voters.

§§ 6, 7.

(Former § 23, renumbered and amended by L. 1911, ch. 891, § 6, and amended by L. 1915, ch. 678, § 3.)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 1, as amended by L. 1900, ch. 225, § 1; L. 1903, ch. 111, § 1; L. 1905, ch. 674, § 1; L. 1908, ch. 456, § 1.

§ 6. **Voting booths and enrollment boxes.**—The board or officers authorized to furnish voting booths in each election district for use at the general election shall cause at least two voting booths of the same kind and description as voting booths used at general elections, to be erected in each place of registration before the first day of registration in each year, and such booths shall be and remain in said places of registration during the registration at the regular meetings for registration during that year; and it shall be the duty of such board or officer to furnish in each voting booth so erected the same articles as are required by law to be placed therein for a general election, which articles shall remain therein during such registration. Such board or officer shall also provide in like manner one enrollment box in each place of registration of sufficient capacity to hold all the enrollment blanks which are to be furnished for such place of registration, which shall be similar to the ballot boxes prescribed by law to be used at a general election. Such board or officer shall also in like manner provide at each polling place on general election day, in each election district wholly outside of a city or village having five thousand inhabitants or more, or partly within and partly outside of any such village, two such voting booths, for the enrollment of voters, the needed articles therefor, and an enrollment box, as above provided. (Former § 25, renumbered and amended by L. 1911, ch. 891, amended by L. 1916, ch. 537, § 2, and L. 1917, ch. 703, in effect June 1, 1917.)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 1, as amended by L. 1900, ch. 225, § 1; L. 1903, ch. 111, § 1; L. 1905, ch. 674, § 1; L. 1908, ch. 456, § 1.

Consolidators' note.—The provision relating to the delivery of books, which has already been taken into § 22, is omitted. "Ballot box" is changed to "enrollment box," to harmonize with § 31. "Of the kind" is changed to "similar to the ballot boxes," as there are no enrollment boxes "prescribed to be used at a general election."

References.—Ballot boxes for general election, § 316, post.

§ 7. **Enrollment blanks.**—There shall also be prepared by the custodian of primary records at public expense, to be borne in the same manner as the expense of furnishing official ballots, and delivered by such custodian with the enrollment books, such number of enrollment blanks for each election district as will exceed by at least twenty-five and not more than fifty the total number of voters registered in such district. The enrollment blanks shall be printed on white paper, and on the face thereof shall be printed the following, or the substance thereof, the blanks to be filled in in type so far as possible:

"Primary enrollment for the yearcity
(or village or town) of; county of
.....; assembly district (or
ward or town); election district; enrollment
number

Name of voter

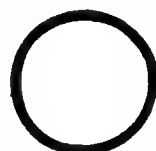
"I,, who have placed a mark underneath the
party emblem hereunder of my choice, do solemnly declare that I am a
qualified voter of the election district in which I have registered or voted,
and that my residence address is
(the residence address as it appears in the register, if the enrollment be
made on a day of registration, and as it appears in the poll book if the en-
rollment be made on the day of general election, is to be inserted in such
space); that I am in general sympathy with the principles of the party
which I have designated by my mark hereunder; that it is my intention to
support generally at the next general election, state or national, the nomi-
nees of such party for state or national offices, and that I have not enrolled
with or participated in any primary election or convention of any other
party since the first day of last January.

.....party.

.....party.

(Insert emblem.)

(Insert emblem.)



"Make a cross X mark, with a pencil having black lead, in the circle
under the emblem of the party with which you wish to enroll, for the pur-
pose of participating in its primary elections during the next year."

The circles underneath the emblem shall be three-quarters of an inch in
diameter, and in them nothing shall be printed. The party emblems shall
be the same as those which were on the ballots for each party respectively
at the last preceding general election, and such emblems shall be so ar-
ranged on each blank that the emblem of the majority party at the last
preceding general election of a governor shall be first, and the other em-
blems shall follow in order in accordance with the vote cast for such office
at such election; over each emblem shall be printed, in type clearly legible,
the name of the party represented by such emblem. The enrollment
blanks shall have thereon the names of those parties only to which this
article is applicable. (*Former § 26, renumbered and amended by L. 1911,
ch. 891, and amended by L. 1913, ch. 820, L. 1916, ch. 537, § 3, and L. 1917,
ch. 703, § 2, in effect June 1, 1917.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 1, as
amended by L. 1900, ch. 225, § 1; L. 1903, ch. 111, § 1; L. 1905, ch. 674; § 1;
L. 1908, ch. 456, § 1.

Consolidators' note.—"Cross (X) mark" is here printed "cross X mark," for the reason that the old method of printing similar instructions relating to the voting marks on the ballot sometimes leads voters, when marking their ballots, to add the parentheses to the X, or the horizontal lines at the ends of the arms of the X, or both, with the consequence that their ballots become liable to rejection as having invalidating marks in the one case, and to protest as marked for identification in the other. While such an effect would not follow here in the enrollment, the law obviously intended to prescribe the same voting mark for enrolling and voting—certainly lack of uniformity would be likely to mislead the voter when he comes to mark his ballot—and accordingly the instruction here is given in the same form as later concerning the ballot.

Reference.—Expenses of printing and delivering ballots, § 318, post.

Use of pencil with black lead is merely directory and although a voter used a fountain pen he may compel the board of election to place his party affiliation upon the enrollment book of his district. *Matter of Kirk* (1910), 66 Misc. 535, 123 N. Y. Supp. 1061.

Enrollment envelopes should be numbered.—*Rept. of Atty. Genl.* (1908) 536.

§ 8. Delivery of enrollment blanks to voters on days of registration.—When, in any political subdivision of the state, a voter shall, at any of the regular meetings for registration in any year, present himself personally to the board of election inspectors in any election district for registration, or if, where his registration was not required to be personal and he was registered without personal application, he shall present himself personally to such board for enrollment only, his name and residence address shall be entered at the proper place in the two original enrollment books for that district. After he shall have been registered, and not before, as a qualified voter of that election district for the next ensuing general election, the board of election inspectors, or a member thereof, shall forthwith and before such voter leaves the place of registration, enter his enrollment number, beginning with number one for the first voter enrolled on the first day, and so on in numerical order, opposite his name, in the first column of the registration books and the enrollment books, and shall write the name of the voter on the blank having the enrollment number which shall be opposite his name on the registration and enrollment books, and shall fill in the other blank spaces on the enrollment blank, and shall deliver to such voter an enrollment blank having his name on it. No voter shall be given more than two enrollment blanks in any event, nor more than one blank unless he shall spoil, deface, improperly mark, or otherwise destroy the first blank given him. In case a second blank is given him, the member of the board of election inspectors in charge of the enrollment books shall draw a line through such voter's enrollment number in the first column in said enrollment and registration books, and shall insert in such space in said columns the number which shall be upon the new blank to be given him, which number shall always be the lowest number of the enrollment blanks then unused in such election district. (*Former § 27, re-numbered and amended by L. 1911, ch. 891, and L. 1916, ch 537, § 4.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 2, as amended by L. 1900, ch. 225, § 2; L. 1908, ch. 456, § 2.

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L. 1909, ch. 22.

Consolidators' note.—The words "in any event" have been inserted to make the third sentence say what it means, and "or" made "nor." "The first column in said book" make "books."

The law as it stands requires the *highest* number of ~~unused~~ blanks to be handed to a voter requiring a second set. The purpose of the provision and the actual practice require the *lowest*. The word is accordingly changed.

§ 9. **Delivery of enrollment blanks to voters on election day where registration is not personal.**—When, in any town or village in which personal registration is not required, or in an election district a part of which comprises territory in which such personal registration is not required, a registered voter whose registration was not personal nor required to be personal, and who was not enrolled on a day of registration, shall present himself to the board of election inspectors in an election district at a general election for the purpose of receiving an official ballot to be voted thereat, his name and residence address shall be entered at the proper place in the original enrollment books for that district. After he shall have voted, the board of election inspectors, or a member thereof, shall forthwith and before such voter leaves the polling place, write his name on the enrollment blank having the lowest number of the blanks then unused in such election district, shall fill in the other blank spaces on such enrollment blank, shall deliver to him an enrollment blank having his name on it and enter opposite his name in the first column of the registration and enrollment books the number on the blank delivered to him. No voter shall be given more than two blanks in any event, nor more than one blank unless he shall spoil, deface, improperly mark, or otherwise destroy the first blank given him. In case a second blank is given him, the member of the board of election inspectors in charge of the enrollment books shall draw a line through such voter's enrollment number in the first column in said registration and enrollment books, and shall insert in such space in such column the number which shall be upon the new set to be given him, which number shall also be the lowest number on the enrollment blanks then unused in such election district. Enrollment blanks shall be numbered consecutively, beginning with the one succeeding the last number used on the last preceding day of registration. (*Added by L. 1911, ch. 891, and amended by L. 1916, ch. 537, § 5.*)

Reference.—Personal registration required in cities and villages of 5000 or more inhabitants, § 158 post.

§ 10. **Enrollment by voters.**—Such voter desiring to enroll shall then enter a voting booth in said place of registration or polling place, and, after having closed the door thereof, may make a cross X mark with a pencil having black lead in the circle underneath the emblem of the party of his selection and thereupon fold said enrollment blank so as to conceal the face thereof, and, before leaving the place of registration or polling place, shall forthwith deposit the same, as so folded, in the enrollment box in said place of registration or polling place in the presence of the inspec-

L. 1909, ch. 22.

Enrollment of voters.

§§ 11, 12.

tors of election, without in any way indicating the party with which he has or has not enrolled, and the inspectors shall thereupon enter in the enrollment books in the fifth column thereof the word "yes." If a voter declines to enroll, he may return the blank to the inspector in charge of the enrollment box, and such inspector shall indorse the name of such voter thereon and deposit the same in the enrollment box; and a like entry shall be made opposite his name in the fifth column of the enrollment books. The entries in the enrollment and registration books required by this and the two preceding sections shall be made by a member of the board designated by the chairman.

One mark crossing any other mark at any angle within the circle shall be deemed a cross mark within the meaning of this article. (*Former § 28, renumbered and amended by L. 1911, ch. 891, and L. 1916, ch. 537, § 6.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 2, as amended by L. 1900, ch. 225, § 2; L. 1908, ch. 456, § 2.

Consolidators' note.—"Ballot box" changed to "enrollment box" to correspond with § 31. The reference to "the preceding" section is required by the new arrangement.

Reference.—Marking ballot. See note to §§ 86, 358, post.

Who are entitled to enroll and vote at primaries. See Rept. of Atty. Genl. (1903) 354; Rept. of Atty. Genl. (1904), 269, 292.

§ 11. **Examination, sealing and custody of enrollment boxes.**—Before the entry of any enrollment number or the delivery of an enrollment blank to any voter, in any year, the said enrollment box shall be examined by the board of election inspectors and when empty shall be locked and sealed by them in such a manner that should it be opened such seal would be broken; and the same shall remain so locked and sealed until the same shall be opened by the custodian of primary records as hereinafter provided. Said boxes shall be in the charge and keeping of the custodian of primary records at all times except during hours of enrollment. (*Former § 29, renumbered and amended by L. 1911, ch. 891, and amended by L. 1916, ch. 537, § 7.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 2, as amended by L. 1900, ch. 225, § 2; L. 1908, ch. 456, § 2.

Consolidators' note.—"Ballot box" changed to "enrollment box" and "said ballot boxes" to "said boxes," to harmonize with § 31.

§ 12. **Certification and secrecy of enrollment occurring on a day of registration.**—1. Except as otherwise provided in subdivision two hereof, at the close of the last meeting for registration in each year the board of election inspectors shall severally subscribe and verify duplicate declarations, one of which shall be printed in or attached to each of the original enrollment books. Such declarations shall be to the effect that the persons shown by such enrollment books are the only persons who registered personally as voters in that district on any of said days of registration or who, having been registered on any of said days without personal appli-

cation, thereafter applied for and received enrollment blanks, and such declarations shall set forth the number of the last enrollment blank used on such last day of registration. Immediately upon the close of each day of registration, and before leaving the meeting place, the board of election inspectors shall publicly inclose the said enrollment books, together with all records pertaining thereto, in a sealed envelope, upon which shall be written or printed in distinct characters the number of the election district. Such envelope shall remain in the custody of the chairman of the board until the meeting on the next day of registration, when it shall be publicly opened. The envelope sealed at the close of the last day of registration shall, within twenty-four hours thereafter, be delivered to the custodian of primary records. Such envelope shall remain sealed until the next Tuesday following the next ensuing day of general election, except that in any election district in which personal registration is not required or comprising territory in a portion of which personal registration is not required such envelope shall be returned to the board of inspectors before the opening of the polls on the day of general election, to be by them opened and used and again delivered to the custodian of primary records as prescribed in section thirteen. No member of the board of election inspectors shall make, or allow to be made, a copy of, or a transcript or statement from, the enrollment books.

2. In a city of over one million inhabitants, at the close of the last meeting for registration in each year the board of election inspectors shall severally subscribe and verify four declarations, one of which shall be printed in or attached to each of the original registers. Such declarations shall be to the effect that the persons shown by such registers are the only persons who registered personally as voters in that district on any of said days of registration and shall set forth the number of the last enrollment blank used on such last day of registration. (*Former § 30, renumbered and amended by L. 1911, ch. 891, and amended by L. 1915, ch. 678, and L. 1916, ch. 537, § 8.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 2, as amended by L. 1900, ch. 225, § 2; L. 1908, ch. 456, § 2.

Reference.—Where personal registration required, §§ 158, 159, post.

§ 13. **Certification and secrecy of enrollment occurring on the day of general election.**—At the close of the day of general election or on the following day in each year, in an election district in which the enrollment of any voters is permitted under this article on the day of such election, the board of election inspectors shall severally subscribe and verify duplicate declarations one of which shall be printed on and attached to each of the original enrollment books. Such declarations shall be to the effect that the persons shown by such enrollment books whose enrollment number is higher than the last number used on the last preceding day of registration, constitute all of the persons voting in that district at such general

election whose registration was not personal and who had not, after such registration, applied for enrollment on a day of registration. They shall inclose such enrollment books, together with all records pertaining thereto, in a sealed envelope, upon which shall be written or printed in distinct characters the number of the election district, and shall within forty-eight hours after the close of such general election deliver the same to the custodian of primary records. Such envelope shall remain sealed until the following Tuesday. No member of the board of election inspectors shall make, or allow to be made, a copy of or a transcript or statement from the enrollment books. (*Added by L. 1911, ch. 891, and amended by L. 1916, ch. 537, § 9.*)

§ 14. **Opening of enrollment box and completion of enrollment.**—It shall be the duty of the board of inspectors, or one of them, at the close of the registration, and again at the close of a day of general election where voters are enrolled on that day, to deliver the enrollment box to the custodian of primary records. All enrollment blanks contained therein shall remain in such box, and the said box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the custodian of primary records, and the blanks contained therein shall be removed thereupon by said custodian, and the name of the party designated by each voter under such declaration shall be by said custodian entered against the name of such voter in the appropriate column of the signature copy of the register in a city having more than one million inhabitants, and of the enrollment books elsewhere for the election district in which such voter resides. Such enrollment shall be completed before the succeeding fifteenth day of February in each year. If cross marks are found in more than one of the circles, or if no cross marks are found in any of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered against the name of such voter in the signature copy of the register in the column reserved for the entry of party enrollments, in any city of over one million inhabitants, and elsewhere in the sixth column of the enrollment books. When all of the enrollment shall be transcribed from the blanks to the enrollment books or register, the custodian of primary records shall subscribe and verify a declaration or identical declarations, one of which shall be printed in or attached to each of the said original enrollment books or registers, which declaration shall be to the effect that he has correctly and properly transcribed the enrollment indicated on the blank of each voter to the said enrollment books or register, as herein provided. (*Former § 31, renumbered and amended by L. 1911, ch. 891, and amended by L. 1915, ch. 678, L. 1916, ch. 537, § 10, and L. 1917, ch. 703, § 3, in effect June 1, 1917.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, subd. 3, as amended by L. 1906, ch. 227.

§ 14-a. **Correction of enrollment lists.**—Any voter who has been or shall have been enrolled with the same political party for five years or upwards and who, at the time of marking an enrollment blank on any day provided in this chapter for the enrollment of voters, makes a mark in the circle beneath the emblem of a party other than the one with which he desired or intended to enroll, by inadvertence, may at any time after the completion of the enrollment in any year as provided in this chapter and prior to the ensuing first day of July, have his party affiliation changed upon the enrollment list by the custodian of primary records with whom such list is filed by striking out the name of the party with which he is thus wrongly described as being affiliated and inserting the name of the party with which he may declare that he is affiliated by making, subscribing and acknowledging before any officer authorized by law to take the acknowledgment of deeds for record in this state, and filing or causing to be filed with such custodian of primary records, a statement embodying a declaration in substantially the following form: "I,, do solemnly declare that I reside in and am a duly qualified voter of the election district of such city (assembly district, ward or town); that at one of the last preceding days for the enrollment of party voters in such election district I received an enrollment blank and made my mark in a circle under one of the party emblems thereon, but such marking was done inadvertently and indicated my enrollment with a party with which I was not then affiliated and with which I did not intend to enroll; and I therefore request that I be specially enrolled with the party. I am in general sympathy with the principles of the party. It is my intention to support generally at the next general election the nominees of such party. I have been duly and regularly enrolled with such party for at least five years prior to the enrollment at which such mistake occurred. I have not participated in any primary election or convention of any other party during such period of five years." If any of the enrollment lists for the preceding five years in the office of such custodian of primary records do not contain the name of such applicant, as an enrolled voter of the party named in the statement, the custodian of primary records shall require him to produce a transcript of so much of an enrollment list as relates to him, if any, from the office of the custodian of primary records of the city or county in which he may have been enrolled for such year or years, accompanied with proof by affidavit showing his identity with the person whose name appears in such transcript.

Upon the filing of such statement, and all other papers or certificates if required, the said custodian of primary records, if the records support the truth of the applicant's statement, shall cause the request contained in such statement to be complied with, by changing the entry relating to the applicant in the enrollment list to conform thereto and recording in the proper column thereof the reason therefor, including a memorandum briefly

describing the papers filed in support thereof. (*Added by L. 1912, ch. 52.*)

§ 14-b. **Special enrollment upon becoming of age.**—Any voter who shall have become of age after the last preceding general election may at any time on or before the fourth Tuesday preceding an official primary in the year following such general election become specially enrolled with any party and have his name added to the original enrollment books of the election district in which he resides, in the manner following:

He shall make and acknowledge before an officer authorized to take the proof or acknowledgment of deeds to be recorded, and file or cause to be filed with the custodian of primary records, a statement embodying a declaration in substantially the following form, the blanks being properly filled in:

"I,, do solemnly declare that I reside at (here insert residence address), and am a resident and duly qualified voter of the election district of the assembly district (or of the ward of the city of, or of the town of in the county of); that I became of age since the last preceding general election; that I am in general sympathy with the principles of the party and it is my intention to support generally at the next general election, state or national, the nominees of such party for state or national offices; that I have not heretofore enrolled with or participated in the primary election of any party. I therefore request that I be specially enrolled with the party.*

The same party name shall be inserted by the voter in the two spaces provided therefor. A blank for such statement and application shall be provided by the custodian of primary records on demand to any person desiring to specially enroll under this section. The mailing of such statement and application from any point within the jurisdiction of such custodian, addressed to such custodian at his office, properly sealed with postage fully prepaid, on or before the day herein provided for filing the same, shall be a sufficient compliance with the requirements of this section.

Upon receiving such statement, the custodian of primary records shall enroll such voter with the said party of his choice in the original enrollment books for the proper election district, in the same manner as upon an enrollment blank deposited at one of the days of registration or on the day of general election; except that above the surname of such voter shall be written the word "Special" and above the Christian name the date of the filing or postmark of mailing of such statement and application. Voters specially enrolled hereunder shall be given by the custodian of primary records an enrollment number beginning, for the first voter thus specially enrolled, with the numeral following the highest number on the enrollment books of those enrolled in the election district at the preceding days of registration or general election. The custodian of primary records shall

* So in original.

§ 14-c.

Enrollment of voters.

L. 1909, ch. 22.

endorse the corresponding number on the statement of the voter to whom such number is given. All such statements and applications shall be public records and open to inspection and may be copied by any person. They shall be kept on file for one year from the day of the next ensuing official primary. (*Added by L. 1914, ch. 244.*)

Note.—L. 1914, ch. 37, authorized the custodian of primary records of Delaware county to complete enrollment books in Roxbury, first district.

Reference.—Section 34 of the Election Law (L. 1909, ch. 22) provided for special enrollment upon becoming of age, but such section was repealed by L. 1911, ch. 891.

§ 14-c. Special enrollment for certain voters failing to enroll on election or registration days in the year nineteen hundred and sixteen.—Any voter who was a member of the national guard of the state enlisted in the military service of the United States on the Mexican border or elsewhere and who failed to enroll at the general election held on the seventh day of November, nineteen hundred and sixteen, or upon any day of registration preceding such election by reason of his absence on such service from the election district in which he would have been entitled to enroll on such election day or registration days, may at any time between the first and thirtieth days of June, both inclusive, in the year nineteen hundred and seventeen, become specially enrolled in any party and have his name added to the original enrollment books in the district in which he resides in the manner following:

He shall make and acknowledge before an officer authorized to take the proof or acknowledgment of deeds to be recorded and file or cause to be filed with the custodian of primary records a statement embodying a declaration in substantially the following form, the blanks being properly filled in:

"I,, do solemnly declare that I reside at (here insert residence address), and am a resident and duly qualified voter of the election district of the assembly district (or of the ward of the city of), (or of the town of of the county of; that during the months of October and November I was a member of company, regiment, national guard of the state of New York, enlisted in the military service of the United States and stationed at in the; that I was necessarily absent from such election district on the last preceding election and registration days engaged in such military service; that I am in general sympathy with the principles of the party, and it is my intention to support generally at the next general election, state or national, the nominees of such party for state or national offices. I therefore request that I be specially enrolled with the party."

The same party name shall be inserted by the voter in the two spaces provided therefor. A blank for such statement and application shall be provided by the custodian of primary records on demand to any person desiring to specially enroll under this section. The mailing of such state-

ment and application from any point within the jurisdiction of such custodian, addressed to such custodian at his office, properly sealed with postage prepaid, on or after the first day of June and before the first day of July, nineteen hundred and seventeen, shall be a sufficient compliance with the requirements of this section. Upon receiving such statement the custodian of primary records shall enroll such voter with the party of his choice in the original enrollment books for the proper election district in the same manner as upon an enrollment blank deposited on one of the days of registration or on the day of general election; except that above the surname of the voter shall be written the word "special," and above the christian name the date of the filing or postmark of mailing such statement and application. Voters specially enrolled hereunder shall be given by the custodian of primary records an enrollment number beginning, for the first voter thus specially enrolled, with the numeral following the highest number on the enrollment books of those already enrolled in such election district. The custodian of primary records shall indorse the corresponding number on the statement of the voter to whom such number is given. All such statements and applications shall be public records and open to inspection and may be copied by any person. They shall be kept on file for one year from the day of the next ensuing official primary. (*Added by L. 1917, ch. 711, in effect June 1, 1917.*)

§ 15. Enrollment for a new political party.—Where an independent body has become a party at a general election, an enrollment of the members of such party shall be made in the manner herein prescribed. After the first day of January and not later than the second Tuesday of April in the year next succeeding that in which such independent body became a party, or in the year nineteen hundred thirteen not later than June first, the custodians of the primary records throughout the state shall cause to be mailed to all voters whose names appear upon the latest registration lists of their respective districts and who are not enrolled as members of any political party, at their respective post-office addresses, enrollment blanks printed on white paper, on the face of which shall be printed the following, or the substance thereof, the blanks to be filled in in type so far as possible:

"Primary enrollment for year city (or village or town) of; county of; assembly district (or ward or town); election district; enrollment number; name of voter"

I, the undersigned, do solemnly declare that I voted in the above election district at the general election held (insert date of last general election); that I still reside in said election district; and that my residence is at the address as given below; that I am in general sympathy with the principles of the party in the circle beneath the name and emblem of which I have made a cross X mark, and supported generally at the said gen-

eral election the nominees of the said party, then an independent body; and that I have not enrolled with any other party since the first day of January (here insert the year in which the general election was held).

Party

(Insert emblem)

Party.

(Insert emblem)

(Voter sign here)

Residing at (The voter here inserts his residence)

"Make a cross X mark in the circle under the emblem of the party with which you wish to enroll for the purpose of participating in its primary elections during the current year, and write your name and address in the blanks immediately under the circle or circles."

The circles under the emblems shall be one inch in diameter and in them nothing shall be printed. The party emblem shall be the same as those which were on the official ballots for each independent body, respectively, to which this section is applicable; over such emblem shall be printed in type clearly legible the name of the party represented by such emblem. The enrollment blanks shall have thereon only the emblem of those parties which were independent bodies and became parties at the last preceding general election and shall have the following instruction printed across the top of the enrollment blanks: "Fill out, sign, and return on or before the first Tuesday of June, nineteen hundred and (here insert the current year) to (here insert the name or title of the custodian of primary records), at (here insert the postoffice address, with street and number, if any of the custodian of primary records)."

Each voter who shall have properly signed such an enrollment blank and shall have either mailed or delivered the same to the proper custodian of primary records on or before the first Tuesday of June, of the then current year, or in the year nineteen hundred thirteen on or before July first, shall be enrolled in his proper and designated party, subject to all the provisions of this chapter applying to enrollment books of party voters, and the custodian of primary records shall enter against the name of each voter in the appropriate column of the enrollment book for the election district in which such voter resides the name of the party with which such voter shall thus enroll. The postmark on any envelope containing such an enrollment blank shall be deemed conclusive proof of the date on which the same was mailed.

One additional copy of the said enrollment blanks shall be furnished to each voter who applies therefor. Additional copies shall be furnished at the rate of twenty-five cents per hundred to any person.

The enrollment blanks as soon as received by the custodian of primary records from the voter shall be public records and shall be open to inspection and copying at any time by any person. They shall be kept on file for one year from the first Tuesday in June. (*Added by L. 1911, ch. 891, § 16, and amended by L. 1913, ch. 587.*)

Reference.—When independent body becomes party, § 3, subd. 15, ante.

§ 16. Duplicate enrollment books.—The custodian of primary records shall annually provide a true copy, duly certified, for the state superintendent of elections and for each party of so much of the said enrollment books as will give the names, addresses and political affiliation of each voter. The said custodian shall, in the month of February each year, deliver one such certified copy to the state superintendent of elections and the chairman of the proper county committee of each such party. Such certified copies shall conform in all respects to the form of the original enrollment books, or to the portion transcribed, as the case may be. The custodian of primary records shall certify to such chairman that each such copy is a correct transcript from the original enrollment book, made during the days of registration of voters for or at the preceding general election. (*Former § 36, renumbered and amended by L. 1911, ch. 891, and amended by L. 1913, ch. 820 and L. 1916, ch. 537, § 11.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 7, as amended by L. 1903, ch. 111, § 5; L. 1905, ch. 674, § 3, and L. 1907, ch. 744, § 1; L. 1908, ch. 456, § 6.

Consolidators' note.—References to cities rearranged. "Any election district of a city or village" is made to read "any election district to which this article is applicable," for the article does not apply to villages of less than five thousand inhabitants. The first part of the same sentence uses the correct expression. Error was made in printing one line of § 36 in the copy of the law as furnished by the secretary of state. The words "or the portion thereof required to be copied if in a city of" in the last sentence of § 36 are taken from the official engrossed copy of the law.

§ 17. Use of duplicate enrollment books at unofficial primaries.—At all unofficial primary elections of a party, the certified copy of the enrollment books, completed, in the case of election districts outside of a city containing a population of not less than fifty thousand and not more than three hundred thousand, or a city containing a population of one million or over, shall be used, and no voter shall be allowed to take part in such primary election as a resident of an election district, unless his name is upon the certified copy of the enrollment book for that district, showing that he is enrolled with the party in whose primary election he seeks to participate. (*Former § 37, renumbered and amended by L. 1911, ch. 891, § 17.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, pt. of subd. 7, as amended by L. 1903, ch. 111, § 5; L. 1905, ch. 674, § 3, and L. 1907, ch. 744, § 1; L. 1908, ch. 456, § 6.

References.—What are unofficial primaries, § 3, subd. 2, ante. Notice and conduct of unofficial primaries, § 92, post.

§ 18. Use of original enrollment books at official primaries.—The original enrollment books shall be used at all official primary elections, and shall be delivered, as provided in this chapter, to the proper boards of election inspectors immediately before the opening of the polls on each official primary day, and shall be returned to the custodian of primary records

forthwith, after the completion of the canvass of the votes. Such enrollment books shall go into effect on the first day of January following the days of registration on which they are begun, and shall, with any additions or changes made as herein provided, remain in force until the first day of the following January, when they shall be superseded by the new enrollment books, as herein provided. (*Former § 38 renumbered and amended by L. 1911, ch. 891, § 19 and amended by L. 1914, ch. 244.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, subd. 8.

§ 19. Right to enroll and vote at primaries.—No voter who has once enrolled in a political party shall be permitted to enroll in another political party before the first day of the next registration. Only voters enrolled as provided in this article shall be entitled to participate in the official primary elections of their respective parties. No voter shall take part in any primary election of any party other than the party in which he shall at the time be enrolled. (*Former § 39, renumbered and amended by L. 1911, ch. 891, § 20.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, subd. 9, part.

Reference.—Enforcement of right to enroll, § 56, post.

Right to enroll.—The right does not depend upon the discretion nor upon the decision of the enrolling authority, but upon possessing the necessary requirements. *Matter of Guess* (1896), 16 Misc. 306, 38 N. Y. Supp. 91.

§ 19-a. Special enrollment after moving.—If, after being enrolled as a member of a party in one election district, by original enrollment, a voter shall move into another election district in the same assembly district, he may, at any time between the first day of February of any year and the thirtieth day before the annual primary day, become enrolled therein as a member of the same party by making an affidavit before any officer authorized by law to take the same and filing, or causing to be filed, with the custodian of primary records, such affidavit which shall specify the name of the party with which, and the election district in which he is enrolled, the street address from which said voter enrolled, if any, the election district into which he has moved and the street address of his residence therein, if any, and stating that he resides in the last mentioned election district, and desires to be enrolled therein as a member of such party. Except as hereinafter provided, upon the filing of such affidavit the custodian of primary records shall enroll the name of such voter in the original enrollment books for the proper election district, specifying the district from which he is transferred and his new residence address, and shall also make a minute, opposite the entry of his name in the original enrollment books of the election district from which he has removed, showing the election district to which his name is transferred. Provided, however, that in any city in which the registers of electors constitute also the enrollment books, as now or hereafter provided by law, such voter shall appear before the custodian of primary records and deliver such affidavit

in person and answer such questions concerning facts affecting his identity as such custodian may deem necessary. Such custodian shall compare the signature, if any, of the voter on the affidavit with his signature on the register of electors. If the voter be unable to write, the custodian shall submit to him, in lieu of requiring his signature, the questions required for the identification statement where an applicant for registry is unable to write. In such city, if the enrollment of a voter be transferred and if he be able to write, he shall also sign his name in the appropriate column of the register for the district to which he is transferred. In any assembly district of the state, if such a transfer be made, all entries relating to the enrollment of the voter on the original books, and relating both to registry and enrollment where the registers constitute the enrollment books, shall be transcribed in the books for the district to which he shall have moved. In any election district outside of such a city, the custodian of primary records may in his discretion in any case require the applicant to appear in person and answer such questions and, where personal registration is required, submit to such signature test as may be necessary to satisfy the custodian of his identity. Where an applicant for transfer is required either by the provisions of this section or by the custodian of primary records to appear in person, in any political subdivision of the state, such custodian shall not transfer the applicant's enrollment unless satisfied of his identity. Such transfer of enrollment shall be made but once during any year for which the original enrollment was made.

Nothing contained in this section shall be deemed to qualify a person to vote at an official primary in the district to which his enrollment is transferred if he be not a resident of such district at the time of the primary and for thirty days theretofore, and he shall be subject to challenge as provided in section seventy-two. (*Added by L. 1916, ch. 537, § 12.*)

References.—Enforcement of right to enroll, § 56, post. Section 35 of L. 1909, ch. 22 provided for special enrollment after moving, but such section was repealed by L. 1911, ch. 891.

§ 20. Application of article.—*Repealed by L. 1911, ch. 891, § 65.*

§ 20. New enrollment books for changed district.—*Former § 40, as re-numbered by L. 1911, ch. 891, repealed by L. 1914, ch. 244, § 20.*

§ 20. New or amended enrollment books for changed districts.—If in the interval between the days of registration and the day of the fall primary in the succeeding year, a new election district shall be created, or the boundaries of an election district shall be changed, and such change or the creation of such new district is to take effect within such interval, the custodian of primary records shall immediately prepare new enrollment books for such district from the enrollment books of the districts covering any part of the same territory, which new enrollment books shall be given the proper descriptive number of the assembly district or ward, or designation of the town, and the descriptive number of the election district,

within which they are to be used but shall in other respects be in the same form and exhibit the same facts as the enrollment books then in force in the territory comprised within such new or changed district and shall contain the names of all the voters, as shown by the enrollment books then in force in such territory, who are the enrolled voters of the respective political parties within, and who are shown by such books to be residents of such new or changed election district. If an election district, whose boundaries are not changed, be given a new number or become included in a different assembly district, ward or town, within such interval, such custodian, before the next official primary at which the enrollment books for such new or changed election district may be used, shall appropriately change the descriptive number on such books of the assembly district, ward and election district, or the designation of the town, as the case may be. The certificate of such custodian to the effect that such new or changed books are true and correct and in conformity with this section shall be attached thereto. New enrollment books, prepared pursuant to this section, shall supersede the enrollment books then in force in such territory until a new enrollment therein takes effect under the other provisions of this article, and the custodian of primary records shall be charged with the same duties concerning the same, including the preparation of duplicate sets thereof or transcripts therefrom, as are provided in this article with respect to books containing enrollments begun on the days of registration. This section shall not be construed to authorize any person to vote in such new or changed district if he shall have ceased to reside in the territory thereof at the time of the preparation of such new books therefor or at the time he offers his vote at an official primary therein. (*Added by L. 1916, ch. 537, § 13.*)

§ 21. Definitions and construction.—*Repealed by L. 1911, ch. 649.*

§ 21. Enrollment books to be public records; transcripts of enrollment.—The enrollment books herein provided for and any declarations filed on enrollment shall be public records, and shall be open to inspection and copying at any time and by any person, except for the period during which they are required to remain sealed as herein provided. It shall be the duty of the custodian of primary records to certify to the correctness of any transcript of such enrollment books, or of any part thereof, on the payment of one cent for every twenty names contained in the transcript. Wherever the custodian of primary records is a salaried officer, the fees received by him for certifying such transcripts shall be paid into the public treasury. Such a certified transcript, containing the name and showing the enrollment of any voter, shall be sufficient evidence of such enrollment. The custodian of primary records shall give to any voter enrolled as in this article provided, a certificate of enrollment, which shall specify the name of the party with which he is enrolled, the date of enrollment and the election district in which such voter is enrolled. Dec-

larations and enrollment blanks filed by voters shall be public records and shall be kept on file until one year thereafter. No person shall be required to enroll, nor shall his failure to do so affect his right to register for the purpose of voting at any election. (*Former § 41, renumbered and amended by L. 1911, ch. 891, § 22, and L. 1913, ch. 820.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, subd. 9, part.

Consolidators' note.—The provision relating to acknowledgments is omitted, being already included in the part of this section which has been made § 32; also the provision prohibiting enrollments in another party before the next registration days, which has been included in new § 39; also the provision limiting special enrollments to electors "who registered as electors in the same city or village in the last preceding year, or who have become of age after the last preceding general election, and whose names are not already on the rolls of any party," this provision being inconsistent with that part of old subdivision 4 of § 3 which is here made § 33, and which permits special enrollments in territory formerly not subject to this article but which shall have been annexed to cities or villages subject to it.

Enrollment-books.—Inspection involves the right to make transcripts. People ex rel. Spire v. General Com. (1898), 25 App. Div. 339, 49 N. Y. Supp. 723. The right is expressly given by the amended section.

§ 22. **Publication of enrollment.**—The board of elections of every city of the first class containing within its boundaries more than one county shall and the board of elections of any county containing a city of the first or second class and when authorized by the board of supervisors the board of elections in any other county may, in its discretion, cause to be published, for each assembly district, within a county over which such board has jurisdiction in pamphlet form, and at public expense a transcript of the enrollment books of each election district in the assembly district, omitting all entries except the names, the residence addresses, and the party, if any, recorded opposite the respective names. Where an independent body shall hereafter become a party at a general election held after the enrollment, of which the lists may have been published under the provisions of this section, by the board of elections, a transcript of all entries upon the enrollment books added thereto under the provisions of section fifteen relating to enrolled voters of such new party, shall be published in the manner hereinabove provided between the first Tuesday in June and the first Tuesday in July of the year in which an enrollment is had of the members of such new party omitting all entries upon such enrollment excepting the names of those enrolled with the new party, the residence addresses and the name of the party recorded opposite each name; provided, however, that if not more than one new party shall have been thus created, the name of the party to which such transcript relates may be placed at the head of the list and need not be repeated opposite each name. The board of elections shall provide all such transcripts for publication. (*Former § 42, renumbered and amended by L. 1911, ch. 891; and amended by L. 1913, chs. 587, 800, and L. 1914, ch. 244.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, subd. 10. as amended by L. 1903, ch. 111, § 6.

Reference.—When independent body become party, § 3, subds. 9, 15, ante.

§ 23. Judicial review of enrollment.—If any statement in the declaration of any person, on the evidence of which his name was enrolled in the original enrollment books for any election district by the custodian of primary records, or if any entry opposite the name of any person in such enrollment books is false, or if any person enrolled in such enrollment books has died, or has removed from or no longer resides in such election district, any voter of the assembly district in which such election district is located (provided such voter is himself duly enrolled with the same political party with which the person, as to whom the application is made, was enrolled) may present proof thereof by affidavit to the supreme court, or to any justice thereof, in the judicial district, or to a county judge of the county, in which such election district is located. And thereupon such court, justice or judge shall make an order requiring the person against or as to whom the proceeding is instituted, unless he is shown to have died, as hereinafter provided, to show cause before such court, justice or judge, at time and place specified in such order, why his name should not be stricken from such enrollment book. Such order shall be returnable on a day at least ten days before a primary election, and a copy thereof shall be served on the person against whom the proceeding is instituted and on the custodian of primary records at least forty-eight hours before the return thereof, either personally or by depositing the same in the post-office of the city in which such election district is located, in a postpaid wrapper or envelope addressed to the custodian of primary records at his office, and to such person by his name at his present address, if known, and otherwise at the address which appears in the enrollment books for such election district. If the person as to whose name the application is made is claimed to be dead, the order to show cause hereinabove provided for shall be directed to the custodian of primary records, and service thereof need only be made upon such custodian of primary records, such service to be made in the manner heretofore in this section specified; but an order requiring the custodian of primary records to show cause why the name of a person claimed to be dead should not be stricken from the enrollment books shall not be made unless the affidavit presented to the court, justice or judge by the voter instituting the proceeding shall state that such voter has personal knowledge of the death of the person with respect to whose name the application is made and unless such affidavit is substantiated either by a certificate of the health department or by other competent evidence of such death. The custodian of primary records shall produce before the court, justice or judge, the original enrollment declaration subscribed by the person against or as to whom the proceeding is instituted. The court, justice or judge shall hear the persons interested, and if it appears by sufficient

evidence that any statement in the declaration of the person against whom the proceeding is instituted, on the evidence of which he was enrolled by the custodian of primary records, or any statement opposite his name in the original enrollment books, is false, or that such person is dead or has removed from or no longer resides in the election district for which he is enrolled, shall order the name of such person stricken from the enrollment books, except as hereinafter provided. If at such hearing the person against whom the proceeding is instituted shall produce evidence that the custodian of primary records has incorrectly copied into the enrollment books the data contained in the declaration of such person, and that if correctly copied such person would be entitled to be enrolled in such election district, such order, instead of requiring his name to be stricken from the enrollment books, shall require the correction of the enrollment books in accordance with such evidence. In either case the order shall require the custodian of primary records to strike such name from the enrollment books, or to otherwise correct such enrollment books in accordance with such order. Upon the correction of such enrollment books in accordance with such order, the custodian of primary records shall certify such correction to the chairman of the general committee of each party to whom a duplicate set of enrollment books has been delivered in pursuance of section sixteen of this chapter. (*Former § 43, renumbered and amended by L. 1911, ch. 891, § 24.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, subd. 11, as added by L. 1904, ch. 350, § 1.

Sufficiency of proof of removal from district.—An affidavit showing the removal of a voter from the residence given, by an occupant of a house in the vicinity, which does not state that the affiant has personal knowledge that the elector has actually removed from the election district, but merely states that fact as a conclusion, is insufficient. The removal of the elector from a dwelling raises no presumption that he has removed from the district. *Matter of Titus* (1907), 117 App. Div. 621, 102 N. Y. Supp. 851, *affd.* (1907), 188 N. Y. 585, 81 N. E. 1163, and see also *Matter of O'Brien* (1907), 117 App. Div. 628, 102 N. Y. Supp. 845, *affd.* (1907), 188 N. Y. 585, 81 N. E. 1163; *Matter of McGuire* (1907), 117 App. Div. 637, 102 N. Y. Supp. 856, *affd.* (1907), 188 N. Y. 585, 81 N. E. 1163.

§ 24. Enrollment books except in cities of one million inhabitants and of second class.—*Repealed by L. 1911, ch. 891.*

§ 24. Correction of enrollment with respect to persons not in sympathy with party.—If any person is not in sympathy with the principles of the political party with which such person is enrolled, any voter of the assembly district in which such election district is located (provided such voter is himself duly enrolled with the same political party with which the person as to whom the application is made was enrolled) may present proof thereof by affidavit to the chairman of the county general committee of the political party with which the voter enrolled, and the chairman of such county general committee shall issue a notice requiring the person against or as to whom the proceeding is instituted to show cause

before such chairman of the county general committee, or a subcommittee appointed by such chairman, at a time and place specified in such notice why his name should not be stricken from such enrollment books. Such notice shall be returnable on a day at least fifteen days before a primary election, and a copy of the affidavit shall be served on the person against whom the proceeding is instituted and on the custodian of primary records at least forty-eight hours before the return thereof, either personally or by depositing the same in the postoffice of the city in which such election district is located, in a postpaid wrapper or envelope addressed to the custodian of primary records at his office, and to such person by his name at his present address, if known, and otherwise at the address which appears in the enrollment books for such election district. The chairman of such committee shall in his discretion personally hear the persons interested in the proceeding or appoint a subcommittee to take testimony, and in such event the action of the subcommittee shall not be final unless approved of by the chairman of such county general committee, and if it appears by sufficient evidence that such person is not in sympathy with the principles of the political party with which such person enrolled, the chairman of the county general committee shall cause to be filed a certificate with the board of elections or with the custodian of primary records setting forth reasons why the name of such person shall be stricken from the enrollment books, together with a record of the proceedings had in the matter. It shall be the duty of the board of elections or the custodian of primary records to make application to the supreme court or to any justice thereof in the judicial district, or to a county judge of the county, in which such election district is located, for an order requiring the person against or as to whom the proceeding is instituted to show cause before such court, justice or judge, at a time and place specified in such order, why the decision of the chairman of such county general committee should not be confirmed. Such order shall be returnable on a day at least five days before a primary election, and a copy thereof shall be served on the person against whom the proceeding is instituted at least forty-eight hours before the return thereof in the manner hereinbefore provided. The said court, justice or judge shall have power to examine fully into the proceedings taken before such chairman or subcommittee and to receive affidavits or other evidence as to the manner in which such proceedings were conducted, and shall determine whether or not said proceeding was fairly conducted and the finding made therein was made upon sufficient grounds upon the merits, and he may approve or disapprove such finding as shall seem to him to be required to do substantial justice to the party against whom the proceeding was instituted and without regard to technical requirements. The court, justice or judge upon approving of the finding of the chairman of such county general committee shall issue an order to the board of elections or to the custodian of primary records requiring the name of the

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voter to be stricken from the enrollment books. (*Former § 44, renumbered and amended by L. 1911, ch. 891, § 25.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 3, subd. 12, as added by L. 1904, ch. 488, § 1.

§ 25. Investigation of enrollment.—Whenever the state superintendent of elections shall require, it shall be the duty of the chief of police and of every captain, in every city of the state to forthwith cause an investigation of each name enrolled in his precinct to be made and to report to the state superintendent of elections, at his office, in such city or at such other office as the state superintendent of elections may in writing designate any case of false enrollment there found. It shall be the duty of the board of elections of the county or of such city to furnish to the chief of police and police captain a printed or typewritten list of the enrolled voters of such city and afford necessary facilities, including clerical assistance, to either such chief of police or police captain, to transcribe the whole or any part of the enrollment list, in aid of the duty of investigation imposed on him under the provision of this section. (*Added by L. 1916, ch. 537, § 14.*)

§ 32. Special enrollment.—*Repealed by L. 1911, ch. 891.*

§ 33. Special enrollment for annexed territory.—*Repealed by L. 1911, ch. 891.*

§ 34. Special enrollment upon becoming of age.—*Repealed by L. 1911, ch. 891.*

§ 35. Special enrollment after moving.—*Repealed by L. 1911, ch. 891.*

ARTICLE III.

(Schedule amended by L. 1911, ch. 891, and L. 1913, ch. 820, in effect December 17, 1913.)

PARTY ORGANIZATION.

Section 35. Party committees.

36. State committee.

37. County committee.

38. Election of members of state and county committees.

39. Formation of committees other than state or county committees.

40. Organization and rules of committees.

41. Review of election of committees.

42. Removal of member of committee.

43. Vacancies in state or county committees.

§ 35. Party committees.—Party committees shall consist of a state committee, county committees, and such other committees as the rules and reg-

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ulations of the party may provide. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

§ 36. **State committee.**—The state committee of each party shall be constituted by the election from each assembly district of one member who shall be an enrolled voter of the party within said district. Each member of a state committee shall be entitled to one vote.

In case of the death, declination, disqualification, removal from district, or removal from office of a member of a state committee or the failure to elect a member as by reason of a tie vote, the vacancy in such state committee caused thereby shall be filled by the remaining members of such state committee as provided in section forty-three of this chapter.

In the event of a change of the boundaries or designation of assembly districts after the election of members to such state committee, members thereof shall represent for the balance of their term, the district in which they reside, provided there is only one such member resident in such district. If no member, or more than one member, be resident in such district so changed, a vacancy from such district shall be deemed to exist which shall at a meeting, of which every member shall have three days' notice by mail from the chairman of the county committee, be filled by the members of the county committee residing in such assembly district until the next official primary election, at which time such vacancies shall be filled by election in the manner provided in this chapter for the balance of such term. (*Added by L. 1911, ch. 891, and amended by L. 1912, ch. 4, L. 1913, ch. 820, and L. 1916, ch. 537, § 14-a.*)

§ 37. **County committee.**—The county committee of each party shall be constituted by the election in each election district within such county of at least one member, and of such additional members as the rules and regulations of the party may provide for such district, proportional to the party vote in the district for governor at the last preceding gubernatorial election, or in case the boundaries of such district have been changed or a new district has been created since the last preceding gubernatorial election, proportionate to the party vote cast for member of assembly at the last preceding general election; and in any county having one million or more inhabitants, where the county committee of any party, by its rules and regulations, is constituted by the election of county committeemen from each election district proportionate to the party vote in such district, an additional member shall be elected at large from each assembly district or aldermanic district in such county, if the said county committee shall by its rules and regulations so provide. If, in any county, no additional members are provided for by rules and regulations, the voting power of each member shall be in proportion to such party vote. In a county in which additional members are so provided for, on the basis of the party vote in election districts, or from assembly or aldermanic districts, each member of the committee shall have one vote. Each member of a county com-

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mittee shall be an enrolled voter of the party residing in the assembly or aldermanic district from which or in the assembly district containing the election district in which he is elected.

In case of the death, declination, disqualification, removal from district or removal from office of a member of the county committee, or the failure to elect a member, as by reason of a tie vote, the vacancy in such county committee caused thereby shall be filled by the remaining members of such county committee as provided in section forty-three of this chapter. (*Added by L. 1913, ch. 820, and amended by L. 1916, ch. 104, and L. 1917, ch. 703, in effect June 1, 1917.*)

Eligibility.—Only an enrolled voter is eligible as a candidate for election as a member of a county committee, and the question of eligibility may be raised after the election. *Matter of Werther (1916), 94 Misc. 681, 158 N. Y. Supp. 321.*

§ 38. Election of members of state and county committees.—Members of the state and county committees shall be elected at official primary elections as herein provided for. Members of the state committee shall be elected biennially in each even numbered year. Members of county committees shall be elected annually.

Members of both committees shall be elected at fall primaries, except that in a year when a president of the United States is to be elected, such members of committees shall be elected at the spring primary. The members of either committee shall hold office until the election of their successors. (*Former § 37 as added by L. 1911, ch. 891, and amended by L. 1912, ch. 4, and L. 1913, ch. 820.*)

Term commences at once upon election. *Matter of Werther (1916), 94 Misc. 681, 158 N. Y. Supp. 321.*

§ 39. Formation of committees other than state or county committees.—All committees other than state and county committees shall be formed in the manner provided for by the rules and regulations of the party. (*Added by L. 1913, ch. 820.*)

Section cited.—*Matter of Sherman (1915), 92 Misc. 589, 157 N. Y. Supp. 236.*

§ 40. Organization and rules of committees.—Every state and county committee, shall within fifteen days after their election meet and organize by the election of a chairman, treasurer and secretary, and such other officers as its rules may provide, and within three days thereafter file with the secretary of state and the board of elections of the county a certificate stating the names and postoffice addresses of such officers.

Each committee may prepare rules and regulations for the government of the party and the conduct of the official primaries within its political subdivision, which may include the payment of dues. Within three days after the adoption of such rules and regulations a certified copy of the same shall be prepared and filed by the secretary with the custodian of primary records for the political subdivision for which such committee is to serve and also a certified copy with the secretary of state. Such rules

shall continue to be the rules and regulations for the committee until they are amended or new rules adopted. Such rules and regulations may be amended from time to time by majority vote of the committee, provided a copy of the proposed amendment shall be sent with the notice of the meeting at which such amendments are to be proposed, such notice to be not less than five days before such meeting, and to be mailed at the postoffice address of each member of the committee. Until the adoption of such rules and regulations, the rules and regulations of the existing committee, so far as consistent with this chapter, shall continue to be the rules and regulations of the party for that political subdivision. (*Former § 38, as added by L. 1911, ch. 891, renumbered and amended by L. 1913, ch. 820, and amended by L. 1916, ch. 537, § 15, and L. 1917, ch. 703, § 5, in effect June 1, 1917.*)

Rules.—The committee is not required to make rules; it may act without formal rules and the court will not interfere; nor should it interfere if the self-made rules are not followed in full. Such rules have not the force of a statute and should not be so considered. *Matter of Ganley* (1915), 90 Misc. 445, 154 N. Y. Supp. 773.

§ 41. Review of election of committees.—The election of members to any party committee may be reviewed by summary proceedings before the supreme court or a justice thereof, as provided for in section fifty-six of this act, upon the petition of any person qualified to vote at the primary election of the party which such committee represents. (*Former § 39, as added by L. 1911, ch. 891, and amended by L. 1912, ch. 4, and renumbered by L. 1913, ch. 820.*)

See *Matter of Zimmer* (1912), 76 Misc. 320, 134 N. Y. Supp. 502.

§ 42. Removal of member of committee.—A member of a party committee may be removed by such committee, for disloyalty to the party or corruption in office, after notice and a hearing upon written charges, to be heard by the committee or a subcommittee thereof appointed for that purpose, which shall report its findings to the full committee. The action of any committee in removing a member thereof as herein provided for may be reviewed in a summary proceeding before the supreme court or by a justice thereof, upon a petition of the person so removed. (*Former § 40, as added by L. 1911, ch. 891, and renumbered by L. 1913, ch. 820.*)

§ 43. Vacancies in state or county committees.—Except as otherwise provided in this article, where a vacancy occurs in any state or county committee, such vacancy shall be filled by the remaining members of said committee by the selection of an enrolled voter of the party qualified for election from the unit of representation as to which said vacancy shall have occurred. (*Added by L. 1913, ch. 820, and amended by L. 1916, ch. 537, § 15-a.*)

ARTICLE IV.

(Schedule amended by L. 1911, ch. 891, and L. 1913, ch. 820; title amended by L. 1913, ch. 820.)

PARTY NOMINATIONS AND DESIGNATIONS.

Section 45. Direct nomination of candidates for public office.

- 46. Designations; how made.
- 48. Designations by petition.
- 49. Filing of designations.
- 50. Declination by person designated.
- 51. Certification by secretary of state.
- 52. Vacancies in designations, how filled.
- 53. Delegates to national party conventions.
- 54. Presidential electors.
- 55. Existing state and county committees continued.
- 55-a. Objections to designating petitions.
- 56. Contests; judicial review.
- 58. Official primary ballot.

§ 45. Times and purposes of official primaries.—*Repealed by L. 1911, ch. 891.*

§ 45. Direct nomination of candidates for public office.—Party nominations for all offices to be filled at a general election, except town, village and school district offices and electors of the president and vice-president of the United States, shall be made at the fall primary next preceding such general election by the enrolled voters of the party as in this chapter provided. Nominations of party candidates for town, village and school district offices shall be made in the manner prescribed by the rules and regulations of the county committee of the county wherein such town, village or school district is located. Nominations of party candidates for city offices to be filled at an election held at a different time from the general election shall be made directly at unofficial primaries by enrolled party voters.

Nothing contained in this chapter shall prevent a party from holding party conventions, to be constituted in such manner, and to have such powers in relation to formulating party platforms and policies and the transaction of business relating to party affairs, as the rules and regulations of the party may provide, not inconsistent with the provisions of this chapter. Delegates to any such convention and members of party committees, other than members of state and county committees, shall not be chosen at official primaries or otherwise at public expense. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820 and L. 1914, ch. 5.*)

References.—Conduct of official primaries, §§ 70 ff, post. Of unofficial primaries, § 92, post. Limitation of amount to be expended by candidate, Penal Law, § 781. What are legitimate expenses, Penal Law, § 667. Failure of candidate to file statement of expenses, Penal Law, § 776. Judicial candidates not to contribute, Penal Law, § 780. Soliciting from candidates, Penal Law, § 779. Procuring nomination by promise of office or other bribe, Penal Law, § 775.

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The word "committee," as used in subdivision 4 of former section 45 of the Election Law providing "that party nominations for town, ward and village purposes and for the office of school director shall be made in the manner prescribed by rules to be adopted by the party committee of the county wherein such town, village or school district is located," need not necessarily be a committee elected at a primary election. *People ex rel. Robinson v. O'Connell* (1913), 155 App. Div. 428, 140 N. Y. Supp. 140.

§ 46. Congressional primaries.—*Repealed by L. 1911, ch. 891.*

§ 46. Designations; how made.—Designations of candidates for party nominations or for election to party positions shall be by petition only, in the manner provided by this chapter. (*Added by L. 1913, ch. 820.*)

§ 47. Meetings of committees for purposes of designation.—*Repealed by L. 1913, ch. 820*

See *Matter of Akin* (1912), 149 App. Div. 950, 134 N. Y. Supp. 20.

§ 48. Designation by petition.—1. Every petition for the designation of a candidate for party nomination or for election to a party position shall be in substantially the following form:

I, the undersigned, do hereby certify that I am a duly enrolled voter of the party, as hereinbelow specified, and entitled to vote at the next primary election of said party, that my place of residence is truly stated opposite my signature hereto, and I do hereby designate the following named person, or persons, as a candidate, or candidates, for nomination by the party for public office, or offices, or as a candidate or candidates for election to the position or positions, of the said party to be voted for at the official primary election to be held on the day of, A. D.,, as hereinafter specified, and it is my intention to support at the ensuing primary the candidacy of the person or persons and each of them herein designated by me.

Name of candidate.	Public office or party position.	Place of residence.	Place of business.
.....
.....
.....
.....
.....

I do hereby appoint (here insert the names and addresses of at least three persons, all of whom shall be enrolled voters of said party) as a committee to fill vacancies in accordance with the provisions of the election law.

In witness whereof, I have hereunto set my hand the day and year placed opposite my signature.

Date.	Name of signer.	Residence.	Election district, town or ward.
.....
.....
.....
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.....

STATE OF NEW YORK,

County of..... } ss.:

On this day of, in the year, before me personally came (here shall be inserted the names of each and every voter appearing and making oath before the said officer) each of whom was to me personally known and known by me to be the voter whose name and place of residence is subscribed by him to the foregoing certificate and each of the foregoing voters being by me duly and severally sworn did make oath that he is a voter and has truly stated his residence, and that it is his intention to support at the polls the candidacy of the person or persons designated for nomination for public office in the foregoing certificate of designation, if the same are nominated.

(Signature and official title.)

(Subd. 1 also amended by L. 1917, ch. 703, § 6, in effect June 1, 1917.)

2. Any signature to a designating petition for the primary may as an alternative be authenticated by a qualified witness in the same manner as in the case of a nominating certificate for the election, as provided in section one hundred and twenty-three of the election law, the forms and procedure being changed to apply to the primary instead of the election, and with like penalty for any false affidavit, certificate or statement by any person. No signature to a designating petition shall be counted unless authenticated either by acknowledgment or by a witness as aforesaid.

3. A petition for the designation of candidates for party nomination or for election to party position may designate candidates for nomination for one or more public offices, or for election to one or more party positions, or both.

4. Petitions for the designation of candidates for party nominations or for the election of candidates for party positions or both shall be signed by enrolled voters resident within the political subdivision or unit of representation for which the nomination or election is to be made to a number equivalent to not less than three per centum of the total number of enrolled voters of the party residing within said political subdivision or unit of representation, as determined by the last preceding enrollment, provided, however, that for the following officers the number of signatures need in no case exceed the following fixed limits:

For the office of United States senator or for any office to be filled by all the voters of the state, three thousand signatures;

For the office of justice of the supreme court, judge of the court of general sessions in the city of New York, and judge of the city court of the city of New York, fifteen hundred signatures;

For any office to be filled by all the voters of a city containing more than a million inhabitants, fifteen hundred signatures;

For any office to be filled by all the voters of any other city of the first class or of any county or borough containing more than two hundred and fifty thousand inhabitants, according to the last preceding federal or state enumeration, one thousand signatures;

For any office to be filled by all the voters of any county or borough containing more than twenty-five thousand and not over two hundred and fifty thousand inhabitants according to the last preceding federal or state enumeration, or of any city of the second class, or of any congressional or senatorial district, five hundred signatures;

For any office to be filled by all the voters of any other county or of any city of the third class or of any assembly district, two hundred and fifty signatures.

For any office to be filled by the voters of any political subdivision contained within another political subdivision, not to exceed the number of signatures required for such larger subdivision; and for any office to be filled by the voters of a subdivision containing more than one assembly district, county or other political subdivision, not to exceed the aggregate of the signatures required for the subdivisions or parts of subdivisions so contained.

5. All papers signed and verified in the manner and form above prescribed for the purpose of designating the same candidate for nomination for the same public office or the same party position shall, when bound together and offered for filing as provided in this chapter, be deemed to constitute one petition with respect to said candidate.

No enrolled voter shall join in designating a greater number of candidates for party nominations for a public office or for election to a party position than the number of persons to be elected thereto. Where an enrolled voter shall sign any petition or petitions designating a greater number of candidates than he is permitted to designate as aforesaid his signatures, if they bear the same date, shall not be counted, and if they bear different dates they shall be counted in the order of their priority of date and only so far as he was entitled to make designations. A signature made earlier than eleven weeks before the official primary shall be void and of no effect; but if bearing a date within such period it shall be counted in the first instance by the board or officer with which or whom the petition is offered for filing, subject to judicial review if objections be filed under section fifty-five-a of this chapter. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820, L. 1915, ch. 678, L. 1916, ch. 537, § 16, L. 1917, ch. 723, in effect June 4, 1917. Subd. 5, amended by L. 1917, ch. 778, in effect June 8, 1917.*)

Amendment of 1917 provides that a signature made earlier than eleven weeks before primary shall be void.

Sufficiency of petition for nomination as member of state committee.—Where, under this section, 451 names were requisite to constitute a valid petition for a nomination for the position of member of the Democratic state committee for the fortieth senatorial district, and, on the last day for filing designations of nomination for such positions, there was received at the office of the Secretary of State a petition designating S. for the position, and containing a total of 432 names of which 13 could not properly be counted, and, from one sheet containing 16 names, the notary's certificate was and still is lacking, two papers containing the same designation and a total of 38 names received at the office of the Secretary of State by mail the next day cannot be considered in order to bring the number of signers above the requisite 451, and the attempted nomination of S. must fail. *Matter of Swarthout* (1912), 76 Misc. 24, 136 N. Y. Supp. 243.

Sufficiency generally.—A petition purporting to designate persons as independent candidates for county and ward committeemen is insufficient where it fails to state the time of holding the primary election, the ward or county committee for which the candidates are designated, the place of residence of the candidates or of the signers, and the certificate of acknowledgment does not contain the names of the latter. *Matter of King* (1913), 155 App. Div. 720, 140 N. Y. Supp. 914.

Although presidential electors are candidates for an "office to be filled by all the voters of the State," within the meaning of this section, their designation by petition is not required. *Opinion of Atty. Genl.* (1916) 9 State Dept. Rep. 403.

§ 49. Filing of designations.—1. Where to be filed. All designations of candidates for offices and for election to party positions shall be filed with the officer with whom independent certificates of nomination for such office or offices are required by this chapter to be filed. All designations filed in accordance with the provisions of this section or certified copies thereof shall forthwith be conspicuously posted by the secretary of state or custodian of primary records in his office, and shall remain so posted until primary day, and shall be open to inspection as public records at all reasonable hours; and each such officer shall provide ample and sufficient facilities for keeping and posting said records and for making copies of the same. Forthwith upon the filing of a petition designating a person for nomination to public office, the board or officer with whom the same is filed shall mail notice thereof to each person named as a candidate for nomination to such office in such petition.

2. When to be filed. All designations shall be filed not earlier than the fifth Tuesday and not later than the fourth Tuesday preceding the primary at which the candidates therein designated are to be voted for. All designations shall at the time of the filing thereof be stamped or indorsed by the secretary of state, or the custodian of primary records, as the case may be, with the day, hour and minute of such filing. (*Subd. 2, amended by L. 1916, ch. 537.*) [*Section added by L. 1911, ch. 891, and amended by L. 1913, ch. 820, and L. 1914, ch. 244.*]

Reference.—Officer with whom filed, § 127, post.

Filing; provision of statute mandatory.—The provision of this section as to the time when certificates of nomination shall be filed in the office of the Secretary of

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State, is mandatory; the court may not relieve from accidents or mistakes causing delay in such filing due to want of diligence on the part of those to whom the filing was intrusted. *Matter of Swarthout* (1912), 76 Misc. 24, 136 N. Y. Supp. 243.

Presumption of validity of certificate which appears on its face to be regular *Matter of Board of Elections* (1912), 76 Misc. 33, 134 N. Y. Supp. 639.

§ 50. **Declination by person designated.**—The name of a person designated as a candidate for nomination or for party position shall not be printed on the official ballot if he notifies the officer with whom the original certificate of his designation is filed in a writing signed and duly acknowledged by him that he declines the designation. Such declination, to be effective, must be filed within three days after the third Tuesday preceding the ensuing primary. The officer with whom such declination is filed shall forthwith inform by mail or otherwise the committee authorized to fill vacancies in designations, and if such declination be filed with the secretary of state, such officer shall also give immediate notice by mail or otherwise of such declination to the several custodians of primary records for the election districts affected by such declination. The vacancy created by such declination shall be filled not later than the second Tuesday preceding the primary election.

If a candidate designated for nomination does not decline the designation within the time hereinbefore mentioned, and he is thereafter nominated at the official primary election, his name shall be printed on the official ballot as the candidate of the party or body holding the primary, and he shall not be permitted to decline such nomination. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820, L. 1914, ch. 244, and L. 1917, ch. 703, § 7, in effect June 1, 1917.*)

References.—Filling vacancy after nomination, § 90, post. Declination of nomination made otherwise than at official primary, § 133, post.

§ 51. **Certification by secretary of state.**—The secretary of state shall not later than the second Tuesday before an official primary election, except a primary election held to nominate candidates to be voted for at a special election, prepare and transmit to the several custodians of primary records within the political subdivisions where the candidates, designations of whom have been duly filed with him are to be voted for, a certificate setting forth the names and residences of such candidates and the titles of the offices for which they are named, and the name of the party upon whose primary ballot their names are to be placed, and the order in which such candidates' names are to be printed under the title of an office or party position, and the order of groups of candidates for the same position, if any. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820, and L. 1914, ch. 244.*)

In 1917 certificates are to be transmitted not later than Thursday, Sept. 6. See L. 1917, ch. 776. See *Elections*.

§ 52. **Primary election officers.**—*Repealed by L. 1911, ch. 891.*

§ 52. **Vacancies in designations, how filled.**—If a candidate regularly

designated for election to party position, or for a party nomination for public office, declines a designation or dies before the primary day, or is found to be disqualified to hold the office or position for which he has been designated, the committee to fill vacancies, if any, which may be appointed by the signers and shown upon the face of the petition of designation, may make a new designation, to fill the vacancy so created, by making and filing with the officer with whom the original designation was filed a certificate setting forth the cause of the vacancy, the name of the person designated by them, the name of the original candidate, and the name of the party for whose primary the original designation was made. Such certificate shall be subscribed and acknowledged by a majority of the members of the committee to fill vacancies, who shall severally make oath that the matters therein stated are true, to the best of their knowledge and belief, and when so filed such certificate shall have the same force and effect as the original designating petition. In case such certificate shall be filed with the secretary of state, he shall forthwith certify to the proper custodian, or custodians, of primary records the name of the person designated by such certificate and such other facts as are required to be stated therein. In case the certificate from the secretary of state shall be received by a custodian of primary records, or an original certificate of designation as in this section provided for shall be filed with him, after the official ballots have been printed and before primary day, it shall be his duty to prepare and furnish to the inspectors of election in each election district affected adhesive pasters containing the name of the candidate designated to fill the vacancy with directions for the proper use thereof. The pasters shall be of plain white paper, printed in plain black ink and in the same kind of type used in printing the names of the candidates upon the official ballots, and shall be of a size as large as and no longer than the space occupied upon the official ballot by the name of the candidate in whose place the candidate named upon the paster has been designated. Whenever such pasters are provided, the officer or board furnishing them shall certify, to the inspectors of election in the election districts affected by the vacancy, the name of the person originally designated, the name of the person designated in the new certificate, the title of the office or party position for which the designation is made, the name of the political party to which the committee making the designation belongs, and shall state the number of pasters furnished, which number shall be equal to the number of official ballots furnished for each such district. Upon the delivery of said pasters the inspectors of election shall sign and receipt for the same, which receipt shall be retained by the officer or board furnishing the pasters, and shall be part of the record of his or their office. The inspectors shall affix one of such pasters in the proper place and in a proper manner upon each official ballot before such ballot shall be delivered to a voter. When so affixed to an official ballot the paster shall be a part of the official ballot. The inspectors shall

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include in their statement of ballots a statement showing the number of pasters received by them, the number of pasters affixed to official ballots and the number of unused pasters returned by them, the unused pasters to be inclosed in the package of ballots not delivered to voters. The use of any paster upon the official ballot otherwise than as herein provided is hereby prohibited. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

§ 53. Appointment and removal of primary election officers.—*Repealed by L. 1911, ch. 891.*

§ 53. Delegates to national party conventions.—The rules and regulations of each political party may prescribe that the delegates and alternates to a national convention of that party shall be elected from congressional districts, or partly from the state at large and partly from congressional districts but such rules shall not provide for the election of more than four delegates and four alternates from the state at large.

In each year when a president of the United States is to be elected, delegates and alternates-at-large, and district delegates and alternates, to national party conventions shall be elected at the spring primary. Candidates for the position of delegates and alternates-at-large to said conventions shall be designated in the same manner as prescribed by this chapter for the designation of candidates for party nominations for offices to be filled by the voters of the entire state, and district delegates and alternates to said convention shall be designated in the same manner as prescribed for this chapter for the designation of candidates for party nominations for the office of representative in congress; save that the time for filing designations as hereinbefore prescribed shall be computed with respect to the spring primary instead of the fall primary. (*Added by L. 1911, ch. 891, and amended by L. 1912, ch. 4, and L. 1913, ch. 820.*)

§ 54. Chairman; compensation of inspectors; oaths.—*Repealed by L. 1911, ch. 891.*

§ 54. Presidential electors.—In each year when a president of the United States is to be elected, candidates for the office of elector for president and vice-president of the United States shall be nominated by the state committee of each of the parties to which this act applies, one for each congressional district, and two at large. The candidates so nominated shall be certified to the secretary of state in the same manner as party nominations for state offices. (*Inserted by L. 1911, ch. 891, § 29.*)

§ 55. Ballots, booths and supplies.—*Repealed by L. 1911, ch. 891.*

§ 55. Existing state and county committees continued.—Party state and county committees now existing shall continue until their successors are elected as provided for in this act. (*Added by L. 1911, ch. 891, and amended by L. 1912, ch. 4, L. 1913, chs. 587 and 820.*)

§ 55-a. **Objections to designating petitions.**—A written objection to any petition for the designation of a candidate for party nomination or for election to party position may be filed with the board or officer with whom the original petition is filed within three days after the filing of such petition. If such objection be filed, notice thereof shall be given forthwith by mail to the committee, if any, appointed on the face of such petition for the purpose specified in sections forty-eight and fifty-two of this chapter, and also to each candidate designated by such petition. The questions raised by such written objection shall be heard and determined as prescribed in section one hundred and twenty-five of this chapter. The supreme court, at special term, in any judicial district in which two or more proceedings are pending in such district under the provisions of this section may, by order, consolidate all such proceedings and provide that further proceedings therein be had before such court at special term, in all cases where the question or questions involved are identical. If one or more of such proceedings be pending before a justice or county judge, notice of such order shall be forthwith given to such justice or judge. (*Added by L. 1913, ch. 820, and amended by L. 1914, ch. 244.*)

§ 56. **Voting at official primary elections.**—*Repealed by L. 1911, ch. 891.*

§ 56. **Contests; judicial review.**—Any action or neglect of the officers or members of a political convention or committee, or of any inspector of primary election, or of any public officer or board with regard to the right of any person to participate in a primary election, convention or committee, or to enroll with any party, or with regard to any right given to or duty prescribed for, any voter, political committee, political convention, officer or board, by this article, shall be reviewable by summary proceedings upon the petition of any person aggrieved thereby, or upon a petition presented by the chairman of any political committee, which summary proceedings may be instituted before the supreme court or a justice thereof within the judicial district where the transaction, act or neglect of duty took place. Such proceedings shall be heard upon such notice as the court or justice thereof shall direct. In reviewing such action or neglect, the court, justice or judge shall consider, but need not be controlled by, any action or determination of the regularly constituted party authorities upon the questions arising in reference thereto, and shall make such decision and order as, under all the facts and circumstances of the case, justice may require. For the purposes of this section, service of any notice or order or other process of the court of justice thereof upon the chairman or secretary of a committee or board whose action is sought to be reviewed or directed shall be sufficient. The action of any custodian of primary records in canvassing and certifying the result of any primary election, or of the secretary of state in preparing and certifying the list of members of a state committee, may be reviewed in like manner by the supreme court, or a justice thereof, which by order may make any change in the

result of such primary election as certified to by the custodian of primary records, or any change or alteration in the list of members of a state committee prepared by the secretary of state, as justice may require. The change or alteration so made, if the result is as to the nomination of a candidate for an elective office, the name of the person so adjudged to have been duly nominated in accordance with the provisions of this chapter at such primary for such elective office shall be placed upon the official ballot as the candidate for the party holding such primary. Proceedings taken under this article shall have precedence and priority over all other actions and proceedings in the supreme court or before a justice thereof. The court, or a justice thereof, upon such proceeding, shall have the right to subpoena and examine witnesses, or in its discretion to hear and determine the case upon affidavits. In case the court or a justice thereof should find and determine that both parties to the controversy had been guilty of frauds or that the primary had been so permeated by fraud as to render it impossible for him to determine the true result of such primary and who was elected thereat, such court or justice shall have the right to direct the holding of a new primary at the same place and in the same manner as the regular official primary. The court, or justice thereof, in case of ordering a new primary, may include in such order directions for the canvassing of the vote of such new primary. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

Section should be liberally construed.—*Matter of Trombley* (1912), 150 App. Div. 14, 134 N. Y. Supp. 374, *affd.* dismissed 206 N. Y. 632.

Matters subject to review.—Under former § 70 it was held that the power given to review is confined to such matters as were within the jurisdiction of the board whose action is being reviewed. *Matter of Hines* (1910), 141 App. Div. 569, 126 N. Y. Supp. 386; *Matter of King* (1913), 155 App. Div. 720, 140 N. Y. Supp. 914.

Review of action of custodian of primary records.—While in a summary proceeding under this section to review the action of any custodian of primary records in canvassing and certifying the result of a primary election the court may make any change in the result of such primary election as certified to by the custodian of primary records, it will not interfere until it is shown that the action of the custodian in canvassing and certifying the result is fraudulent, erroneous or in violation of some duty or responsibility imposed by law. *Matter of Sherman* (1915), 92 Misc. 589, 157 N. Y. Supp. 236.

Where a certificate of designation of candidates to be voted for at a primary election is sufficient on its face, in the form prescribed by the statute, apparently signed by the required number of persons authorized by statute to sign it, and the certificate of acknowledgment is regular and sufficient upon its face, the court, on review of the board of elections in accepting the certificate of designation, cannot declare it invalid because certain of the signers neither swore to nor acknowledged their signatures thereto. *Matter of Board of Election* (1912), 76 Misc. 33, 134 N. Y. Supp. 639.

Review of action of custodians of primary records; recount of votes, when authorized.—In a proceeding under sections 41 and 56 of the Election Law to review the action of the custodians of primary records the court can review only such action as the custodians have themselves taken and correct errors which they have made. The statute does not authorize a recount of the votes and a

declaration of a different result based upon such recount in a proceeding against the custodians of primary records. *Matter of Tenjost* (1915), 169 App. Div. 300, 154 N. Y. Supp. 708. But if the inspectors of election have been made parties to the proceeding, the court has power to order the custodians of primary election records to produce ballots cast for rival candidates for examination and recanvass, if the correctness of the original canvass has been challenged, and may provide that the rival candidates may be present in person and by counsel, and that examination shall be made in the presence of the custodians of the records, or employees of their department designated by them, and that the election inspectors may likewise be present in person or by counsel. It is not necessary that a separate proceeding be taken against the officers of each election district, but there may be one proceeding against all the officers of the several districts, where each contributed to a result alleged to be incorrect. *Matter of Tenjost* (1915), 171 App. Div. 129, 157 N. Y. Supp. 528.

Recanvass by inspectors.—The action or neglect of inspectors of primary elections in the performance of their duties as prescribed in article 4a of the Election Law is subject to review under this section. Where it is probable that occurrences in relation to the statement of the result of the canvass of the vote for senator were due to ignorance and neglect in the performance of duty by certain of the inspectors of primary election in the assembly districts composing the eighth senatorial district, the court will order the ballot boxes opened, the enrollment books examined, the true result adjudged, the boards of inspectors of election to reconvene and make and file a statement of said result, and a certificate to be issued to the candidate lawfully elected. *Matter of Ward* (1912), 78 Misc. 15, 137 N. Y. Supp. 659, *affd.* (1912), 152 App. Div. 940, 137 N. Y. Supp. 1147.

New election.—Held under former § 70, that the court may set aside a fraudulent primary election and order a new election. *Matter of Coughlin* (1910), 137 App. Div. 233, 121 N. Y. Supp. 980, *affd.* (1910), 198 N. Y. 613, 92 N. E. 1082.

Review of determination of Secretary of State; jurisdiction.—Upon a proceeding under section 56 of the Election Law to review the determination of the Secretary of State and validity of the designation of a state committeeman, it was held, that the right of review given by said section is summary and the section should not be so construed as to render it ineffectual; that since all the parties interested reside in the fourth judicial district and all the transactions out of which the controversy arises have taken place therein, a judge in such district has jurisdiction, although the action of the Secretary of State is claimed to have occurred in the third judicial district. *Matter of Trombley* (1912), 150 App. Div. 14, 134 N. Y. Supp. 374, *appeal dismissed* 206 N. Y. 632.

Power of Supreme Court over conduct of primary elections.—A justice of the Supreme Court has no power, in a proceeding to review the action of inspectors of a primary election under this section, to enjoin a person to whom a certificate of election to the county committee of a political party has been issued, from participating in the meetings of the committee. The court possesses and should attempt to exercise only such power to interfere with the conduct of primary elections as is conferred by statute. *Matter of Holle* (1914), 160 App. Div. 369, 145 N. Y. Supp. 388; *Schieffelin v. Britt* (1912), 150 App. Div. 568, 135 N. Y. Supp. 62, *affd.* (1912), 206 N. Y. 677, 99 N. E. 1117.

Motion to restrain printing of candidate's name on ballot on election day.—Where the official ballot furnished by the tenth congressional district did not comply with the statute in that after the first ten names the entire ticket was improperly and irregularly numbered, but there is no claim that any one has been deceived nor any evidence that any person voted for the one nominated as the candidate for congress of the National Progressive party who did not intend so to do, or that any person failed to vote against him because of the misnumbering

of the names, and it appears that the official ballot was not printed and delivered until the day of voting, irregularity is not so vital as to render the entire election of the entire Progressive party in said district or elsewhere void, and a motion under this section to restrain the board of elections from printing said congressional candidate's name upon the ballots on election day on the ground that the vote cast for him at the official primary election was void will be denied. *Matter of Holtzman* (1914), 87 Misc. 115, 150 N. Y. Supp. 270.

Delegates to convention.—Under former § 70 held court has power to review the action of a convention in seating delegates, which review may be based upon such notice as the court shall direct. *Matter of Lazarus* (1910), 140 App. Div. 406, 125 N. Y. Supp. 414.

Primary elections; cancellation of certificate of nomination.—Petition asking the cancellation of a certificate of nomination issued by the Secretary of State, showing the nomination of one B. by the Socialist party as justice of the Supreme Court. Said B. was not a member of the Socialist party and two of the six votes cast for him bore the name of his son, a law student. On the contrary, one S., a member of the Socialist party, received five votes. It was held, that the plurality of votes cast for the office of justice of the Supreme Court at said election were cast for S. and that the certificate showing the nomination of B. should be canceled. *Matter of Sweeney* (1913), 158 App. Div. 496, 143 N. Y. Supp. 727, reversed on other grounds (1913), 209 N. Y. 567, 103 N. E. 164, and mandamus held to be the proper remedy.

Where the custodians of a primary election upon certification of the result thereof issued a certificate that a candidate did not receive a majority of the votes cast, and in a proceeding to review said election it appeared from the primary record that if ballots cast for the petitioner who was variously named as a candidate had been counted for him he would have been elected, the Supreme Court, under this section of the Election Law may declare his election. *Matter of Zimmer* (1912), 77 Misc. 336, 136 N. Y. Supp. 506. Criticised in *Matter of Tenjost* (1915), 169 App. Div. 300, 154 N. Y. Supp. 708.

Correction of return falsely stating vote registered by voting machine; mandamus proper remedy.—Where, through the inadvertence of an inspector of elections in not correctly announcing the number of votes cast as indicated by a voting machine, an erroneous statement of the vote has been signed by the inspectors, they may be compelled by mandamus to correct the return to accord with the vote registered by the machine, where there is no contention that the machine did not correctly register and count the votes. The court has power to issue said writ although the Election Law does not specifically so provide. *Smith v. Wenzel* (1915), 171 App. Div. 123, 157 N. Y. Supp. 85, *affd.* (1915), 216 N. Y. 421, 110 N. E. 768.

No jurisdiction to correct mistakes of electors.—This section applies only to the official acts of the board and to matters of which it had jurisdiction. It gives the court no power to correct mistakes made by the electors themselves. Hence, where a petition for the designation of independent candidates is defective, and the time to file such petition has expired, a justice of the Supreme Court has no power to allow an amended petition to be filed *nunc pro tunc*. *Matter of King* (1913), 155 App. Div. 720, 140 N. Y. Supp. 914; *Matter of Jackson v. Britt* (1911), 147 App. Div. 87, 131 N. Y. Supp. 877.

Limitation of jurisdiction.—At a meeting of the Democratic county committee of Washington county, or of some members thereof, held after a proper certificate of petitioner's election at a former meeting as chairman of said committee had been filed with the board of elections of the county and with the secretary of state, a resolution purporting to remove petitioner from his office as chairman was adopted, and thereafter another was chosen as chairman of said committee and a certificate of his election was filed as was the other certificate. Held, that

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the case did not come within this section which provides for a summary proceeding before the court or a judge, and that the court was without jurisdiction to review the proceeding of the county committee held after petitioner had been elected chairman. *Matter of Ganley* (1915), 90 Misc. 445, 154 N. Y. Supp. 773.

The power of review vested in the court under this section of the Election Law does not authorize an alteration of the return of the inspectors of a primary election where, except in a single trifling particular, it is in accord with the votes cast. The power of the court under said section, which must be strictly construed, does not extend to a review of threatened acts of such election officers, and, while the court may make any change in the result of a primary election as certified to by the custodian of primary records, a proceeding against him under said section before a certificate of election has been issued is premature. *Matter of Zimmer* (1912), 76 Misc. 320, 134 N. Y. Supp. 502.

Application of section.—See *Matter of Joslin* (1911), 73 Misc. 354, 132 N. Y. Supp. 416.

§ 57. **Emblems.**—*Added by L. 1911, ch. 891, and repealed by L. 1913, ch. 820.*

Constitutionality.—The provision of this section that “the party emblem shall constitute the committee emblem of the party” is not an abuse of the legislative power. *Matter of Hopper v. Britt* (1912), 204 N. Y. 524, 98 N. E. 86.

Unlawful use of party emblem.—The party emblem, which this section declares shall constitute the committee emblem of the party, cannot lawfully be used to obtain signatures to a petition designating an independent nominee as a candidate for member of assembly to be voted for at the party primaries. *Matter of Foley v. Murphy* (1912), 77 Misc. 638, 138 N. E. 513.

Right of independent body to use of party emblem.—The provisions of the statute relating to party emblems used in primary elections and the determination of conflicts in regard thereto, do not empower the election board, or the Supreme Court, to determine the right to the use of a party emblem at the instance of an “independent body.” *Schieffelin v. Britt* (1912), 150 App. Div. 568, 135 N. Y. Supp. 62, *affd.* (1912), 206 N. Y. 677, 99 N. E. 1117.

§ 58. **Official primary ballot.**—There shall be prepared, printed and supplied in the manner hereinafter provided, for use at official primary elections, official primary ballots, and except as otherwise expressly provided in this chapter, no other ballot shall be used at an official primary election.

No names of candidates for any nomination to public office or election to a party position shall be printed upon the official primary ballot, except upon designation duly made as prescribed in this chapter; nor shall any names, words, or signs, or writing whatever be printed, written, stamped or in any manner placed upon an official primary ballot except as herein provided.

The official primary ballots shall conform in quality, weight, and style of printing, to the ballots prescribed in this chapter for use at the general election, excepting that the title of the party position or office shall be printed in a space three-eighths of an inch in depth, and the name of the candidate therefor shall be printed in a space one-fourth of an inch in depth, instead of one-half inch. The ballots of no two parties shall be

of the same color. The secretary of state shall designate the color of ballots for each party. The ballot shall be printed upon the same leaf with the stub and separated therefrom by a perforated line. The part above the perforated line, designated as the stub, shall extend the entire width of the ballot, and shall be of sufficient depth to allow the following instructions to voters to be printed on the face thereof in type known as brevier, with the word "Instructions" in larger type above:

"This ballot must be marked with a pencil having black lead. To vote for any candidate whose name is printed on this ballot make a cross X mark in the voting space at the left of the name. To vote for any person whose name is not printed on this ballot write the name of such person in the blank space provided for that purpose under the title of the public office or party position to which you wish him nominated or elected. Any other mark than the cross X mark used for the purpose of voting, or any erasure made on this ballot, makes it void, and it cannot be counted as a vote for any candidate. If you tear or deface or wrongly mark this ballot, return it and obtain another, but only one additional ballot may be thus obtained."

Upon the face of the ballot and directly below the perforated line shall be printed the following: "Official ballot for the primary election of the (name of party) party," the name of the county and town or city; the date on which such primary is held; the party emblem; the assembly district number, number of the ward (in any city divided into wards), and the election district number, directly below which shall be printed a heavy black horizontal line.

The face of the ballot below the perforated line shall be divided into two parts by a heavy black vertical line one-fourth of an inch in width. Immediately below the perforated line in the center of the space at the left of said vertical line shall be printed the caption "Candidates for nomination for public office." Under said caption the names of candidates for nomination for public office shall be printed under the titles of the respective offices for which they are candidates respectively, in capital letters in black-faced type not less than one-eighth nor more than three-sixteenths of an inch in height, so that the names of all candidates for nomination for an office shall be printed under the title of said office, and so that the said offices shall appear in the same consecutive order in which they appear upon the official ballot for the general election. Immediately below the title of each public office shall be printed in brevier lower case type a direction to the voters as to the number of persons to be voted for, in the following words: "Vote for....." (the blank space being filled with the number of persons to be nominated for said office at the official primary election). Immediately below this division and separated therefrom by a horizontal line shall be printed the name or names of candidates duly designated for such office. The order in which the names of candidates shall appear under the title of an office

shall be determined by the board or officer with whom designations are filed by lot in the presence of the candidates or their representatives, if present, and other persons required to be notified. At least two days' notice by mail shall be given to all candidates whose names appear on designating petitions and to the members of the committees, if any, appointed by such petitions, of the time and place of such determination, except that when any such designating petition is filed with the board of election of the city of New York such notice shall be given only to the members of the committee, if any, appointed by such petition.

If a vacancy be filled after the position of such names has been determined, the name of the newly designated candidate shall be printed in the order determined for the candidate whose designation was made vacant.

Immediately below the names of all the candidates in the case of each public office there shall be left a blank space or blank spaces equal in number to the number of candidates to be nominated for said office. The voter at the official primary election may write in such blank space or spaces the name of any person or persons for whom he desires to vote whose name or names are not printed upon the ballot. Voting spaces shall be provided at the left of each column opposite the names of candidates in the same manner as provided for on the official ballot for the general election.

Immediately below the said perforated line and in the space at the right of said vertical line shall be printed the caption "Candidates for party positions." Under said caption the names of candidates for election to party positions shall be printed under the titles of the respective party positions for which they are candidates respectively, so that the names of all candidates for a party position shall be printed under the title of said position, and so that the said party positions shall appear in the following order: member of state committee; member (or members) of county committee.

At the spring primary, in a presidential year, such heavy vertical dividing line shall be omitted, and under the caption "Candidates for party positions" the titles of such positions shall be printed in the following order: delegates and alternates at large to a national convention; district delegates and alternates to a national convention; member of state committee; member (or members) of county committee.

Immediately below the title of each of said party positions shall be printed in briefer lower case type a direction to voters as to the number of persons to be voted for, in the following words: "Vote for (the blank space being filled with the number of persons to be elected to said party positions at the official primary election). Immediately below this direction and separated therefrom by a horizontal line shall be printed the name or names of candidates duly designated for such party positions in such order as the board or officer with whom designations are filed may by lot determine, upon the notice and in the

manner provided for determining the order in which candidates for nomination to public office shall be printed. Immediately below the names of all the candidates in the case of each party position there shall be left a blank space or blank spaces equal in number to the number of candidates to be nominated for said positions and the voter at the official primary election may write in such blank space or spaces the name or names of any person or persons for whom he desires to vote whose name or names are not printed upon the ballot. Voting spaces shall be provided at the left of each column opposite the names of the candidates in the same manner as provided for on the official ballot for the general election.

Where two or more candidates are to be elected to a party position, the names of candidates designated by each petition shall be grouped, and the order in which the groups shall be placed, together with the order of the names within each group, shall be determined by lot, in the manner provided in this section, for determining the order in which the names of candidates shall be printed under the title of an office or party position.

The officer or board charged with the duty of printing, preparing and distributing ballots shall determine in how many vertical columns the ballot shall be printed; provided, however, that the names of all persons designated for nomination to the same office or for election to the same party position shall appear in the same column.

To the left of the voting spaces, other than the voting spaces adjoining the heavy black vertical line dividing the names of candidates for public office from candidates for party positions, there shall also be a heavy vertical black line one-half the width of such dividing line, or one-eighth of an inch in width.

The names of candidates for nomination for public office and the names of candidates for party positions shall be numbered consecutively with Arabic numerals printed in heavy faced type at the left of the name of each candidate and at the right of the voting space aforesaid, from one upward beginning with the name of the first candidate for nomination for public office whose name is printed first upon the ballot in the column at the left and continuing consecutively through the names of said candidates for nomination for public office and then consecutively through the names of the candidates for party positions; except that where there are two or more candidates for a party position grouped as hereinbefore provided, each group shall have but one number, which shall be printed opposite the approximate center of the group, and there shall be between each group, including the group of spaces for names not printed, a blank space five-sixteenths of an inch in depth.

Where the name of a candidate for nomination for the same public office or for election to the same party position is designated by two or more petitions, it shall be placed upon a ballot only once; if a candidate for a party position to be filled by two or more persons be designated in more than one petition, his name shall be printed only in the group of

candidates designated by the petition first filed; provided that nothing herein contained shall prevent the printing of the name of a candidate upon the same official ballot as a candidate for nomination for public office and at the same time as a candidate for one or more distinct party positions.

On the back of the ballot below the stub and immediately at the left of the center of the ballot shall be printed the name and emblem of the party, and in great primer roman condensed capitals "Official primary ballot for," and after the word "for" shall follow the designation of the election district for which the ballot is prepared, the date of the primary election, and a facsimile of the signature of the officer who has caused the ballot to be printed. Immediately above the center of such indorsement and upon the back of the stub, shall be printed the consecutive number of the ballot beginning, on the ballots of each party, with "number one," and increasing in regular numerical order, and on the back of the stub below the number, the name of the party. All official primary ballots shall, so far as it conforms to the above description, be substantially in the following form: * (*Added by L. 1911, ch. 891, and amended by L. 1913, chs. 800, 820, and L. 1914, ch. 244.*)

Reference.—Ballots for use at general election, § 331, post.

Constitutionality.—That part of this section which provides that "the name of a candidate shall not appear more than once on the ballot as a candidate for the same public office or party position" is an unreasonable restriction upon freedom in voting and a violation of the fundamental law. *Matter of Hopper v. Britt* (1912), 204 N. Y. 524, 98 N. E. 86. Provision omitted in section as amended by L. 1913, ch. 800 (Ext. Sess.), and the decision has no application to the new form of ballot.

ARTICLE IV-A.

(Schedule inserted by L. 1911, ch. 891, and amended by L. 1913, ch. 820; title amended by L. 1913, ch. 820.)

CONDUCT OF OFFICIAL PRIMARY ELECTIONS; CANVASS OF RETURNS.

Section 70. Organization and conduct of official primaries.

71. Qualifications of voters at official primaries.
72. Challenges at official primary elections.
73. Expense of official primaries.
74. Primary districts, officers and polling places.
75. Notice of official primaries.
76. Restrictions as to place of primaries.
77. Removals from, and filling vacancies in, boards of primary election officers.
78. Primary poll clerks and poll-books, in primary districts outside of cities of over one million inhabitants.
- 78-a. Primary poll clerks and poll-books in cities of over one million inhabitants.
79. Ballots, booths, books, blanks and supplies.

* Form omitted. See Session Laws, 1914, ch. 244.

§ 70.

Official primaries.

L. 1909, ch. 22

80. Delivery of ballots and manner of voting.
81. Unofficial ballots.
82. Preparation of ballot by voters.
83. Persons within the guard-rail.
84. Watchers; challengers; electioneering.
85. Canvass of votes.
86. Intent of voters.
87. Proclamation and statement of result.
88. Preservation of records and papers.
89. Canvass of statements of results; certificates of election to party position.
90. Filling vacancies and determination of tie vote after primaries.
91. Party nominations for special elections and to fill certain vacancies.
92. Unofficial primaries.
93. Penalty for violation.
94. Perjury.

§ 63. Canvass of statements of results.—*Repealed by L. 1911, ch. 891.*

§ 64. Committees, and rules and regulations of parties.—*Repealed by L. 1911, ch. 891.*

§ 65. Organization of committees and adoption of rules.—*Repealed by L. 1911, ch. 891.*

§ 68. Contested seats.—*Repealed by L. 1911, ch. 891.*

§ 69. Substitution of delegates; date of convention.—*Repealed by L. 1911, ch. 891.*

§ 70. Jurisdiction of, and review by, the courts.—*Repealed by L. 1911, ch. 891.*

§ 70. Organization and conduct of official primaries.—1. Election inspectors for each election district within or comprising a primary district shall be the election officers for such primary district.

2. All said officers shall take and subscribe the constitutional oath of office, before entering on the discharge of their duties.

3. Each primary shall be held open, for voting thereat, from seven o'clock in the forenoon until nine o'clock in the evening, except in a city of over one million inhabitants, where such primary shall be held open, for voting thereat, from three o'clock in the afternoon until nine o'clock in the evening.

4. The primary election officers shall perform the duties required of election officers at a general election, and such additional duties as are in this chapter prescribed and shall receive the same pay as for services of inspectors on the last day of registration; except that in any city of over one million inhabitants, they shall respectively receive seven dollars and fifty cents for their services at each official primary.

5. In each year an official primary election shall be held on the seventh Tuesday before the general election; in each year in which a president of the United States is to be elected, an additional official primary election shall be held on the first Tuesday in April.

6. Subject only to such differences as are herein provided or as may be necessary, an official primary shall be conducted in the same manner as the general election. A chairman of each board of primary inspectors shall be elected in the same manner as a chairman of a board of inspectors at a general election. The chairman shall designate an inspector to act as primary ballot clerk, with the powers and duties of ballot clerks under this chapter. In a primary district comprising one election district, the inspector so designated shall be of opposite political faith from the chairman. In any primary district, the remaining inspectors, exclusive of the chairman, shall act as primary poll clerks, with the powers and duties of such clerks under this chapter. The chairman shall receive the primary ballots, as they are cast or returned by the enrolled voters. All the inspectors, including those designated as poll clerks and ballot clerks, shall also perform the duties of primary inspectors from the time the polls are opened until the statements of the results of the canvass are completed. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820, L. 1915, ch. 678, L. 1916, ch. 537, § 18, and L. 1917, ch. 703, § 8, in effect June 1, 1917.*)

References.—Conduct of general elections, §§ 291 ff, post. Election officers, § 302, post. Criminal misconduct of officers and voters, Penal Law, §§ 751, 764, 765. Limitation of amount to be expended by candidates, Penal Law, § 781. What are legitimate expenses, Penal Law, § 667. Judicial candidates not to contribute, Penal Law, § 780. Soliciting from candidates, Penal Law, § 779. Failure of candidate to file statement of expenses, Penal Law, § 776. Procuring nomination by promise of office or other bribe, Penal Law, § 775. Conspiracy to promote or prevent election by unlawful means, Penal Law, § 773. Duress or intimidation of voters, Penal Law, § 772. Bribery at primary election, Penal Law, §§ 768, 769.

§ 71. Direct nomination of candidates at primary elections.—*Repealed by L. 1911, ch. 891.*

§ 71. Qualifications of voters at official primaries.—No person shall be entitled to vote at any official primary unless he is duly enrolled and may be qualified to vote on the day of election. The primary election inspectors shall decide all questions that arise relating to the qualifications of voters. (*Inserted by L. 1911, ch. 891, § 32.*)

Change of residence after enrollment; residence in new district over six months.—A voter who has enrolled in an election district and subsequently changed his residence by moving into another district in which he has not enrolled, but in which he has resided for more than six months immediately preceding the holding of the primary, is not entitled to vote at the primary election, even though his name has not been stricken from the enrollment list in the first election district and no proceeding instituted for that purpose, and he cannot compel the board of inspectors to receive his ballot by taking the oath provided for by section 72 of the Election Law. *Steinbrink v. Lloyd* (1915), 169 App. Div. 354, 154 N. Y. Supp. 870. See also Atty. Genl. Opin. (1915), 5 State Dep. Rep. 481.

§ 72. Application of this article to political parties.—*Repealed by L. 1911, ch. 891.*

§ 72. Challenges at official primary elections.—The right of an enrolled

voter to participate in any official primary election shall be subject to challenge at any time before his ballot is deposited in the ballot box. When any enrolled voter shall be challenged, the chairman, or one of the members, of said board, shall forthwith put to him an oath or affirmation to answer truly such questions as shall be put to him, and he shall be allowed to vote if, and only if, he shall make such oath or affirmation, and shall answer in the affirmative each of the following questions: "Are you (using the name which he has given as his name)?"

Do you reside, and have you, for thirty days last past, resided at (giving the address which he has given as his residence)? (*Former § 57, renumbered by L. 1911, ch. 891, § 33.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 7, subd. 2.

The oath provided by this section is a means of identifying only a voter who is enrolled in the election district in which he seeks to vote. *Steinbrink v. Lloyd* (1915), 169 App. Div. 354, 154 N. Y. Supp. 870.

§ 73. Application of this article to cities of the third class and villages.—*Repealed by L. 1911, ch. 891.*

§ 73. Expense of official primaries.—The expense of official primary elections, including the expense of preparing and copying new enrollment books and the compensation herein provided to be paid to primary election officers, shall be paid by the same officers or boards and in the same manner, as the expenses of general elections. If provision shall not have been made for the payment of such expense in any year, then the officers who are empowered by law to make such provision in any county, city, town or other political subdivision of the state, are hereby authorized and directed to raise money to such an amount as may be necessary, in any manner provided by law for meeting expenses in anticipation of the collection of taxes and to pay such expense therefrom. The amount so raised shall be included in the amount to be raised by tax in the ensuing year. (*Former § 47, renumbered and amended by L. 1911, ch. 891, § 34.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 4, pt. of subd. 2, as amended by L. 1900, ch. 506, § 1; L. 1901, ch. 360, § 1.

Reference.—Expense of primary, § 318, post.

§ 74. Primary districts, officers and polling places.—The custodian of primary records shall thirty days before each official primary day, divide every ward in a city, except a city of over four hundred thousand inhabitants, and divide every village having five thousand inhabitants or more, into primary districts, each of which shall consist of two contiguous election districts, except that in case there is an odd number of election districts in such ward or village, the highest numbered election district shall be a primary district by itself. In each of such primary districts, except where an election district shall be a primary district by itself, there shall be two polling places. Such polling places shall be designated and provided at public expense by the officers or boards whose duty it is to provide

polling places for days of general election, and shall be, so far as they are available, the same places as were used for the last preceding general election. The custodian of primary records shall assign one of the polling places in each such primary district to the party which, at the last election of governor, cast the highest number of votes for governor, and at the other polling place in such primary district there shall be held the primary elections of all other parties. In all other villages and towns, and in each city having over four hundred thousand inhabitants, each election district shall constitute a primary district. In a city, town or village in which each or any election district constitutes a primary district there shall be for each such primary district primary election officers, who shall consist of the election inspectors for the election district comprising such primary district and such inspectors shall be the board of primary inspectors. In a city or village having more than five thousand inhabitants, except a city having over four hundred thousand inhabitants, there shall be for each primary district having two polling places two groups of primary election officers, one of which shall consist of the election inspectors for the election districts comprised within such primary district who shall at the time represent the party which at the last preceding election of a governor shall have cast the largest number of votes for governor, and the other of which shall consist of the election inspectors who shall represent the party which, at such election, shall have cast the second largest number of votes for governor. The first mentioned officers shall conduct the primary election of the party represented by them and the second mentioned officers shall conduct the primary elections of all other parties at the time entitled to hold primary elections. The election inspectors belonging to each such group of primary officers shall be the board of primary inspectors.

In a city, town or village in which each or any election district constitutes a primary district the polling place in each such primary district shall be designated and provided at public expense by the officers or boards whose duty it is to provide the polling places for the general election, and, where practicable, it shall also be the same place that was used at the last preceding general election, unless, in a city having over one million inhabitants, the primary polls be placed in a school or other public building as provided in section two hundred and ninety-nine. (*Former § 48, re-numbered and amended by L. 1911, ch. 891, and amended by L. 1913, ch. 820, L. 1915, ch. 678, L. 1916, ch. 537, § 19, and L. 1917, ch. 703, § 9, in effect June 1, 1917.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 4, subd. 3.

§ 75. Notice of official primaries.—At least thirty-five days before each official primary day the chairman of the general committee of each party subject to the provisions of this article, shall certify and deliver to the custodian of primary records a statement of the committees and officers for which members or candidates as the case may be, are to be elected

or nominated thereat, and the number of members of committees, to be elected in each unit of representation. If delegates and alternates to a national party convention are to be chosen at the primary, such statement shall certify the number to be elected in each unit of representation. The custodian of primary records shall prepare a notice of each official primary election provided for by this article, and shall publish such notice, not more than thirty-five days and not less than thirty days prior to such primary election, in at least one newspaper having a general circulation in the city or village, of the political faith of each of the two parties which at the last preceding election of a governor, cast the highest and next highest number of votes for governor. Such notice shall specify the day of such primary election, the hours during which it will be held, the location of each such polling place, the election districts whose voters may vote at each such polling place, the name of the party or parties whose primary elections will be held thereat, and the national party conventions, party committees or public offices for which delegates, members or candidates, as the case may be, will be chosen thereat. (*Former § 49, renumbered and amended by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 4, subd. 4, as amended by L. 1908, ch. 463, § 1.

Sufficiency of notice.—See *Matter of Murphy* (1908), 126 App. Div. 58, 110 N. Y. Supp. 1020.

Contents of notice.—See Rept. of Atty. Genl. (1904) 244.

§ 76. Restrictions as to place of primaries.—No primary election shall be held in a saloon or drinking place, or in a room which is more than one flight of stairs from the street or not readily accessible from the street. (*Former § 51, renumbered by L. 1911, ch. 891, § 37.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 4, subd. 5, part.

§ 77. Removals from, and filling vacancies in, boards of primary election officers.—Removals from boards of primary election officers shall be made, and vacancies occurring in such boards shall be filled, in the same manner as is provided in this chapter for making removals from boards of election officers and for filling vacancies therein on a day of registration. (*Added by L. 1911, ch. 891, § 38.*)

Reference.—Removals; vacancies. See § 308, post.

§ 78. Primary poll-clocks * and poll-books, in primary districts outside of cities of over one million inhabitants.—The provisions of this section shall apply only to primary districts outside of a city having over one million inhabitants. Each primary poll-clerk at each polling place at an official primary election shall have a poll-book for each party in each election district within the primary district for keeping the list of enrolled voters voting, or offering to vote thereat at the primary election. Each such book shall have columns headed respectively "number of enrolled voter," "name of enrolled

* So in original.

voter," "residence of enrolled voter," "number on ballots delivered to enrolled voter," "number on ballot voted," and "remarks."

Upon each delivery of an official primary ballot by the primary ballot clerk to an enrolled voter, the primary poll-clerk shall enter upon the poll-book of the election district in which the enrolled voter resides, in the appropriate column, the number of the enrolled voter, in the successive order of the delivery of the ballots thereto, the name of the enrolled voter in the alphabetical order of the first letter of his surname, his residence by street and number, or if he have no street number, a brief description of the locality thereof, the printed number upon the stub of the ballots delivered to such enrolled voter, and the number of the ballot voted by him. If the ballot delivered to any enrolled voter shall be returned by him to the primary ballot clerk, and he shall obtain a new ballot, the primary poll-clerk shall write opposite his name on the poll-book in the proper column, the printed number of the stub of such ballot. Each primary poll-clerk shall make a memorandum upon his poll-book opposite the name of each person who shall have been challenged and taken either of the oaths prescribed upon such challenge, or who shall have received assistance in preparing his ballot and shall also enter upon the poll-book opposite the name of such person the names of the primary officers or persons who render such assistance, and the cause or reason assigned for such assistance by the elector assisted.

As each enrolled voter offers the ballot which he intends to vote to the primary inspector, each primary poll-clerk shall report to the primary officers whether the number entered on the poll-book kept by him as the number on the ballot last delivered to such enrolled voter is the same as the number on the stub of the ballot so offered. As each enrolled voter votes, each primary poll-clerk shall enter in the proper column on his poll-book the number on the stub of the ballot voted. Upon the close of the polls of the primary election, the primary poll-clerks and all primary officers shall compare the poll-books with the enrollment books or registers and correct any mistakes found therein. (*Added by L. 1911, ch. 891, § 39, and amended by L. 1915, ch. 678.*)

§ 78-a. Primary poll clerks and poll-books in cities of over one million inhabitants.—1. The provisions of this section shall apply only to primary districts within a city having over one million inhabitants.

2. In every such city each primary poll-clerk at each polling place at an official primary election shall have a poll-book for keeping the list of enrolled voters voting or offering to vote thereat at the primary election. In each primary district of such city the poll-book shall be arranged in columns as provided in this section, and the leaves of such poll-book shall be indexed from A to Z. Columns one to seven inclusive shall be arranged upon the left hand pages of said book, and the remaining columns upon the right hand pages. The first column of the poll-book shall be entitled "number of

voter voting at the primary," and in such column, as the name of each enrolled voter voting at such primary is recorded, shall be entered a number opposite the name, beginning with "one" opposite the name of the first voter voting at the primary of any party in such election district and continuing in numerical order to and including the last voter voting at such polling place. The second and third columns shall together be entitled "name of enrolled voter," with the respective sub-titles "surname" and "given name or names." As the enrolled voters in the respective parties present themselves to vote at such primary the surnames of such voters shall be entered in such second column in the alphabetical order of the first letter of such names on the pages bearing the index letters of such surnames. In the third column shall be entered the christian or given name or names of such voters respectively. The fourth column shall be entitled "residence of enrolled voter," and in such column shall be entered the residence of each such voter. The fifth column shall be entitled "party of enrolled voter," and in such column shall be entered the name of the party in which each such voter is enrolled and in whose primary he is participating. The sixth column shall be entitled "signature of enrolled voter (or number of identification statement)," and above each horizontal line in said column shall be printed the words "The foregoing entries are true and correct," and in such column, below such words printed above the line on which his name is entered, each voter participating in the primary shall sign his name by his own hand and without assistance, using an indelible pencil or ink, or in default of such signature (in case only of inability to sign as hereinafter provided) shall be entered the number of such voter's identification statement. The seventh column shall be entitled "signature compared by inspector," and before the voter shall receive a primary ballot, one of the inspectors, other than the inspector who receives the primary ballots from the enrolled voters, shall compare the voter's signature then and there made in such poll-book with the same voter's signature theretofore made in the registration book on registration day, and such inspector shall then and there sign his initials in said seventh column in evidence thereof. The eighth, ninth and tenth columns shall be grouped together under the title "number of primary ballot delivered to enrolled voter" with the respective sub-titles "first ballot," "second ballot," "third ballot," and in such column or columns, beginning with the eighth, shall be entered the number on the ballot (or successive ballots) delivered to such voters respectively. Then shall follow as many columns as there are parties holding a primary in such election district, grouped together under the title "number on primary ballot voted," and at the top of each column shall be printed the name of one of such parties, the party names to be arranged in the order of the size of their respective vote for governor at the last preceding general election, the party casting the highest number of votes for governor to come first, and so on; and the number upon the ballot voted by each such enrolled voter shall be entered in the column bearing the name of the party

whose ballot he casts. The last column in such poll-book shall be entitled "remarks regarding challenges, oaths, and other facts required to be recorded," and in such column shall be entered, opposite the name of each voter, such record of challenges, oaths, and other facts relating to him as this law requires to be entered in the poll-book and are not otherwise provided for.

3. The procedure with respect to recording in each such poll-book the names of and other particulars concerning the enrolled voters presenting themselves to vote at any primary, obtaining, comparing and certifying to their signatures prior to the delivery of ballots to them, or obtaining identification statements in lieu of such signatures, recording and announcing the ballots delivered and voted, making and recording challenges, and all other procedure with respect to the taking of the vote at any party primary shall be the same as that prescribed for the general election, and except as otherwise provided in this article, all provisions of article ten of the election law applying to the taking of the vote at a general election shall apply equally to each party primary. (*Added by L. 1915, ch. 678, § 9.*)

§ 79. Ballots, booths, books, blanks and supplies.—The custodian of primary records shall have for each party printed ballots for each election district equal in number, as near as may be, to one and one-fifth times the total number of enrolled voters of the party in the election district, prepared as herein described. Such ballots and the sample ballots and the original enrollment books, poll-books, blanks and stationery shall be delivered by the board of elections, at its office on the Saturday before the primary election for which they are needed to each town or city clerk in the county, except in New York city and in the city of Buffalo. It is hereby made the duty of each such town or city clerk to call at the office of such board at such time and receive such ballots and supplies. Each such town or city clerk shall deliver to the proper polling places in their city or town the ballots and such supplies for such primary election, at least one-half hour before the time fixed for opening the polls. In the cities of New York and Buffalo, such custodian shall cause such supplies to be delivered to the proper primary officers at the various polling places at least one-half hour before the time fixed for the opening of the polls. The polling places, voting booths, guard-rails, distance markers, ballot boxes, sample ballots, poll-books and other supplies required for official primary elections shall be provided and paid for by the same officers, and in the same manner, as in the case of general elections. At all official primary elections a separate ballot box with the name and emblem of the party and with the number of the election district clearly and conspicuously written or printed thereon, shall be provided at each polling place for each party participating in a primary election at such polling place; and there shall also be a large box for the reception of unvoted ballots and an additional box for detached ballot stubs and there shall be affixed to the out-

side of the polling place and in at least two places on the inside thereof, and in a conspicuous manner, placards printed with large-sized bold-faced type, which shall specify the name of the parties whose primary election is being held in such polling place. Sample ballots shall be provided by the custodian of primary records for each party for each election district, equal in number, as near as may be, to twenty-five per centum of the number of official ballots required to be furnished for such party for such election district. Such sample ballots shall be printed on paper different in color from the paper used for the official ballot, and there shall be no numbers upon the stubs thereof, but in all other respects such sample ballots shall be precisely like the official ballots. One of such sample ballots shall be furnished upon application at any time on primary day to any voter entitled to vote the ballot of which he requests a sample.

The custodian of primary records shall prepare and furnish for each board of primary election inspectors two tally sheet blanks and two statement of result blanks for each party whose primary election is under the jurisdiction of said board of primary election inspectors. Upon each of said blanks shall be indorsed the name of the party, the name of the county, the number of the assembly district or ward, or the name of the town, and the number of the election district for which said blank is to be used.

Each such tally sheet shall consist of three columns separated from each other by vertical lines running from top to bottom of each page of the tally sheet. In the first column shall be printed the title of each public office for which a candidate is to be nominated, and, in the case of the party tally sheets, the name of each party position to which members are to be elected. Under the name of each public office, on the party tally sheets, for which candidates are to be nominated and on the same page shall be printed, in alphabetical order, the names of all candidates for the nomination therefor. Under the name of each party position on the party tally sheets and on the same page shall be printed, in alphabetical order, the names of all candidates for election thereto. On all the tally sheets, under the names of the group of candidates for each public office or party position, shall be printed, each on a separate line, the words "blank" and "void" and the phrase "total number of votes cast for this office (or position)," and under such phrase shall be left several blank spaces for writing in names not printed on the ballot. Each name and each such word, phrase or space upon said tally sheet shall be separated from each other name and each other such word, phrase or space next thereto by parallel horizontal lines extending from one side of the sheet to the other. The second column upon the tally sheet shall be headed, at the top of each page thereof, "Space for tally as canvass progresses." The third column in like manner shall be headed "Space for total number of votes received by each candidate."

Each such statement of result sheet shall consist of two columns separated

from each other by a vertical line running from top to bottom of each page of the sheet. In the first column shall be printed the title of each public office, and, in the case of the party statement of result sheets, the name of each party position, and the names of all the candidates therefor, which shall be printed in the same manner and order as upon the tally sheet in the first column thereof. All names shall be separated from each other by parallel horizontal lines. At the head of each statement of result sheet shall be printed the following: "Statement of result of the vote cast at the official primary election held on theday of (the blanks being properly filled)," and there shall also be printed the name of the county, the number of the assembly district or ward, or the name of the town, and the number of the election district. At the foot of each such statement of result sheet shall appear the following certificate to be signed by the primary election inspectors:

"We hereby certify that the foregoing statement of result is true and correct in all respects:

.....,

Board of primary election inspectors."

All pages of each tally sheet and of each statement of result sheet shall be securely bound together in convenient form. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820, L. 1914, ch. 244 and L. 1917, ch. 703, § 10, in effect June 1, 1917.*)

Reference.—Expense of supplies, § 318, post.

§ 80. **Delivery of ballots and manner of voting.**—No voter at a primary election shall be given or be allowed to mark or cast the ballot of any party with which he has not enrolled. The folding and delivery of ballots and the manner of voting shall be the same as prescribed for the folding and delivery of ballots and the manner of voting prescribed by the provisions of this chapter relating to general elections so far as the same may be applicable, excepting that each ballot after detachment of the stub by the officer charged with that duty shall be deposited in the separate box provided for the party designated on the ballot, and such officer, in addition to announcing the name of the voter and number of the stub, shall also announce the party name thereon. (*Inserted by L. 1911, ch. 891, § 41.*)

References.—Delivery of ballots and manner of voting at general elections, §§ 356, ff, post. Criminal misconduct of officers and voters, Penal Law, §§ 751, 764, 765.

§ 81. **Unofficial ballots.**—If, for any cause, the official ballots for any party shall not be provided as required by law at any polling place, upon

the opening of the polls of any primary election thereat, or if the supply of official ballots for any party shall be exhausted before the polls are closed, unofficial ballots, printed or written, made as nearly as practicable in the form of the official ballot, may be used. (*Inserted by L. 1911, ch. 891, § 42.*)

§ 82. Preparation of ballot by voters.—The voter, on retiring to the voting booth, shall prepare his ballot in the following manner: He shall make a cross X mark in the voting square at the left of the name of each candidate for whom he desires to vote. A cross X mark is any straight line crossing any other straight line at an angle within the voting space and no ballot shall be declared void because a cross X mark thereon is irregular in form. It shall not be lawful to make any mark on the ballot other than a cross X mark for the purpose of voting, and such mark shall be made only with a pencil having black lead, and only in the voting space to the left of the name of a candidate; except that the voter may write with a pencil having black lead in the blank space under the title of the proper office or party position the name of any person or persons for whom he desires to vote, whose name or names are not printed upon the ballot; not exceeding with the candidates for whom he has voted by cross X mark the total number of persons by whom such office or position is to be filled. It shall not be lawful to deface or tear a ballot in any manner, nor to erase any printed name, device, figure, word or letter therefrom, nor to erase any mark made thereon by such voter nor inclose in the folded ballot any other paper or any article. If the voter deface or tear a ballot or wrongly mark the same or make an erasure thereon, he may obtain one additional ballot on returning to the ballot clerk the one so defaced or wrongly marked. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820, and L. 1916, ch. 537, § 20.*)

References.—Preparation of ballot at general election, § 358, post. Intent of voters, § 86, post. See notes to these sections. Criminal misconduct of voters, Penal Law, §§ 751, 764, 765.

Marking of ballots.—See cases under section 358, post.

§ 83. Persons within the guard-rail.—From the time of the opening of the polls until the result of the canvass of the votes cast thereat shall have been announced, and the official statements of such canvass shall have been signed, the ballot boxes and all voted ballots shall be kept within the guard-rail. No person shall be admitted within the guard-rail during such period, except primary election officers, duly authorized watchers, persons admitted by the inspectors to preserve order or enforce the law, and persons duly admitted for the purpose of voting; provided, however, that any candidate voted for may be present at the canvass of the votes. (*Former § 58, renumbered and amended by L. 1911, ch. 891, § 44.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 7, subd. 3.

Reference.—Unlawfully within guard-rail, Penal Law, § 764, subd. 6.

§ 84. **Watchers; challengers; electioneering.**—The ballot and other boxes used at any primary shall be examined by the inspectors in the presence of the watchers, if any, before any ballots are received. One watcher for each election district may be appointed by any political committee, and by any two or more of the persons whose names are upon any ballot to be voted at such primary election. Such watchers may be present at such polling place and within the guard-rail from at least fifteen minutes before the examination of any ballot or other box at the opening of the polls of such primary election until after the announcement of the result of the canvass of the votes cast thereat and the signing of the statements thereof by the inspectors. A reasonable number of challengers, at least one person for any three or more persons of each party holding its primary election at that polling place, whose names are upon any official ballot at such primary election, shall be permitted to remain just outside the guard-rail of each such polling place, where they can plainly see what is done within such rail outside the voting booths, from the opening to the close of the polls thereat. No person shall, while the polls are open, at any polling place do any electioneering within such polling place, or within one hundred feet therefrom, in any public street or in any building or room, or in a public manner, and no political banner, poster or placard shall be allowed in or upon such polling place on any primary day. (*Former § 59, renumbered and amended by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 7, subd. 4.

Reference.—Unlawful electioneering, Penal Law, § 764, subd. 4.

§ 85. **Canvass of votes.**—As soon as the polls at any official primary election shall close, the primary inspectors shall forthwith publicly canvass and ascertain the result thereof, and they shall not adjourn or postpone the canvass until it shall be fully completed. All questions touching the validity of ballots or their conformity with the provisions of this chapter shall be determined by a majority vote of the primary inspectors. The room in which such canvass is made shall be clearly lighted, and such canvass shall be made in plain view of the public. It shall not be lawful for any person or persons during the canvass, to close, or cause to be closed, the main entrance to the room in which such canvass is conducted, in such manner as to prevent ingress or egress thereby. The primary inspectors shall proceed to canvass the vote by counting the ballots found in the ballot boxes without unfolding them, except so far as to ascertain that each ballot is single, and by comparing the ballots found in each box with the number shown by the enrollment book to have been deposited therein. If the ballots found in any box shall be more than the number of ballots so shown to have been deposited therein, such ballots shall be replaced, without being unfolded, in the box from which they were taken, and shall be thoroughly mingled therein, and one of the inspectors designated by the board shall, without seeing the same and with his back to the box, publicly

draw out as many ballots as shall be equal to such excess, and, without unfolding them, forthwith destroy them. If two or more ballots shall be found in a ballot box so folded together as to present the appearance of a single ballot, they shall be destroyed if the whole number of ballots in such ballot box exceeds the whole number of ballots shown by the enrollment book to have been deposited therein, and not otherwise. If there lawfully be more than one ballot box for the reception of ballots voted for at any one polling place, no ballot found in the wrong ballot box shall be rejected, but shall be counted in the same manner as if found in the proper box, if such ballots shall not, together with the ballots found in the proper ballot box, make a total of more ballots than are shown by the enrollment book to have been deposited in the proper box. The chairman only of the board of primary officers shall unfold the ballots taken from a ballot box. When a ballot is not void, and a primary election inspector or a duly authorized watcher shall, during the canvass of the vote, declare his belief that any particular ballot has been written upon or marked in any way for the purpose of * identification, the inspectors shall write on the back of such ballot "Protested as marked for identification," and shall specify over their signatures upon the back thereof the mark or markings upon such ballot to which objection is made. The votes upon each such ballot shall be counted by them as if not so protested. If any ballot shall be rejected as void, the reason for such rejection shall be written on the back thereof by the chairman, or by an inspector designated by him. All ballots rejected as void, and all ballots protested as marked for identification, shall be enclosed in a separate sealed package, which shall be endorsed on the outside thereof with the names of the inspectors, the designation of the election district, and the number and kind of ballots contained therein. Such package shall be filed by the chairman with the original statement of the canvass. A statement of the number of ballots of any party protested as marked for identification, and of the number thereof rejected as void, shall be included in each of the statements of the result of the canvass for such party. If requested by any watcher, the inspector shall, during the canvass, exhibit any and all ballots cast at such primary election to such watcher, fully opened and in such condition that he may fully and carefully read and examine the same, but such inspector shall not allow any such ballot to be taken from his hands. Any person other than a constituted election officer who shall handle any ballot voted or unvoted or the stub thereof shall be guilty of a misdemeanor. (*Former § 60, renumbered and amended by L. 1911, ch. 891, and amended by L. 1913, ch. 820, and L. 1917, ch. 703, in effect June 1, 1917.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 8, subd. 1.

Consolidators' note.—"Objected to because marked for identification" changed to "protested as marked for identification," and "objected to" changed to "protested," to be uniform with §§ 370, 373, 376, 377, 378.

* So in original.

References.—Validity of ballots, § 358, post, and notes. False canvass, Penal Law, § 751, subd. 12.

Ballots objected to as having been marked for identification, should be canvassed by the inspectors and returned as protested ballots. *Matter of Crowforth* (1908), 58 Misc. 614, 109 N. Y. Supp. 1003.

Use of paste, held not a marking for identification, where its presence could not be discovered by an inspection of outside of ballot. *Matter of McDade* (1899), 43 App. Div. 303, 60 N. Y. Supp. 333.

Erasure of names and substitution of others, not discoverable from outside of ballot, held not a marking for identification, *Id.*

Canvass of votes by board of elections in city of New York.—The board of elections of the city of New York as custodian of primary records cannot be compelled by the supreme court to recount ballots returned by boards of primary inspectors as void and protested, and determine whether or not those ballots, alleged to be lawful were counted, and, if not counted, add them to the returns and canvass them. The power of the board of elections in such matters is ministerial only. *Matter of Rush* (1903), 42 Misc. 70, 85 N. Y. Supp. 581.

Recanvass of a primary election is unauthorized after the convention has been held. *Matter of Orgel* (1910), 140 App. Div. 410, 125 N. Y. Supp. 291.

§ 86. **Intent of voters.**—If the voter marks more names than there are persons to be nominated for an office or elected to a party position, or if for any other reason it is impossible to determine the voter's choice of a candidate for a party position or for nomination for an office, his vote shall not be counted therefor but shall be returned as a blank vote for such nomination or party position.

A void ballot is a ballot upon which there shall be found any mark other than a cross X mark made for the purpose of voting, which voting mark must be made with a pencil having black lead, only in a voting space to the left of the name of the candidate; or one upon which anything is written other than the name or names of any person or persons not printed upon the ballot for whom the voter desires to vote, which must be written in the blank space under the title of the proper office or party position with a pencil having black lead; or one which is defaced or torn by the voter; or one upon which there shall be found any erasure of any printed device, figure, letter or word, or of any name or mark written thereon, by such voter; or in which shall be found inclosed a separate piece of paper or other material; and upon such ballot no vote for any candidate thereon shall be counted. Any straight line across any other straight line at any angle within a voting space shall be deemed a valid voting mark; but no ballot shall be declared void because a cross mark thereon is irregular in form. (*Added by L. 1911, ch. 891, amended by L. 1913, ch. 820, and L. 1916, ch. 537, § 21.*)

Reference.—See § 358, post, and cases cited.

Marking of ballot.—See cases cited under § 358, post.

§ 87. **Proclamation and statement of result.**—Immediately upon the completion of such canvass, the board of primary inspectors in each primary district shall make public oral proclamation of the result thereof, and shall

make upon the statement of result sheet for each party a written statement of such result for each election district in such primary district, and also a duplicate thereof, which shall be known as the duplicate statement. Immediately after the completion of such statements, such board shall file the originals thereof with the custodian of primary records, and shall file the duplicate statements with the clerk of the city, town or village.

In cities having more than one million inhabitants the board of primary inspectors shall also make and sign a police return of the vote at the primary similar to that required at the general election by section three hundred and seventy-two of this chapter, and such return and its contents shall be treated in the same manner by the same officers as is provided in that section with respect to the statement of the result of the canvass of votes on election day to be delivered to the police. (*Former § 61, as amended by L. 1909, ch. 240, § 23, renumbered and amended by L. 1911, ch. 891, and amended by L. 1915, ch. 678.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 8, subd. 2.

Announcement of result.—The written statement of the result of a canvass of votes cast at a primary election controls over the oral proclamation of the result. *Matter of Walsh v. Church* (1906), 115 App. Div. 82, 100 N. Y. Supp. 764.

§ 88. **Preservation of records and papers.**—At all reasonable times any watcher shall have reasonable opportunity to make a transcript of any such statement, or any portion thereof, and any candidate shall be entitled to receive, upon demand, a written statement showing the result of the primary election so far as he is concerned.

After the close of the canvass of the votes at official primary elections, the ballots of each party cast thereat, except the protested, void and wholly blank ballots, shall be tied together, labeled and replaced in the ballot boxes from which they were respectively taken, and such ballot boxes shall then be securely locked and sealed, and, together with the box containing the stubs, shall be returned to the officer from whom they were received, who shall safely keep the same, subject, however, to be produced upon the order of any court of record or judge thereof, for not less than thirty days after such primary election, and until all suits or proceedings before any court or judge touching the same shall have been finally determined, when the ballots and stubs shall be removed and without examination, destroyed. In the case of a contested nomination for office or a contested election to a party position any candidate shall be entitled as of right to an examination in person or by authorized agents of any primary ballots upon which his name lawfully appeared as that of a candidate; but the court shall prescribe such conditions, as of notice to other candidates or otherwise, as it shall deem to be necessary and proper. The custodian of primary records shall preserve for at least two years all books, records, petitions, objections, certificates and papers filed with him under any provision of law for a period of at least two years, at the expiration of which time all such books, records, petitions, objections, certificates and

papers may be destroyed by such custodian. (*Former § 62, renumbered and amended by L. 1911, ch. 891, and L. 1913, ch. 820.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 8, subd. 3, as amended by L. 1905, ch. 207.

§ 89. Canvass of statements of results; certificates of election to party position.—1. Canvass by custodians of primary records. The custodian of primary records shall forthwith proceed to canvass the statements of results filed with him as provided in this article, and shall complete such canvass within one hundred and twenty hours from midnight of the day upon which the primary election was held.

He shall canvass separately the votes cast in each election district by the enrolled voters of the several parties respectively.

The candidate for a party nomination to public office, or for election to a party position, to be filled by the voters of a territory wholly within an election district, ward or town, who has received the highest number of votes cast in the primary election of a party in such election district, ward or town, shall be the nominee of said party for such public office, or shall be elected to such party position. Said custodian shall deliver upon request to such candidate, if he be elected to a party position, a certificate of his election.

The candidate for a party nomination to public office, or for election to a party position, to be filled by the voters of a district wholly within the jurisdiction of a custodian of primary records and greater than an election district, ward or town, who has received the highest number of votes cast in the primary election of a party in such district shall receive the nomination of said party for the public office, or be elected to the party position, for which he was designated or voted for. The custodian of primary records shall deliver upon request to such candidate, if he be elected to a party position, a certificate of such election.

The custodian of primary records shall duly certify to the secretary of state a statement of the vote cast in the county in the primary election by the enrolled voters of each party, respectively, for all candidates for nomination for public office, or for election to party position, whose designations are required by this chapter to be filed in the office of the secretary of state. Such statement shall be filed by such custodian in the office of the secretary of state within one hundred and twenty hours from midnight of the day on which the primary election was held. (*Subd. amended by L. 1914, ch. 244, and L. 1916, ch. 537, § 22.*)

2. Canvass by the secretary of state. The secretary of state shall forthwith proceed to canvass the certified statements so filed with him, and such canvass shall be made separately as to the candidates of each party.

The candidate voted for at an official primary election who has the highest number of votes shall receive the nomination of said party for the public office, or be elected to the party position, for which he was designated

or voted for. The secretary of state shall forthwith transmit to each candidate elected to a party position a certificate of such election.

3. A certificate of election to party position at an official primary of a party duly issued as herein provided shall entitle the person to whom it is issued to membership in the committee or to a seat in the national convention to which he is elected. Upon the completion of said canvass to be made by the secretary of state, he shall prepare certified statements of the result of the primary election of each party participating therein.

4. The statements of result of any official primary election filed or prepared in the office of a custodian of primary records or of the secretary of state showing the nomination of a party candidate for public office at an official primary election shall be equivalent to a certificate of his nomination, and no other certificate of nomination shall be required to be filed for any such candidate so nominated. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

References.—False canvass, Penal Law, § 751. Filing or receiving for filing certificate of nomination knowing same was falsely made, Penal Law, § 760. Suppressing certificate of nomination, Penal Law, § 760.

Canvass by custodian is limited to the face of the returns. *Matter of Hines* (1910), 141 App. Div. 569, 126 N. Y. Supp. 386.

§ 90. Filling vacancies and determination of tie vote after primaries.—A vacancy in a nomination for public office made at a primary election shall be filled as follows: A vacancy caused by the declination, disqualification or death of a candidate, or by a tie vote, shall be filled by a majority vote of a quorum of the state committee, if the vacancy occur in a nomination for an office to be filled by all of the voters of the state, and otherwise by the members of the county committee or committees elected at such primary in the political subdivision in which such vacancy occurs, or by such other committee as the rules and regulations of the party may provide. Certificates of such nomination shall be filed in the office in which a designation of a candidate for such office is required to be filed. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

References.—Declination of designation, § 50, ante. Candidate duly nominated at official primary cannot decline, § 50, ante, otherwise if at unofficial primary, § 133, post.

Filling vacancy.—Where a person nominated for county clerk by the Independence League at the primaries afterward resigns, the county committee which designated him as party candidate on the primary ballot should fill the vacancy. *Rept. of Atty. Genl.* (1912) Vol. 2, p. 472.

§ 91. Party nominations for special elections and to fill certain vacancies.—Party nominations to an office to be voted for at a special election shall be made in the manner prescribed by the rules and regulations of the respective parties. A party nomination of a candidate for a vacancy in an elective office required to be filled at the next general election, occurring after the expiration of the period provided for the delivery by the chairman of a general committee to the custodian of primary records

of the certified statement provided for in section seventy-five, shall be filled by a majority vote of a quorum of the state committee, if the vacancy occur in a nomination for an office to be filled by all the voters of the state, and otherwise by the members of the county committee or committees elected in the political subdivision in which such vacancy occurs at the official primary preceding the general election at which such vacancy is to be filled, or by such other committee as the rules and regulations of the party may provide. (*Added by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

§ 92. **Unofficial primaries.**—Notice of all unofficial primary elections shall be given in the same manner as in the case of official primary elections, except that such notice shall be given by the proper party officers and shall not be at public expense. Unofficial primary elections shall be held in such places within the unit of representation for which the primary election is held, as shall be designated by the proper political committee, but there shall be at least one polling place within and for each assembly district, ward or village. The chairman and secretary of the political committee calling an unofficial primary election, or under whose direction such primary election is held, shall post and keep posted during the election, at or near the entrance to the room where the primary election is held, so that the same is clearly visible from the street, a conspicuous notice calling attention to the place at which the primary election is being held. Unofficial primary elections shall be held at the expense of the party holding them, and, except as herein otherwise provided, shall be subject to the rules and regulations of such party.

There shall be a chairman and secretary for each unofficial primary and there may be tellers. No person shall be entitled to vote at an unofficial primary unless he may be qualified to vote on the day of election.

The chairman may administer any oath required to be administered at any primary and he shall decide all questions that arise relating to the qualification of voters when a voter is challenged by any elector and shall reject such vote unless the person offering the vote is willing to be and shall be sworn that he will truly answer all questions put to him touching his qualifications as such voter and shall state under oath that he is qualified to vote at such primary.

The ballot box used at any primary shall be examined by the secretary and by the tellers, if any, in the presence of the watchers, if any, before any ballots are received, to see that there are no ballots therein. Such watchers are entitled to be present from the commencement of the primary to the close of the canvass and the signing of the certificates thereof. At the close of the canvass of the ballots cast for each candidate, the secretary shall publicly announce the vote and the result of the canvass.

No unofficial primary election shall be held in a saloon or drinking place, or in a room which is more than one flight of stairs from the

street or not readily accessible from the street. (*Former § 50 renumbered and amended by L. 1911, ch. 891, § 53.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 4, subd. 5, part.

Reference.—When unofficial primaries may be held, § 45, ante. Criminal misconduct at primaries, Penal Law, § 751.

§ 93. *Penalty for violation.*—Unless otherwise expressly provided in this chapter any person violating any of the provisions of articles two, three, four, four-a and four-b of this chapter is guilty of a misdemeanor. (*Inserted by L. 1911, ch. 891, § 54.*)

Reference.—Punishment of misdemeanor, Penal Law, § 29.

§ 94. *Perjury.*—All oaths administered under the provisions of this article and the preceding articles of this chapter are hereby declared to be oaths required by law, and to be necessary for the ends of public justice. (*Former § 74, renumbered and amended by L. 1911, ch. 891, and amended by L. 1913, ch. 820.*)

Source.—Former Primary Elec. L. (L. 1899, ch. 473) § 10, part.

Reference.—Punishment for perjury, Penal Law, §§ 1620–1634.

Art. IV (§§ 90–104.) *Enrollment in towns.*—*Repealed by L. 1911, ch. 891, § 65.*

Art. IV-B (§§ 110–114.) *Conventions.*—*Added by L. 1911, ch. 891, and amended by L. 1912, ch. 4, repealed by L. 1913, ch. 820, § 45.*

ARTICLE V.

(Title and Schedule amended by L. 1913, ch. 820.)

NOMINATING CERTIFICATES; EMBLEMS; VACANCIES.

Section 121. Certification and filing of nominations for town, village and certain other offices.

122. Independent nominations.
123. Independent certificates of nomination.
124. Emblems.
125. Conflict in names or emblems.
126. Supplying omitted emblems.
127. Places of filing independent certificates of nomination.
128. Times of filing independent certificates of nomination.
129. Certification of nominations by secretary of state.
130. Publication of nominations.
131. Lists for town clerks and aldermen.
132. Posting town and village nominations.
133. Declination of nomination.
134. Objections to certificates of nomination.
135. Filling vacancies in nominations.
136. Certificates of new nominations.
137. Death of candidate after printing of ballots; official posters.

L. 1909, ch. 22. Nominating certificates; emblems; vacancies. §§ 121, 122.

§ 120. **Party Nominations.**—*Repealed by L. 1911, ch. 891, § 65.*

§ 121. **Certification and filing of nominations for town, village and certain other offices.**—A person nominated at a party primary for a town or village office or for a city office to be filled at an election held at a different time from the general election shall receive a certificate of such nomination. It shall be signed by the presiding officer and a secretary of such primary, or, if made by a committee, by a majority of the members thereof, who shall add to their signatures their respective places of residence, and shall make oath before an officer qualified to take affidavits that the affiants were such officers of such primary or that they are members and constitute a majority of such committee, as the case may be, and that such certificates and the statements therein contained are true to the best of their information and belief. A certificate that such oath has been administered shall be made and signed by the officer before whom the same was taken and attached to such certificate of nomination. Such certificate of nomination shall contain the title of the city, town or village office for which such person is nominated and his name and residence. Such certificate shall also designate, in not more than five words, the name of the political party by which the nomination is made and shall be properly authenticated. Such certificate shall also, upon its face, appoint a committee of three or more persons to fill a vacancy in any of such nominations occurring for any of the reasons specified in section one hundred and thirty-five of this chapter between the date of such nomination and the day of election.

Such certificate shall be filed with the clerk of such city, village or town, respectively. In towns in which town meetings are held at the time of the general election, certificates of nomination of candidates for town offices shall be in duplicate, one of which shall be filed with the town clerk of the town in which such officers are to be voted for and the other with the board of elections of the county in which such town is located. All such certificates shall be filed with such city, village or town clerk, or such board of elections, not less than twenty nor more than thirty days before the day of election. All such filed certificates and corrected certificates of nomination, all objections to such certificates and all declinations of nominations are hereby declared to be public records. (*Former § 121, as amended by L. 1911, ch. 891, repealed and new § 121 inserted by L. 1913, ch. 820.*)

References.—Party primaries, when authorized, § 45, ante. How conducted, § 92, ante. Filing or receiving for filing certificate of nomination knowing same was falsely made, Penal Law, § 760. Suppressing certificate of nomination duly filed, Penal Law, § 760.

§ 122. **Independent nominations.**—Nominations made as provided by this and the next section shall be known as independent nominations, and the certificate whereby such nominations are made shall be known as an

independent certificate of nomination. Independent nominations of candidates for public office to be voted for by all the voters of the state can only be made by six thousand or more voters of the state; provided, however, that in making up such number at least fifty voters in each county of the state (the counties of Fulton and Hamilton to be considered as one county) shall subscribe the certificate provided for in this and the next section. Independent nominations of candidates for offices to be voted for by the voters of any political subdivision of the state can only be made by five per centum of the total number of votes cast for governor at the last gubernatorial election in such political subdivision, excepting that not more than three thousand electors shall be required to make an independent nomination in any political subdivision; and excepting that not more than one thousand five hundred electors shall be required to make an independent nomination for a borough or county office. (*Amended by L. 1911, ch. 891, and L. 1913, ch. 800 (Ext. Sess.).*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 57, part, as amended by L. 1899, ch. 363; L. 1901, ch. 654.

Constitutionality of former statute requiring a minimum and fixed number of signatures. See *People ex rel. Hotchkiss v. Smith* (1912), 206 N. Y. 231, 99 N. E. 568; *People ex rel. Woodruff v. Britt* (1912), 206 N. Y. 246, 99 N. E. 573.

Independent nomination for alderman.—Where assembly and aldermanic districts are coterminous the certificate for an independent nomination of an alderman must be subscribed and verified by at least five hundred electors of the district. *Matter of Gulotta* (1905), 108 App. Div. 278, 95 N. Y. Supp. 616.

Nomination for alderman in part of a ward.—The provisions of the above section authorizing the filing of independent nominations for candidates for public office to be voted for only by the electors of a town or ward of a city or village, is sufficient to authorize the making of an independent nomination for the office of alderman in an aldermanic district in the city of New York, which includes only part of a ward. *Matter of Behrmann v. Voorhis* (1901), 65 App. Div. 11, 72 N. Y. Supp. 293, *affd.* (1901), 168 N. Y. 367, 61 N. E. 283.

Nominations for alderman in N. Y. City.—Number of signers of certificate. See *Matter of Fagan* (1897), 21 Misc. 403, 47 N. Y. Supp. 288.

Signatures for supervisor.—Number of signatures necessary in order to make an independent nomination for the office of supervisor. *Rept. of Atty. Genl.* (1903) 438.

Nominations of regular party candidates by independent party.—*Fernbacher v. Roosevelt* (1895), 90 Hun 411, 35 N. Y. Supp. 898.

§ 123. Independent certificates of nomination.—1. Independent nominations shall be made by a certificate subscribed by the required number of such electors, each of whom shall add to his signature his place of residence and make oath that he is an elector and has truly stated his residence. The making of the said oath shall be proved by the certificate of the notary or other officer before whom the said oath is taken, and it shall be unnecessary for an elector who has subscribed a certificate of nomination, as herein provided, to sign any affidavit as to the matter to which he has made oath as aforesaid. The certificate hereinbefore provided for of the notary or other officer shall be in the following form substantially:

STATE OF NEW YORK, }
 County of } ss.:

On the day of, in the year, before me personally came (here shall be inserted the names of each and every elector appearing and making oath before the said officer), each of whom was to me personally known and known by me to be the elector whose name and place of residence is subscribed by him to the foregoing certificate and each of the foregoing electors being by me duly and severally sworn did make oath that he is an elector and has truly stated his residence, and that it is his intention to support at the polls the candidacy of the person or persons nominated for public office in the foregoing certificate of nomination.

(Signature and official title.)

2. As an alternative method of authentication, in lieu of such acknowledgment, provision may be made in such nominating certificate for a column under the title "witness," for the signature of a witness opposite the names of signers of the certificate. There may be a subscribing witness for any signature, and the same person may act as witness for any number of signers. No person shall be qualified to act as such witness unless he shall be a freeholder within or shall have been for the last preceding five years a resident of the county in which the person resides whose signature he is witnessing; nor unless he shall have been registered either for the same address or within the same election district for the last preceding two general elections, or the territory of such election district as defined at the time of the first of such two registrations; nor unless his good character and honesty are certified to as provided below either by at least one-half of the candidates whom the certificate nominates or by the committee to fill vacancies named therein, which certificate of good character and honesty must be filed with the board or officer with whom the nominating certificate is filed. Such witness must sign his name in the presence of the voter whose name he is witnessing and must thereafter appear before an officer authorized to administer oaths and take acknowledgments and make the following affidavit to be attached to the nominating certificate:

STATE OF NEW YORK, }
 County of } ss.:

On this day of, in the year, before me personally came (here insert name of witness), to me personally known, who, being by me duly sworn, did depose and say that he knew each of the voters whose names and places of residence are subscribed to the foregoing nominating certificate, as to whose signatures deponent has signed as a witness above, and deponent makes oath that he saw each of them sign the same, and that each such voter on signing such certificate declared to deponent that it was his intention to support at the polls the candidacy of the person or persons nominated for public office in the foregoing nomina-

ting certificate; and that deponent thereupon signed his name as a witness thereto in the presence of each such voter.

Said deponent does also make oath that he is (here state his qualifications to act as a witness as above provided) and that he has been registered for the last two general elections as follows: For the general election of 19.. I was registered from (state address) in the election district of the assembly district, county of, state of New York. For the general election of 19.. I was registered from (state address) in the election district of the assembly district, county of, state of New York.

.....
(Signature of witness.)

Subscribed and sworn to before me,
this day of

.....
(Official title of officer.)

3. The certificate to the good character of the witness must be substantially as follows:

The undersigned hereby certifies to the good character and honesty of the following named person acting as witness to signatures upon a nominating certificate for the next ensuing election:

Name of witness	Permanent residence of witness	Business of witness	Business address of witness
.....
.....
.....

I certify that I have known the said witness for (here state length of acquaintance) and that all the facts herein stated as to the character, honesty, residence, business and business address of the witness certified to, are stated upon my knowledge.

Dated.....

(Signature).....

(Residence).....

If the person making such certificate of good character and honesty has not personal knowledge of all such facts, his certificate may nevertheless be accepted, provided he shall state therein that any fact, specifying it, not made on his personal knowledge, is made in good faith upon information received from another person whom he names, and further provided that he attaches a certificate of such other person in substantially the foregoing form stating such fact or facts upon personal knowledge. Such other person must be a qualified elector of the district for which the nomination is made.

4. Any such witness, candidate, member of committee to fill vacancies

or other person, who makes a false affidavit, certificate or statement as thus provided for, is guilty of a misdemeanor and shall be punished by imprisonment for a term of not less than three months.

5. The certificate of nomination and each separate paper thereof, if there be more than one such paper, shall contain the following declaration which shall be subscribed by the signers thereof:

"We the undersigned duly qualified electors of the district for which the nomination for public office is hereby made under the provisions of sections one hundred and twenty-two and one hundred and twenty-three of the election law do hereby declare that it is our intention to support at the polls the candidacy of the person or persons herein nominated for public office."

The certificate shall also contain the titles of the offices to be filled, the name and residence of each candidate nominated, and if in a city, the street number of such residence and his place of business, if any; and shall designate in not more than five words the political or other name which the signers shall select, which name shall not include the name of any organized political party.

A certificate may designate upon its face one or more persons as a committee to represent the signers thereof, for the purposes specified by section one hundred and thirty-five of this article. The signatures to the certificate of nomination need not all be appended to one paper. No person shall join in nominating more candidates for any one office than there are persons to be elected thereto, and no certificate shall contain the names of more candidates for any office than there are persons to be elected to such office.

6. The name of no person signing an independent certificate of nomination shall be counted unless such person shall on one of the days of registration in such year be registered as a qualified elector, and in case a candidate nominated by an independent certificate of nomination be at the time of filing the said certificate or afterwards the candidate of a political party for the same office the name of no person who is an enrolled member of such political party shall be counted, except where such nomination is afterwards made by a party committee or committee to fill vacancies. For the purpose of ascertaining whether the person whose name appears on an independent certificate of nomination signed such certificate, the affidavit or testimony of such person that he did not sign such certificate shall be prima facie evidence that he did not sign such certificate. If the name of a person who has signed a certificate of independent nomination appear upon another certificate nominating the same or a different person for the same office, it shall not be counted upon either certificate. (*Amended by L. 1911, ch. 649, and L. 1916, ch. 537, § 23.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 57, part, as amended by L. 1899, ch. 363; L. 1901, ch. 654.

Consolidators' note.—The sentence requiring the adoption of an emblem by in-

§ 123. Nominating certificates; emblems; vacancies. L. 1909, ch. 22.

dependent bodies is omitted, for the reason that this requirement is amply covered by § 124, which now relates by position as well as in express terms to emblems of parties and of independent bodies equally.

Reference.—Filing or receiving for filing false certificate, Penal Law, § 760. Suppressing certificate duly filed, Penal Law, § 760.

Construction and application.—The Election Law with reference to certificates of nominations by independent petitions should be liberally and not strictly construed. Rept. of Atty. Genl. (1909) 328.

New political parties.—Provisions of sections 122 and 123 indicate the purpose of the Legislature to exclude from recognition as political parties, so far as making nominations by primary or convention is concerned, all new political bodies until they have obtained a following of ten thousand voters in a state election as attested on the vote for governor. Until a political party movement shall acquire that strength it must act in making nominations as an independent political body, and by independent certificate of election signed directly by electors. In such a case, also, the certificate may not use or include the name of any organized political party. It was the apparent purpose of that provision to prevent a political body from acting in the making of nominations as an independent political body if it has acquired the status entitling it to nominate by primary and convention. But a political body which has acquired the right of nominating by primary and convention thereby loses its right to nominate by independent certificate of nomination. Rept. of Atty. Genl. (1907) 278-279.

Effect of participating in independent nomination.—Participation in a so-called caucus choosing independent nominees does not debar the participant from joining in the execution of an official certificate of an independent nomination. Rept. of Atty. Genl. (1911) 269, distinguishing *Matter of Commissioners of Election* (1909), 64 Misc. 620, 623, 128 N. Y. Supp. 580, and *Matter of Smith* (1903), 41 Misc. 501, 503, 85 N. Y. Supp. 14.

After participating in one independent nomination a voter is disqualified from participating in another independent nomination to the same office. Rept. of Atty. Genl. (1911) 248.

Signatures.—If the requisite number of persons add their places of residence the certificate is sufficient although many electors who sign do not give their residences. *Matter of Fitzgerald* (1906), 51 Misc. 491, 100 N. Y. Supp. 753.

When a sufficient number of signatures have been attacked by competent evidence establishing that the signers were non-residents so as to bring the number below that required by the statute, the certificate is insufficient; affidavits showing that certain sheets were lost are insufficient to make up the deficiency in the absence of proof of the names of the signers and that any of them did sign the paper, or that it was properly executed and acknowledged. *Matter of Quimby* (1906), 116 App. Div. 142, 102 N. Y. Supp. 201, *affd.* (1906), 186 N. Y. 266, 79 N. E. 708.

Sufficiency of signatures generally.—Signatures followed by the street numbers and the word Brooklyn and subsequent signatures followed by street and house number without the city or borough are sufficient. *Matter of Farrell* (1908), 51 Misc. 493, 100 N. Y. Supp. 754.

Signatures of non-residents.—The names of persons who appeared on the certificate to reside outside the district should be eliminated. Illegible signatures should be rejected. *Matter of Ind. League Nominations* (1906), 51 Misc. 486, 100 N. Y. Supp. 760.

Fraudulent and forged signatures.—Where five per cent. of the names of the subscribers appearing upon a given sheet are fraudulent and forged, such sheet shall not be considered a valid part of the nominating certificate notwithstanding that the remaining signatures thereon are genuine. *Matter of Burke v. Terry* (1911), 146 App. Div. 520, 521, 131 N. Y. Supp. 841, *affd.* (1911), 203 N. Y. 293.

L. 1909, ch. 22. Nominating certificates; emblems; vacancies. § 123.

96 N. E. 931. Decision under provision of former law, which has been eliminated by subsequent amendment.

Names on two certificates.—Where the same name and address appear upon petitions nominating different candidates for the same office, the signature on one or the other of such petitions is unauthorized and must be rejected. The presumption is that the two names represent the same person. Practical convenience requires that the signature upon the petition first filed must be recognized, not the one that appears to be first verified. *Matter of Commissioner of Elections* (1909), 64 Misc. 620, 120 N. Y. Supp. 580.

Constitutionality of provision as to sheets.—The provision of this section that "the signatures to a certificate of nomination need not all be appended to one paper" is constitutional. The electors may all sign a single sheet or each may sign a sheet by himself. *Matter of Burke v. Terry* (1911), 203 N. Y. 293, 96 N. E. 931.

Limitation on number of candidates for which person may join in nominating.—The provision that no person shall join in nominating more candidates for one office than there are persons to be elected thereto, when construed as only intended to prevent an elector from signing two independent nominating petitions for the same office, is not unreasonable. *People ex rel. Hotchkiss v. Smith* (1912), 206 N. Y. 231, 99 N. E. 568.

Registration as a qualification.—An elector to be qualified to sign a certificate of independent nomination need not have been registered at the time; it is sufficient if he registers before his name is counted. *People ex rel. Steinert v. Britt* (1911), 146 App. Div. 683, 131 N. Y. Supp. 455.

The provision of this section that no person signing an independent certificate of nomination shall be counted unless such person shall, on one of the days of registration in such year, be registered as a qualified elector, tends to prevent fraud and to make more certain the good faith of the persons seeking to present to the voters independent candidates for office. A person signing an independent certificate of nomination should be counted if he registers in such year either before or after signing such certificate. *People ex rel. Hotchkiss v. Smith* (1912), 206 N. Y. 231, 99 N. E. 568.

Signatures of unregistered electors.—If the electors who subscribed a certificate of an intended nomination were not registered and the time for registration had not then expired, they had the necessary qualifications to join in the certificate; but if the time for registration had expired, and the persons subscribing had failed to register and were not in a position to support the candidate nominated at the polls, they were not qualified to sign the certificate. *Matter of Horan* (1905), 108 App. Div. 269, 95 N. Y. Supp. 607.

Clerk to determine qualifications of signers.—Clerk with whom a certificate of nomination is filed may determine whether the parties named in such certificate are legal voters. *Rept. of Atty. Genl.* (1904) 270.

Independent nominations by members of party.—Members of incorporated party may nominate under this section, if party fails to make nomination for an office. *Matter of O'Brien* (1912), 152 App. Div. 856, 137 N. Y. Supp. 718, *affd.* (1912), 206 N. Y. 694, 99 N. E. 1111.

Use of emblem and name.—When a body of voters meet for the purpose of nominating an independent ticket and a committee has been appointed which adopts an emblem and a name and subsequently files petitions naming a candidate for the head of the ticket and a committee has been appointed to take charge of the canvass and nominations, the name and emblem adopted by such committee and persons representing them are to be considered as belonging to that political movement. It becomes a question of good faith as to whether or no particular persons nominated for the ticket are in sympathy with the movement. Thus, those

nominated by those in sympathy with the movement should be recognized by the board of elections. When there is a contest over two certificates signed by different nominators, the preference of the committee in charge of the general ticket should have great weight in determining who shall be candidates in that column. A certificate filed with the board of elections nominating candidates of another party who are in opposition to the ticket on which they desire to be placed, should not be recognized merely because it is the first certificate filed. *Matter of Folks* (1909), 134 App. Div. 376, 119 N. Y. Supp. 71, *affd.* (1909), 196 N. Y. 540, 90 N. E. 1156.

The electors in the several districts who are in general sympathy with the nominations of the city, county and borough candidates have a right to nominate by petition district candidates, and to adopt the same name and emblem as that chosen by the nominators of the general candidates. Where district nominations are made by two different sets of nominators, both claiming to be in general sympathy with the city, county and borough candidates, the views of a committee appointed at a mass meeting to nominate such candidates are entitled to great weight on the question as to which of the district nominators are in sympathy with the general ticket. Unless some reason is made to appear why such name and emblem should not be so used, or that some other body or party has a prior right to the use thereof, the board of elections or the court are powerless to interfere. *Matter of Wechsler* (1909), 134 App. Div. 378, 119 N. Y. Supp. 79.

Certificate may consist of several sheets.—If composed of several separate sheets firmly bound together, it constitutes but one separate paper under the meaning of this section; it is not necessary that the declaration of the signers as to their intention to support the persons nominated should appear upon each separate sheet. Such certificate is not defective because some of the signers took the oath and acknowledgment before notaries who were nominated therein as candidates for office. *Matter of Bulger* (1905), 48 Misc. 584, 97 N. Y. Supp. 232.

Certificates nominating more than one candidate where the electors making it are qualified to make a certificate for the nomination of all of the candidates therein; and when they are properly filed in the same office, they are not invalid. *Independent Nominations* (1906), 186 N. Y. 268, 79 N. E. 708.

The certificate first filed by one of several sets of local Independent League nominators is entitled to preference provided it was filed by the same "independent body" which had made the state nomination. *Matter of Independent Nominations* (1906), 186 N. Y. 268, 79 N. E. 708.

Fraudulent and forged certificate.—Where, after a certificate for the independent nomination of S., as a candidate of the National Progressive party for member of assembly for the second assembly district of Ulster county, had been signed and verified by 519 electors of said district, it was discovered that S. was ineligible for the office, and without authority from any of the signers the name and address of F. was pasted over the name and address of S., and without further signature and verification said certificate was filed with the board of elections, the certificate is "fraudulent and forged" within the meaning of this section as to every name appearing thereon, and is of no effect. That the person who made the change acted in good faith, under legal advice, does not alter the legal effect of his act. *Matter of Shook* (1912), 78 Misc. 89, 137 N. Y. Supp. 834.

Defects.—A certificate nominating an assemblyman which does not contain the name of the office is defective but not void. *Matter of Independence League Nominations* (1906), 51 Misc. 485, 100 N. Y. Supp. 760.

Cited as part of system of the nomination of candidates for public office. *Matter of Greene* (1907), 121 App. Div. 693, 106 N. Y. Supp. 425.

§ 124. **Emblems.**—It shall be the duty of the state committee of a party

to select some simple device or emblem to designate and distinguish the candidates of the party for public office. Such device or emblem shall be shown by a representation thereof upon a certificate signed and duly executed by the chairman and secretary of such state committee, which certificate shall be filed with the secretary of state, and such device or emblem, when so filed, shall in no case be used by any other party or any independent body. When any independent body shall make a nomination of a candidate or candidates to be voted for by the voters of the entire state, it shall be the duty of the persons who shall sign and execute the certificate of nomination of such candidate or candidates, to likewise select some simple device or emblem to designate and distinguish the candidate of such independent body making such nomination, and such device or emblem shall be shown by the representation thereof upon such certificate of nomination. The device or emblem so chosen, when filed as aforesaid, shall be used to designate and distinguish all the candidates of the same party or independent body nominated by such party or independent body, or duly authorized committee or primary thereof, in all districts of the state and shall continue to be used to designate and distinguish the candidates of such party or independent body in all districts of the state until changed by the state committee of the party or by the independent body choosing such device or emblem. The device or emblem chosen as aforesaid may be a star, an animal, an anchor, or any other appropriate symbol, but neither the coat of arms or seal of any state or of the United States, nor the state or national flag, nor any religious emblem or symbol, nor the portrait of any person, nor the representation of a coin or of the currency of the United States shall be chosen as such distinguishing device or emblem.

Existing devices or emblems, heretofore chosen pursuant to law, shall continue until changed in the manner provided in this section as hereby amended. (*Amended by L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 56, part, as amended by L. 1898, ch. 335; L. 1901, ch. 654.

Consolidators' note.—"A certificate signed and duly executed by the proper parties authorized for that purpose," at the end of the sentence imposing the duty of selecting an emblem on an independent body, is changed to "such certificate of nomination," for the reason that there can be no "proper parties authorized for that purpose," but the emblem is included in the original nominating petition. The expression may have been intended to include the case of action by a committee designated "for the purposes specified by section sixty-six" (new §§ 135 and 136). The exceptional case is fully guarded in the sections governing it.

Emblem resembling profile of "Liberty."—An emblem on a certificate of nomination although resembling the profile of "Liberty" as used on some of the earlier coins, held not to be in violation of this section. Rept. of Atty. Genl. (1909) 328.

Section cited.—Matter of Wechsler (1909), 134 App. Div. 378, 119 N. Y. Supp. 79.

§ 125. Conflict in names or emblems.—If two or more different parties or independent bodies shall select the same, or substantially the same, device or emblem or party name, the supreme court or any justice thereof

within the judicial district or any county judge within his county shall decide which of said parties or independent bodies is entitled to the use of such device or emblem or party name, being governed as far as may be in his decision by priority of selection in the case of the device or emblem, and of use in the case of the party name. If the other party or independent body shall present no other device or party name after such decision, the custodian of primary records shall select for such other party or independent body another device or party name, so that no two different parties or nominating bodies shall be designated by the same device or party name. If there be a division within a party, and two or more factions claim the same, or substantially the same, device or name, the court or judge aforesaid shall decide between such conflicting claims, giving preference of device and name to the primary, body or committee thereof, recognized by the regularly constituted party authorities.

Any question arising with reference to any device, or to the party or other name designated in any certificate filed pursuant to the provisions of this article, or with reference to the construction, sufficiency, validity or legality of any certificate, shall be determined upon the application of any citizen by the supreme court, or any justice thereof, within the judicial district, or any county judge within his county, who shall make such order in the premises as justice may require, but the final order at special term must be made on or before the twelfth day or, in the case of a certificate of nomination of a town or village officer, the seventh day preceding the day of election. Such question shall be heard upon such notice to such officers, persons or committees as the said court or justice or judge thereof shall direct.

The supreme court, at special term, in any judicial district in which two or more proceedings are pending in such district under the provisions of this section may, by order, consolidate all such proceedings and provide that further proceedings therein be had before such court at special term, in all cases where the question or questions involved are identical. If one or more of such proceedings be pending before a justice or county judge, notice of such order shall be forthwith given to such justice or judge. (*Amended by L. 1911, ch. 649, and L. 1913, ch. 820, and L. 1914, ch. 244.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 56, part, as amended by L. 1898, ch. 335; L. 1901, ch. 654.

Reference.—Misconduct in relation to certificates of nomination. Penal Law, § 760.

Formerly the officer or board filing the certificate decided as to conflict of names or emblems, and the proceeding was brought to review such determination.

Officer with whom certificates are filed may select, where conflicting nominations are made between two conventions, each claiming to regularly represent a political party. *People ex rel. Ward v. Roosevelt* (1897), 151 N. Y. 369, 45 N. E. 840.

Any citizen who has instituted a proceeding by filing objections to a certificate of a party may apply to the supreme court to review the determination of the secretary of state as to the use of a party name. *Matter of Social Democratic*

L. 1909, ch. 22. Nominating certificates; emblems; vacancies. § 125.

Party (1905), 182 N. Y. 442, 75 N. E. 415, revg. (1905), 105 App. Div. 243, 93 N. Y. Supp. 1023.

Review of determination of officer under former provision.—Proceeding, where brought. *Matter of Fairchild* (1897), 151 N. Y. 359, 45 N. E. 943. On what papers heard, *Id.* Time for order prescribed by statute applies only to original order. *Matter of Emmet* (1896), 150 N. Y. 538, 44 N. E. 1102. An appeal from order may be taken to appellate division even though election has been held, *Id.*; *Matter of Cuddeback* (1896), 3 App. Div. 103, 39 N. Y. Supp. 388. Court not bound by decision of party convention, in reviewing decision of secretary of state. *In re Heacock* (1896), 18 Misc. 311, 41 N. Y. Supp. 161.

Conflicting names.—The above section prohibits a certificate of an independent nomination from including the name of an organized political party; a certificate which states the name selected for the designation of the independent party as "independent republican party," is a violation of the section. *Matter of Smith* (1903), 41 Misc. 501, 85 N. Y. Supp. 14.

The name "Independent Democratic Party," adopted by a body of independent voters in a certificate of nomination for member of assembly, is in violation of this section. In such case the county clerk cannot select another name in place of the one selected, and put the nominee's name upon the official ballot as the candidate of such new party. *Matter of Carr* (1904), 94 App. Div. 493, 88 N. Y. Supp. 107.

The name "Social Democratic Party," is substantially the same as "Democratic Party," and the use thereof is prohibited under this section. *Matter of Social Democratic Party* (1905), 182 N. Y. 442, 75 N. E. 415, revg. (1905), 105 App. Div. 243, 93 N. Y. Supp. 1023.

The use of the word "Progressive" by any organization or individual other than "The National Progressive Party," though in conjunction with other names, would tend to create confusion and a loss of votes through inadvertence on the part of some electors, and the court under this section has jurisdiction to pass upon the right to the use of said word in a certificate of nomination. *Matter of Kaufman* (1912), 78 Misc. 72, 138 N. Y. Supp. 804, mod. (1912), 152 App. Div. 940, 137 N. Y. Supp. 1124. See also *Matter of Greene* (1896), 9 App. Div. 223, 41 N. Y. Supp. 177, *affd.* (1896), 150 N. Y. 566, 44 N. E. 1124.

Section directory as to time of order.—Provision that order must be made before last day for filing certificates of nomination, is directory. Subsequent order will be effectual where jurisdiction has been acquired. So held under former provision. *Matter of Hennessey* (1900), 164 N. Y. 393, 58 N. E. 446, revg. (1900), 54 App. Div. 180, 66 N. Y. Supp. 463; *Matter of Stoddard* (1913), 158 App. Div. 525, 143 N. Y. Supp. 739.

Where applicant had ample time to comply with statute, his application will not be entertained unless submitted to the special term or a justice of the supreme court for decision at least fifteen days before election. *People ex rel. Tuers v. Dooling* (1910), 69 Misc. 391, 399, 125 N. Y. Supp. 857, *affd.* (1910), 141 App. Div. 918, 125 N. Y. Supp. 857.

Priority of nominations.—Where a number of independent electors have adopted an emblem and a party name and nominated a candidate for mayor of a city and have appointed a committee to nominate candidates for the other offices, the regular candidate of one of the political parties for the office of assemblyman may not procure a petition nominating him for such office as an independent candidate under such name and emblem without the consent of such committee. *Matter of Commissioner of Elections* (1909), 64 Misc. 620, 120 N. Y. Supp. 580.

Independent party.—For the purpose of selecting a name and an emblem for use upon an official ballot, the persons executing the several certificates of nominations are to be regarded as one and the same "Independent Party," within the meaning

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and intent of the Election Law. *Matter of Wise* (1905), 108 App. Div. 52, 95 N. Y. Supp. 843.

Evidence as to candidates of independent party.—The affidavits of the executive officers of an independent party, like the Independence League, are competent evidence as to whether particular candidates are the legitimate candidates of that party and entitled to the benefit of the party name and emblem. *Matter of Quimby* (1906), 116 App. Div. 142, 102 N. Y. Supp. 201, *affd.* (1906), 186 N. Y. 266, 79 N. E. 708.

Petition for submission to local option questions.—Neither the supreme court nor a justice thereof has jurisdiction under this section to entertain a summary proceeding to determine the sufficiency of a petition filed by the town clerk, requiring the submission of local option questions to the electors of a town. *Matter of Town of Newburgh* (1904), 97 App. Div. 438, 89 N. Y. Supp. 1065.

"Factions" refers to different organizations in the same party—not to contending members of the same organization. *In re Heacock* (1896), 18 Misc. 311, 41 N. Y. Supp. 161.

Regularity of faction or nomination determined by party authorities. *Fernbacher v. Roosevelt* (1895), 90 Hun 411, 35 N. Y. Supp. 898; *Fairchild v. Ward* (1897), 151 N. Y. 359, 45 N. E. 943; *Matter of Redmond* (1893), 5 Misc. 369, 25 N. Y. Supp. 381; *Matter of Pollard* (1893), 55 N. Y. St. Rep. 155, 25 N. Y. Supp. 385.

§ 126. **Supplying omitted emblems.**—If a party or independent body shall have nominated candidates to be voted for by the voters of the entire state, in any year, and shall have no device or emblem, selected and certified as required by this chapter, to distinguish such candidates, it shall be the duty of the secretary of state to select a device or emblem for that purpose, and such device or emblem so chosen shall be used to distinguish all candidates of that party or independent body throughout the state, whether such candidates are nominated for state or local offices; and if any certificate of nomination of candidates to be voted for by the voters of a district less than the entire state shall be filed with the secretary of state, or with any public officer pursuant to this article, by an independent body, or if nominations for such offices be made by a party, which independent body or party shall have made no nomination of candidates for offices to be filled by the voters of the entire state, and such independent certificate of nomination shall omit or the state committee of such party shall have omitted to select a device or emblem to distinguish the candidates thus nominated, it shall be the duty of the secretary of state or other public officer with whom an independent certificate of nomination for such offices is required by this chapter to be filed to select a device or emblem to represent such candidates. (*Amended by L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 56, part, as amended by L. 1898, ch. 335; L. 1901, ch. 654.

§ 127. **Places of filing independent certificates of nomination.**—Independent certificates of nomination of candidates for office to be filled by the voters of the entire state, or of any division or district greater than a county, shall be filed with the secretary of state, except that each such

L. 1909, ch. 22. Nominating certificates; emblems; vacancies. § 127.

certificate of nomination of a candidate for member of assembly for the assembly district composing the counties of Fulton and Hamilton shall be filed in the office of the board of elections of Fulton county, and a copy thereof certified by the board of elections of Fulton county shall be filed in the office of the board of elections of Hamilton county, so long as the said counties constitute one assembly district, and except that such certificates of nomination of candidates for offices to be filled only by the voters or a portion of the voters of the city of New York shall be filed with the board of elections of the city of New York.

Independent certificates of nomination of candidates for offices to be filled only by the votes of voters, part of whom are of New York city and part of whom are of a county not wholly within the city of New York, shall be filed with the board of elections of such county and in the office of the board of elections of said city. Such certificates of nomination of candidates for offices of any other city, to be elected at the same time at which a general election is held shall be filed with the board of elections of the county in which such city is located. Such certificates of nomination of candidates for offices of a city, village or town to be elected at a different time from a general election shall be filed with the clerk of such city, village or town, respectively.

In towns in which town meetings are held at the time of general elections, independent certificates of nomination of candidates for town offices shall be in duplicate, one of which shall be filed with the town clerk of the town in which such officers are to be voted for, and the other with the board of elections of the county in which such town is located. All other independent certificates of nomination shall be filed with the board of elections of the county in which the candidates so nominated are to be voted for.

All such filed certificates and corrected certificates of nomination, all objections to such certificates and all declinations of nomination are hereby declared to be public records; and it shall be the duty of every officer or board to exhibit without delay every such paper to any person who shall request to see the same. It shall also be the duty of each such officer or board to keep a book which shall be open to public inspection, in which shall be correctly recorded the names of all candidates nominated by independent certificates issued by or filed in the office of such officer or board or certified thereto, the title of the office for which any such nomination is made, the name and emblem of the independent body making such nomination, and in which shall also be stated all declinations of such nominations or objections to such nominations, and the time of filing each of the said papers. (*Amended by L. 1911, ch. 891, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 58, as amended by L. 1897, ch. 379, § 11; L. 1898, ch. 363, § 9; L. 1900, ch. 381, § 3; L. 1901, ch. 95, § 12; L. 1902, ch. 241, § 1; L. 1902, ch. 405, § 3; L. 1905, ch. 643, § 10.

References.—Filing party nominations and designations, § 49, ante. Filing or

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receiving for filing false certificate, Penal Law, § 760. Suppressing certificate duly filed, Penal Law, § 760.

Filing of certificate of nomination.—People ex rel. Simmons v. Ham (1907), 56 Misc. 112, 115, 106 N. Y. Supp. 312; People ex rel. Darling v. Dooling (1907), 56 Misc. 116, 107 N. Y. Supp. 368.

Filing certificates of nomination in a county not wholly within the city of New York.—The provision of this section, governing the filing of certificates of nomination in a county not wholly within the city of New York, is inoperative owing to the fact that there is no longer any county partly in and partly outside of said city. People ex rel. Donegan v. Dooling (1910), 141 App. Div. 31, 125 N. Y. Supp. 783.

§ 128. **Times of filing independent certificates of nomination.**—Independent certificates of nomination required to be filed with the secretary of state shall be filed not earlier than the sixth Tuesday, and not later than twenty-five days before the day of general election. All other independent certificates of nomination, except those required to be filed with village clerks and with town clerks of towns in which town meetings are held at a time other than the time of general elections, shall be filed not earlier than the sixth Tuesday and not later than twenty days before the day of general election. Independent certificates of nomination required to be filed with village clerks and with town clerks of towns in which town meetings are held at a time other than the time of general elections shall be filed at least ten, and not more than twenty days before the day of election.

In case of a special election ordered by the governor under the provisions of section two hundred and ninety-two of this chapter, independent certificates of nomination for the office or offices to be filled at such special election shall be filed with the proper officers or boards not less than ten days before such special election. (*Amended by L. 1911, ch. 891, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 59, as amended by L. 1897, ch. 379, § 12; L. 1898, ch. 363, § 9; L. 1900, ch. 381, § 3; L. 1901, ch. 95, § 13; L. 1902, ch. 405, § 3; L. 1905, ch. 643, § 11.

Reference.—Time of filing party nominations and designations, § 49, ante.

Statute is mandatory.—Matter of Cuddeback (1896), 3 App. Div. 103, 39 N. Y. Supp. 388; Matter of Halpin (1905), 108 App. Div. 271, 95 N. Y. Supp. 611. But see Matter of Darling (1907), 189 N. Y. 570, 82 N. E. 438, affg. (1907), 121 App. Div. 656, 106 N. Y. Supp. 430, post. But certificate may be filed at any hour of last day. Need not be filed within hours during which clerk's office is open. Matter of Norton (1898), 34 App. Div. 79, 53 N. Y. Supp. 1093, appeal dismissed (1899), 158 N. Y. 130.

Secretary of state is not bound to receive a certificate of nomination after the date fixed by law for filing it. Rept. of Atty. Genl. (1895) 289.

When the last day for filing the certificate falls on Sunday it must be filed on the day preceding. Rept. of Atty. Genl. (1902) 318.

Certificate filed with the county clerk at any time on the last day is legal. Rept. of Atty. Genl. (1895) 295.

Filing of certificates, where the last day occurs on Sunday must be made on the Saturday before. Rept. of Atty. Genl. (1911) Vol. 2, p. 647.

L. 1909, ch. 22. Nominating certificates; emblems; vacancies. §§ 129, 130.

When court may give relief.—The statutory requirement as to the time when certificates of nomination should be filed is mandatory, yet there may occur accidents and mistakes, causing delay in such filing, and from the effects of which the supreme court may give relief, provided it finds that the delay was not due to the negligence of the convention making the nomination, but to the party to whom the filing of the certificate was intrusted; but the question in each case, as to whether there has been excusable default or misfortune depend upon the particular facts, and the determination of the question rests in the supreme court. *Matter of Darling* (1907), 189 N. Y. 570, 82 N. E. 438, affg. (1907), 121 App. Div. 656, 106 N. Y. Supp. 430.

Mailing in time.—Default in filing nominations may be remedied by the Supreme Court, where it appears that the certificates were so mailed as to reach the office of the Secretary of State in time. *Matter of Bayne* (1910), 69 Misc. 579, 127 N. Y. Supp. 915.

Mandamus will not issue to compel the acceptance and filing of certificates of nomination, if they are not tendered for filing twenty days before the election, as required by this section. *People ex rel. Steinert v. Britt* (1911), 146 App. Div. 684, 131 N. Y. Supp. 455.

Mandamus to compel the board of elections to accept a second certificate of nomination will be denied where the former certificate was valid. *Matter of People ex rel. McGrath v. Dooling* (1910), 141 App. Div. 29, 127 N. Y. Supp. 748.

Effect on official ballot.—An official ballot is not invalid because it contains the name of a candidate whose certificate of nomination was not filed until after the fixed date. *Rept. of Atty. Genl.* (1895) 293.

§ 129. **Certification of nominations by secretary of state.**—The secretary of state shall, fourteen days before the election, or nine days before a special election, certify to the board of elections of each county, and to the board of elections of the city of New York, the name, residence and place of business, if any, of each candidate either nominated in any certificate so filed with him, or to whom he has issued a certificate, for whom the voters of any such county or said city, respectively, may vote, the title of the office for which he is nominated, the party or other political name specified in such certificate, and the emblem or device chosen to represent and distinguish the candidates of the political party or independent body making such nominations. (*Amended by L. 1911, ch. 891, § 62.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 60, as amended by L. 1897, ch. 379, § 13; L. 1901, ch. 95, § 14; L. 1905, ch. 643, § 12.

Effective certificate.—The certificate of the secretary of state as to the names of candidates of state offices, emblems of parties and order of position on the ballot is binding on the local election authorities and the ballot should be printed accordingly. *Fernbacher v. Roosevelt* (1895), 14 Misc. 199, affd. (1895), 90 Hun 441, 35 N. Y. Supp. 898.

§ 130. **Publication of nominations.**—At least six days before an election to fill any public office the board of elections of each county, except those counties which are wholly within the city of New York, shall cause to be published in not less than two nor more than four newspapers within such county, one of which shall be a daily newspaper, if a daily newspaper is published in such county, and in any county having one hundred thousand

or more inhabitants, adjoining a city having a population of one million or more, in not less than six nor more than ten newspapers a list of all nominations of candidates for offices other than town offices to be filled at such election, certified to such board by the secretary of state, or filed with such board or certified by such board. The board of elections of the city of New York shall, within the same time before an election to fill any public office, cause to be published in two newspapers published in each borough within such city a list of the nominations of candidates for office to be voted for at such election in such boroughs respectively, which were certified to such board by the secretary of state, or filed in the office of such board, or certified by such board and in the borough of Brooklyn the board of elections shall cause such publication to be made in the newspapers designated as corporation newspapers of said borough and in one daily newspaper published in the Jewish language.

Such publication shall contain the name and residence, and if a city, the street number of the residence and place of business, if any, and the party or other designation of each candidate, and a facsimile of the emblems or devices selected and designated as prescribed by this article, to represent and distinguish the candidates of the several political parties or independent bodies. The city clerk of each city except New York, and the board of elections of the city of New York, shall at least six days before an election of city officers thereof, held at a different time from a general election, cause like publications to be made as to candidates for offices to be filled at such city election in a like number of newspapers published in such city.

One of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election for governor cast the largest number of votes in the state for such office; and another of such publications shall be made in a newspaper which advocates the principles of the political party that at the last preceding election for governor cast the next largest number of votes in the state for such office. The officer or board, in selecting the papers for such publications, shall select those which, according to the best information he can obtain, have a large circulation within such county or city. In making additional publications, the officer or board shall keep in view the object of giving information, so far as possible, to the voters of all political parties. The officer or board shall make such publication twice in each newspaper so selected in a county or city in which daily newspapers are published; but if there be no daily newspaper published within the county, one publication only shall be made in each of such newspapers. Should the board of elections or other officer find it impracticable to make the publication six days before election day in counties where no daily newspaper is printed, he shall make the same at the earliest possible day thereafter, and before the election. (*Amended by L. 1911, ch. 891, and L. 1915, ch. 673.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 61, as amended by L. 1897, ch. 379,

L. 1909, ch. 22. Nominating certificates; emblems; vacancies. §§ 131-133.

§ 14, and ch. 608, § 1; L. 1901, ch. 95, § 15; L. 1904, ch. 74, § 1; L. 1905, ch. 643, § 13.

Designation of papers should not be arbitrary, but officials should show good faith in considering evidence of circulation. *People ex rel. Press Co. v. Martin* (1894), 142 N. Y. 228, 36 N. E. 885.

Certiorari to review designation of newspapers to publish election notices, *Id.*

§ 131. **Lists for town clerks and aldermen.**—The board of elections of each county, except those counties which are wholly within the city of New York, shall at least six days before election day send to the town clerk of each town, and to an alderman of each ward in any city in the county, at least five and not more than ten printed lists for each election district in such town or ward, containing the name and residence, and if in a city, the street number of residence, and place of business, if any, of all candidates whose certificates of nomination have been filed with or issued by it or been certified to it, and the party or other designation, and also a facsimile of the emblem or device of each political party or independent body nominating candidates to be voted for by the voters of the respective towns and wards. Such lists shall at least three days before the day of election be conspicuously posted by such town clerk or alderman in one or more public places in each election district of such town or ward, one of which lists shall be so posted at each polling place. (*Amended by L. 1911, ch. 891, § 62.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 62, as amended by L. 1897, ch. 379, § 15; L. 1905, ch. 643, § 14.

Consolidators' note.—The last clause of the section, "one of which shall be at each polling place," made to read "one of which lists shall be so posted at each polling place," which is the intent, but not clearly expressed.

§ 132. **Posting town and village nominations.**—Each town and village clerk shall cause at least ten copies of a like list of all nominations to office filed with him for an election to be held at a time other than the day of the general election, to be conspicuously posted in ten public places in the town or village, at least one day before the town meeting or village election, one of which copies shall be so posted at each polling place of such town meeting or village election.

Source.—Former Elec. L. (L. 1896, ch. 909) § 63, as amended by L. 1905, ch. 643, § 15.

§ 133. **Declination of nomination.**—The name of a person nominated for an office otherwise than by an official primary election, shall not be printed on the official ballot if he notifies the board or officer with whom the original certificate of his nomination is filed, in a writing signed by him and duly acknowledged, that he declines the nomination, or if nominated by more than one political party or independent body, the name of a person so nominated shall not be printed on the ticket of a party or independent body whose nomination he shall in like manner decline. If the declination be of a nomination filed with the secretary of state, such

notification shall be given at least twenty days before the election. If the declination be of a nomination filed with a board of elections of any county and in the counties within the city of New York with the board of elections of the city of New York, or with the city clerk of any city, such notification shall be given at least eighteen days before the election. If the declination be of a party nomination filed with a town or village clerk, such notification shall be given at least ten days, and if of an independent nomination at least seven days before the election; except that a declination of nomination to a town office in towns where town meetings are held at the time of general elections, must be filed in the office of the board of elections, within the time required by this section for filing the declination of nomination to a county office, and the board of elections shall forthwith notify the town clerk in writing of such declination.

When a person who was not designated for nomination at an official primary election receives a nomination for public office at such primary, it shall be the duty of the board or officer with whom designations for nomination to such office are required by this chapter to be filed to forthwith notify, by mail, such person of his nomination. A person nominated as aforesaid, without designation, at an official primary, may decline such nomination not later than the seventh day after the day of the primary at which he was nominated, by filing his written declination thereof, signed by him and duly acknowledged, with the board or officer with whom designations for nomination to such office are required by this chapter to be filed.

The board or officer to whom such notification is given shall forthwith inform by mail or otherwise the committee appointed on the face of such certificate as provided by sections one hundred and twenty-one and one hundred and twenty-three of this chapter, that the nomination has been declined, and if such declination be filed with the secretary of state, such officer shall also give immediate notice by mail or otherwise that such nomination has been declined, to the several boards of elections or other officers authorized by law to prepare official ballots for election districts affected by such declination. (*Amended by L. 1911, ch. 891, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 64, as amended by L. 1897, ch. 379, § 16; L. 1901, ch. 95, § 16; L. 1902, ch. 405, § 4; L. 1905, ch. 643, § 16.

When declination constitutes vacancy.—A vacancy within the meaning of this section is not caused by the declination of a candidate who does not decline in the manner or within the time required. *Matter of Halpin* (1905), 108 App. Div. 271, 95 N. Y. Supp. 611.

Filing of declination.—Notice of declination of a nomination should be filed in the office of the town and of the county clerk. *Rept. of Atty. Genl.* (1899) 358.

Declination of senatorial nomination, filing of. *Rept. of Atty. Genl.* (1906) 281.

Cited as part of system of the nomination of candidates for public office. *Matter of Greene* (1907), 121 App. Div. 693, 106 N. Y. Supp. 425.

§ 134. **Objections to certificates of nomination.**—A written objection to any certificate of nomination may be filed with the officer with whom

the original certificate of nomination is filed within three days after the filing of such certificate, excepting that if by any independent certificate of nomination any person is nominated who is at the time or shall be after the filing of such independent certificate of nomination, the candidate of a political party for the same office and the party certificate has been filed after the filing of the independent certificate of nomination, the written objection to the independent certificate of nomination may be filed within three days after the filing of such party certificate; and if written objections to such independent certificate of nomination have been already filed by the same or some other person and shall have been heard and determined or heard and not determined, there shall be a new hearing upon all the objections so filed, the written objections to an independent certificate of nomination filed after the filing of a party certificate as herein provided may contain all objections to such independent certificate notwithstanding the same or some other person has already filed objections to such certificate. If such objection be filed, notice thereof shall be given forthwith by mail to the committee, if any, appointed on the face of such certificate for the purposes specified in section one hundred and thirty-five of this article, and also to each candidate placed in nomination by such certificate. The question raised by such written objections shall be heard and determined as prescribed in section one hundred and twenty-five of this article. (*Amended by L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 65.

Reference.—Objections heard and determined as prescribed in § 125, ante.

Validity of certificate to be recognized unless objection is filed. Matter of Cowie (1890), 33 N. Y. St. Rep. 710, 11 N. Y. Supp. 838.

Notice to candidates affected.—Section requires notice to be given to candidates affected. *Sweeny v. Comrs. of Elections* (1913), 209 N. Y. 567, 103 N. E. 164.

Review of action of local authorities.—Although no written objection to the certificate has been filed in the office in which the certificate was filed within three days after the filing of the certificate, any citizen may under the provision of § 56 apply to the supreme court to review the determination and acts of the local authorities in regard to a certificate of nomination which has been filed. *Fernbacher v. Roosevelt* (1895), 90 Hun 441, 35 N. Y. Supp. 898.

Section cited.—*People ex rel. Simmons v. Ham* (1907), 56 Misc. 112, 115, 106 N. Y. Supp. 312.

§ 135. Filling vacancies in nominations.—If a nomination made otherwise than by an official primary election is duly declined, or the attempt to nominate at a primary results in a tie, or a candidate regularly nominated otherwise than by an official primary election dies before election day, or is found to be disqualified to hold office for which he is nominated, or if any certificate of nomination is found to be defective but not wholly void, the committee appointed on the face of such certificate of nomination, as provided by sections one hundred and twenty-one and one hundred and twenty-three of this chapter, may make a new nomination to fill the vacancy so created, or may supply such defect, as the case may be,

by making and filing with the proper officer a certificate setting forth the cause of the vacancy or the nature of the defect, the name of the new candidate, the title of the office for which he is nominated, the name of the original candidate, the name of the political party or other nominating body which was inscribed on the original certificate, and such further information as is required to be given by an original certificate of nomination; except that where a certificate is filed pursuant to this section to fill a vacancy, it shall not be lawful to select a new name or emblem, but that the name and emblem chosen to distinguish the candidate nominated by the original certificate shall be used to distinguish the candidate nominated as provided by this section. (*Amended by L. 1911, ch. 891, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 66, pt. of subd. 1, as amended by L. 1897, ch. 379, § 17; L. 1901, ch. 95, § 17; L. 1905, ch. 49, § 1, and ch. 643, § 17.

Consolidators' note.—The words "or the attempt to nominate at a primary results in a tie" were inserted in this section by L. 1905, ch. 49, but the draftsman of ch. 643 of the same year (which amended this and a number of other sections to harmonize the machinery of the Election Law with the new office of commissioner of elections of Erie County created by L. 1904, ch. 394) omitted them, presumably in ignorance of the pendency of the earlier amendment, and both bills passed the legislature without being harmonized. The result is that the original omission to cover the case of a tie vote, once cured, has been recreated.

References.—Vacancies in designations at official primaries, § 52, *ante*. See notes to that section. Filling vacancies after primaries, § 90, *ante*. The effect of the above note of consolidators has been superseded by subsequent amendments.

Nomination by committee.—A nomination made by a party committee is of equal dignity and originality with one made by a convention. Where a candidate is nominated for a state office at a convention of one political party the secretary of state cannot refuse to file a certificate nominating the same man for the same office by a duly authorized committee of a convention of another political party. So held under former law. *Matter of Gillespie v. McDonough* (1902), 39 Misc. 147, 79 N. Y. Supp. 182.

The power of filling vacancies caused by declination, death, or disqualification is vested solely in the committee appointed by the nominating convention; and the convention has no authority to reconvene and fill such vacancies. *Matter of Greene* (1907), 121 App. Div. 693, 106 N. Y. Supp. 425.

Majority of committee may act.—Where a party nominee has duly declined the nomination and filed a certificate to that effect with the board of elections as required by the statute, two of a committee of three appointed by the convention pursuant to this section are entitled to nominate a person in his place by filing a new certificate. *Matter of Kirk v. Gallagher* (1911), 146 App. Div. 685, 131 N. Y. Supp. 594.

Committee cannot make an original nomination for an office with reference to which the convention failed to take any action. Rept. of Atty. Genl. (1901) 292; Rept. of Atty. Genl. (1902) 307; Rept. of Atty. Genl. (1906) 632.

Candidate of another party.—Since a committee having the right to fill vacancies is prohibited from selecting a person who has been named as a candidate by another party, it follows that a candidate who was nominated by another cannot be nominated to fill the vacancy by filing a certificate of nomination by independent voters. Decision under former law. *Matter of Brevillier* (1906), 116 App. Div. 144, 102 N. Y. Supp. 217, *affd.* (1906), 186 N. Y. 268, 79 N. E. 208.

L. 1909, ch. 22. Nominating certificates; emblems; vacancies. §§ 136, 137.

§ 136. **Certificates of new nominations.**—The certificate so made shall be subscribed and acknowledged by a majority of the members of the committee, and the members of the committee subscribing the same shall make oath before the officer or officers before whom they shall severally acknowledge the execution of the said certificate that the matters therein stated are true to the best of their information and belief. Except in case of the death of a candidate after the official ballots have been printed and before election day, the said certificate shall be filed in the office in which the original certificate was filed, at least five days before election, if filed in the office of a town or village clerk; otherwise at least fifteen days before the election; and upon being so filed shall have the same force and effect as an original certificate of nomination. When a new certificate of nomination is filed with the secretary of state, he shall, in certifying the nomination to the various boards and officers, insert the name of the person who has been thus nominated instead of that of the candidate nominated originally, or, if he has already sent forward his certificate, he shall forthwith certify to such boards and other officers the name of the person newly nominated, and such other facts as are required to be stated in such certificate. (*Amended by L. 1911, ch. 891, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 66, pt. of subd. 1, as amended by L. 1897, ch. 379, § 17; L. 1901, ch. 95, § 17; L. 1905, ch. 49, § 1, and ch. 643, § 17.

Constitutionality of former provisions.—The former provisions of this section forbidding a committee of any party or independent body authorized either to make nominations or to fill vacancies to nominate a candidate of another party or independent body for the same office, held unconstitutional. *Matter of Callahan* (1910), 200 N. Y. 59, 93 N. E. 262, affg. (1910), 140 App. Div. 897, 125 N. Y. Supp. 1114. The prohibition has been omitted from the statute, rendering obsolete various decisions construing it, including *Matter of Sammon* (1909), 134 App. Div. 374, 119 N. Y. Supp. 51.

Nomination for public office becomes complete only upon filing the certificate of nomination with the proper officers, and then, and not before, the person nominated becomes the candidate of the party for that office, within the meaning of this section. *Matter of O'Brien* (1910), 140 App. Div. 467, 125 N. Y. Supp. 260.

§ 137. **Death of candidate after printing of ballots; official pasters.**—In case of the death of a candidate after the official ballots have been printed, and before election day, the vacancy may be filled by filing the proper certificate of nomination of a candidate to fill such vacancy, with the officer or board with whom the original certificate was filed, or by whom it was issued, and if filed with the secretary of state, the secretary of state shall immediately give the necessary notifications, and it then shall be the duty of the officer or board furnishing the official ballots to prepare and furnish to the inspectors of election in the election districts affected adhesive pasters containing the name of the candidate nominated to fill the vacancy. The pasters shall be of plain white paper, printed in plain black ink and in the same kind of type as that used in printing the names of the candidates upon the official ballots, and shall be of a size as large as and no larger than the space occupied upon the official ballot by the name of the

candidate in whose place the candidate named upon the paster has been nominated. If, however, the deceased shall be the candidate of several parties or bodies, and they shall not all nominate the same candidate as his successor, a paster shall be prepared which shall contain the entire matter to be contained in the section on which such deceased candidate's name appears, and shall be pasted over the whole section and shall supersede it.

Whenever such pasters are provided, the officer or board furnishing them shall certify to the inspectors of election in the election districts affected by the vacancy, the name of the original candidate, the name of the new nominee, the title of the office for which the nomination is made, and the name of the political party or independent body making the nomination, and shall state the number of pasters furnished which number shall be equal to the number of official ballots furnished for such district. Upon the delivery of said pasters, the inspectors of election shall sign a receipt for the same, which receipt shall be retained by the officer or board furnishing the pasters, and shall be part of the record of his or their office. The inspectors shall deliver the pasters to the ballot clerks, who are required to affix one of such pasters in the proper place and in a proper manner upon each official ballot before said ballot shall be delivered to a voter. When so affixed to the official ballot, the pasters shall be part of the official ballot. The ballot clerks shall include in their statement of ballots a statement showing the number of pasters received by them, the number of pasters affixed to official ballots and the number of unused pasters returned by them, the unused pasters to be inclosed in the package of ballots not delivered to voters.

The use of any paster upon the official ballot otherwise than as herein provided is hereby declared a felony, punishable by imprisonment in a state prison for not less than one nor more than five years. (*Amended by L. 1911, ch. 891, and L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 66, subd. 2.

ARTICLE VI.

REGISTRATION OF VOTERS.

Section 150. Meetings for registration.

151. Additional meetings for registration.

152. Conduct of meetings; watchers.

153. Adding and erasing names on register.

154. Register of voters.

155. Register; how arranged; signature law.

157. Preparation and distribution of registry lists; investigation of false registration.

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159. Registration elsewhere.

160. Registration for other than general elections.

161. Registration for town or village elections.
162. Qualifications of voters.
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176. Certification of register.
177. Making up the registers; custody thereof after registration.
178. Custody and filing of registers after registration in cities of first class.
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181. Certifying number of registered voters.
182. Delivery of blank books for registration; certificates and instructions.
- 182-a. Special instructions to voters to be prepared for the year nineteen hundred and fourteen.
183. Delivery of previous registers and poll books to inspectors.
184. Penalties.

§ 150. Meetings for registration.—1. Except as otherwise herein provided, before every general election, the board of inspectors for each election district in every city, and in villages having five thousand inhabitants or more, shall hold four meetings for the registration of the electors thereof, at the place designated therefor, to be known respectively as the first, second, third and fourth meetings for registration. The said meetings shall be held on the fourth Friday, fourth Saturday and the third Friday and third Saturday before such election. Each meeting shall begin at seven o'clock in the forenoon, and continue until ten o'clock in the evening. In all election districts other than in cities or villages having five thousand inhabitants or more, the board of inspectors of election for each such election district shall hold two meetings for the registration of voters thereof, at the places designated therefor, before each general election, namely, on the fourth and third Saturdays before the election, to be known respectively as the first and second meetings for registration, which meetings shall begin at seven o'clock in the forenoon and continue until ten o'clock in the evening.

2. In a city having more than one million inhabitants, the board of inspectors for each election district shall hold six meetings for the registration of the electors thereof before each general election. Such meetings shall begin on Monday the twenty-ninth day before such election and continue on each day of the same week up to and including Saturday. On

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each day except Saturday the meeting shall begin at half past five o'clock in the evening, and on Saturday at seven o'clock in the morning. All such meetings shall continue until half past ten o'clock in the evening. (*Amended by L. 1911, ch. 649, L. 1913, ch. 800, and L. 1915, ch. 678.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 30, as amended by L. 1898, ch. 335, § 4; L. 1901, ch. 300, § 1; L. 1905, ch. 675, § 2.

Consolidators' note.—The registration of voters was provided for by statute earlier than their enrollment in parties under L. 1898, ch. 179, and we accordingly find the words "enrollment" and "enrolled" occasionally used in the sense of "registration" and "registered." In view of their subsequent use in the different sense, "enrollment" and the like have been changed throughout this article to "registration" and the like.

References.—Registration required, Const., art. 2, § 4. Registry boards may sit on Saturday, § 166, post. Misconduct of registry officers, Penal Law, § 753.

Constitutionality of registration laws.—People ex rel. Stapleton v. Bell (1890), 119 N. Y. 175, 23 N. E. 533.

Hours of closing.—The statute does not prevent registry of persons in place of registry at hour of closing. People ex rel. Cass v. Hosmer (1885), 2 How. Pr. N. S. 472. See also Rept. of Atty. Genl. (1904) 448.

Inspectors cannot adjourn the meeting during designated hours. Rept. of Atty. Genl. (1902) 322.

§ 151. Additional meetings for registration.—*Repealed by L. 1911, ch. 649.*

§ 151. Additional meetings for registration.—If a special election be called by the governor or a special or other election be appointed by or pursuant to law for a time other than the day of general election, the inspectors of election of the various election districts in the political subdivision for which such special or other election is to be held shall meet in their respective districts on the second Saturday preceding such election, from eight o'clock in the forenoon to ten o'clock in the evening, for the purpose of revising and correcting the register of voters as provided in this article. (*Added by L. 1916, ch. 537, § 24.*)

Reference.—Saturday not a holiday for such purpose, § 166, post.

§ 152. Conduct of meetings; watchers.—No inspector shall on any day for registration be absent during the hours fixed for registering the names of electors. Each political party or independent body duly filing or entitled to file certificates of nominations of candidates for offices to be filled at any such election may, by a writing signed by the duly authorized county, city, town or village committee of such political party or independent body, or by the chairman or secretary thereof charged with that duty, and delivered to and filed with one of the inspectors of election, appoint not more than two watchers to attend any meeting or meetings of inspectors for an election district held for the registration of electors thereof. Each watcher must be a qualified elector of the county in which the election district for which he is appointed a watcher shall be located, provided that women who are citizens and residents of the county, and of

the age of twenty-one years, may act as watchers, with full rights and privileges of such office, at any meeting or meetings, of inspectors for an election district held for the registration of electors thereof, immediately preceding any election whenever held at which a woman suffrage constitutional amendment is to be submitted to the voters except that but one woman watcher for, and one woman watcher opposed to, the adoption of such amendment shall be permitted in each election district. Such watchers may be present at such polling place, and within the guard-rail, from at least fifteen minutes before the commencement of the said meeting until after the completion of the duties of the board of inspectors for that day of registration. (*Amended by L. 1910, ch. 428, L. 1911, ch. 649, and L. 1914, ch. 242.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 30, as amended by L. 1898, ch. 335, § 4; L. 1901, ch. 300, § 1; L. 1905, ch. 675, § 2.

Reference.—Misconduct of registry officers, Penal Law, § 753.

§ 153. Adding and erasing names on register.—If the board of inspectors at any meeting for the registration of electors shall have neglected or refused to place upon the register of electors the name of any person who is entitled to have his name placed thereon, application may be made to the supreme court, or any justice thereof in the judicial district in which such election district is located, or of a county adjoining such judicial district, or to a county judge of the county in which such election district is located, for an order to place such name upon the register of electors; and such court, justice or judge may, upon sufficient evidence, and upon such notice of such application, of not less than twenty-four hours, to the board of inspectors and such other persons interested, as the court, justice or judge may require, order such inspectors to convene as a board of registration on the second Saturday before such election, and to add the name of such person to such register of electors, and such register shall be corrected accordingly; but no court, justice or judge shall order the name of any person to be added to the register of electors unless it shall have been omitted therefrom through the fault, error or negligence of the election officers. In case the name of any person who will not be qualified to vote in such election district, at the election for which such registration is made, shall appear upon such register, application may be made in like manner by any elector of the town or city in which such election district is located or by the state superintendent of elections or any deputy state superintendent of elections to any court, justice or judge hereinbefore designated, for an order striking such name from the register, and such court, justice or judge may, upon sufficient evidence, and upon such notice of such application, of not less than twenty-four hours, to the person interested as the court, justice or judge may require, served either personally or by depositing the same in the post-office addressed to said person by his name, and at the address which appears in the register certified by the inspectors of election, order such board to strike such name

from such register of voters, and such register shall be corrected accordingly. In all applications to strike the names of voters from the register under this section an affidavit by the state superintendent of elections or any of his deputies when duly deputed by the state superintendent of elections for that purpose, that investigation was made by him pursuant to the provisions of section four hundred and seventy-five of this chapter, and that the affiant did visit and inspect the premises claimed by the voter as his residence, and did interrogate an inmate, house dweller, keeper, caretaker, owner, proprietor or landlord thereof or therein as to the said voter's residence therein or thereat, and that the said affiant was informed by one or more of said persons, naming them, that they were acquainted with and knew the persons residing therein or thereat, and that the voter did not reside at said premises thirty days before election, shall be presumptive evidence against the right of the voter to register from such premises, and in case the court, justice or judge direct that service of the order to show cause may be made by depositing the same in the post-office, such service shall not be complete until a copy of the order to show cause shall also have been served upon the custodian of primary records for the political subdivision in which such election district is located, and upon the chairman of each political committee for the political subdivision in which such election district is located. If upon the hearing of such application the court, justice or judge shall decide that the name of the elector shall be stricken from the register, the order of the court, justice or judge shall direct that the board of elections shall cause such name to be stricken from the register and also from the books of enrollment if it appears therein. In case the elector has, through no fault or neglect of his own, been registered in a wrong election district, the board of elections, upon proper proof, and upon such notice to the chairmen of the county committees of the several parties as the board shall prescribe, may direct that his name be stricken from the register of the district in which he is not a qualified elector and, if he is a qualified elector in an adjoining election district within the jurisdiction of such custodian, may direct that he be registered in the election district in which he is a qualified elector. The proper inspectors of elections shall carry out the directions of the board. In a county having a single commissioner of elections or where the duties of a board of elections are performed by a county clerk, such officer shall not have power to make any such direction. In any such county, such direction may be made by the court, upon proper proof. No application to add a name to or strike a name from the register shall be made after a day at least two days prior to the second Saturday before election. (*Amended by L. 1911, chs. 649, 740, L. 1913, ch. 820, L. 1916, ch. 537, § 25, and L. 1917, ch. 703, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 31, as amended by L. 1905, ch. 675.

Consolidators' note.—The expression relating to notice of application to the court has been slightly rearranged in two places, without change of words, in

the interest of clearness; in "any of his deputies when duly *directed* by the state superintendent of elections for that purpose," "directed" is changed to "*deputed*"; and in "that investigation was made by *them*," "them" is changed to "him," as its antecedent is singular.

The final clause of the section, providing that the presumption raised by the affidavit of the superintendent or a deputy "may be rebutted only by the oral testimony under oath or affidavit of the elector whose name is sought to be stricken from the register," is omitted, having been held to be unconstitutional in the *Matter of the Application of Morgan as to name of Rolle*, 114 App. Div. 45, 99 N. Y. Supp. 775 (1906).

Striking name from list, when judge may order. *Matter of Goodman* (1895), 146 N. Y. 284, 40 N. E. 769, overruling in effect *Matter of Hamilton* (1894), 80 Hun 511, 30 N. Y. Supp. 499; *Matter of Ward* (1892), 48 N. Y. St. Rep. 613, 20 N. Y. Supp. 606.

Services of order.—An order to show cause why the name of a person should not be stricken from a registry list need not be served upon any one except such person, although order provides for service upon others. *Matter of Griffiths* (1896), 16 Misc. 128, 38 N. Y. Supp. 953.

Failure to fill in residence of voter by inspectors does not authorize the striking of name from register. *Matter of Matthews* (1911), 143 App. Div. 561, 128 N. Y. Supp. 537.

Constitutionality.—The amendment of this section by the act of 1905 providing that affidavits of the superintendent of elections of the metropolitan elections district or his deputies, showing that on inquiry at the residence claimed by the elector the affiant was informed that he did not reside at such premises thirty days before election, shall be presumptive evidence against the right of the elector to vote, is constitutional. So also is the provision that notice of the application to strike the name of elector from the register may be served by mail. But the former provision that the presumption of the affidavit of the superintendent can be rebutted only by "oral testimony under oath," held unconstitutional. *Matter of Morgan* (1906), 114 App. Div. 45, 99 N. Y. Supp. 775.

The affidavit of the superintendent of election is not void on the theory that such superintendent was not constitutionally appointed. Art. 10, § 2, of the Constitution does not require such officer to be appointed or elected as a local officer. *Matter of Morgan* (1906), 114 App. Div. 127, 99 N. Y. Supp. 783.

Presumption where name does not appear on return of lodging house keeper.—Where, upon an application to strike from the registry list the name of a proposed elector who has registered from a lodging house, it appears that the name of the elector was not on the statement filed by the keeper of such lodging house, pursuant to § 9 of the metropolitan election district law, a presumption arises that he does not reside at the place named and is not entitled to remain upon the registration list. *Matter of Jacobs* (1904), 45 Misc. 113, 91 N. Y. Supp. 596.

Legal residence.—A person may have a legal residence at a lodging house or hotel notwithstanding the irregularity of his visits. *Rept. of Atty. Genl.* (1908) 412.

Register in wrong district.—Where a person negligently registers himself in the wrong district, the court cannot relieve him after the time for registration has expired. *Matter of Hart* (1898), 25 Misc. 93, 53 N. Y. Supp. 1071.

Personal appearance before the board of registration of the electors who voted at the last preceding general election in a rural town is not required for their registration, but it is the duty of the board to place their names on the register; and the board will be directed to do so where, being uncertain as to its duty, the members thereof apply to the court for an order directing them in reference thereto. *Matter of Randall* (1911), 73 Misc. 539, 132 N. Y. Supp. 457.

§ 154. **Register of voters.**—The board of inspectors of each election district in the state shall, at their meetings for registration for the general election in each year, make a quadruplicate register—one copy by each inspector—in the forms hereinafter prescribed, of those persons, and none other, who are or will be qualified to vote in such district at such election, which register, when finally completed, shall be the register of voters of the district for such election. Such register shall also be used at all other elections held in such district during the year succeeding the election for which it is made, except for town meetings and village elections for which no registration is required.

Source.—Former Elec. L. (L. 1896, ch. 909) § 32, pt. of subd. 1, as amended by L. 1899, ch. 630, § 5; L. 1901, ch. 113, § 1; L. 1905, ch. 675, § 4; L. 1908, ch. 521.

References.—Registry books to be furnished by secretary of state, § 182, post. Misconduct of registry officers, Penal Law, § 753.

§ 155. **Register; how arranged; signature law.**—1. This sub-division shall apply to election districts outside of a city having more than one million inhabitants. In all such election districts the register shall be arranged in twenty-four columns, except that in election districts in which personal registration is not required it shall consist of twenty-three columns, of which the first twenty-one columns shall be the same as in the registers for election districts in which personal registration is required. The leaves of the register shall be indexed from A to Z. In the first column of such register there shall be entered, at the time of the completion of the registration on the last day for registration, a number opposite the name of each person so enrolled, beginning with "one" opposite the first name entered in the page indexed A and continuing in numerical order to and including the last name entered upon the last page of such register. On each day of registration there shall be entered in the second column thereof the surname of such persons in the alphabetical order of the first letter thereof, on the page bearing the index letter of such surname and in the third column the christian name or names of such persons respectively. In the fourth column shall be entered the residence number or other designation, and in the fifth column the name of the street or avenue of such residence or a brief description of the locality thereof. In the sixth column shall be entered the number of the floor or room occupied by the elector at the residence given by him, and in the seventh column shall be entered the full name of the householder, tenant, subtenant or apartment-lessee with whom the elector resides, and in the eighth column shall be entered his age, in the ninth, tenth and eleventh columns shall be entered his length of residence by years, months and days as the case may be, in the state, county and election district, respectively; and in the twelfth column shall be entered the country of his nativity which shall mean the country, state or province of the elector's birth, irrespective of his former political allegiance. In

the thirteenth column, if he be a naturalized citizen, shall be entered the date of the naturalization certificate under which he claims citizenship and in the fourteenth column shall be entered the designation of the court issuing such naturalization certificate. In the fifteenth, sixteenth, seventeenth and eighteenth columns shall be entered respectively the name of the state, the city or town, and the street number and the name of the street or avenue of the residence of such person from which such person last registered or voted, and the year in which he last registered or voted. In the nineteenth column shall be entered the date of the registration of the elector. In the twentieth column shall be entered if the elector is in business for himself or with others the name under which he is so in business, or, if the elector is employed by some other person, the name of his present employer. If he is not in business and has no employment, the word "none" shall be entered, together with the name under which he was last in business or the name of his last employer, if any. In the twenty-first column shall be entered the street and number, or if it has no street number, a brief description of the location of the place, if any, where he is so in business or employed, or, if unemployed, the place, if any, where he was last in business or employed. The information required to be stated in the twentieth and twenty-first columns shall only be asked in the event that the person offering to register shall not have registered in the same county in the general election immediately preceding. The twenty-second column of the register of any election district in which personal registration is required shall be reserved for the signature, at the time of registration, of any elector who registers personally in any such district, or in case such elector alleges his inability to write, for entering therein the number of the "identification statement for registration day" made by such elector as hereinafter provided. Above each horizontal line in the said twenty-second column shall be printed the words "the foregoing statements are true" and the elector shall at the time of personal registration, sign his name by his own hand and without assistance, using an indelible pencil or ink, below such words on the horizontal line in the register of electors, which register shall be known as the "signature copy." Said signature copy shall be one of the registers, other than the public copy, which signature copy shall be kept by an inspector of opposite political faith from the chairman, and shall be used at the polls on election day. The twenty-third column, or, in the register for an election district in which personal registration is not required, the twenty-second column, shall be reserved for entering the consecutive number on the stub of the official ballot, voted by the elector on election day. In the twenty-fourth column, or, in the register for an election district in which personal registration is not required, the twenty-third column, shall be entered, opposite the name of each elector, under the heading "remarks" the facts regarding challenges, oaths and other facts affecting such elector required to be recorded, including, in the

case of a person not required to register personally who did in fact so register, the word "personal."

2. This subdivision shall apply only to election districts within a city having more than one million inhabitants. In all election districts in any such city, the register shall be arranged in twenty-nine (at the general election preceding a presidential primary, thirty) columns, and the leaves thereof shall be indexed from A to Z. The first column of the register shall be entitled "Registration No. of Voter," and in such column shall be entered at the time of the completion of the registration on the last day for registration, a number opposite the name of each person so registered, beginning with "one" opposite the first name entered in the page indexed A and continuing in numerical order to and including the last name entered upon the last page of such register. Columns two to twenty-four inclusive shall be filled in on each day of registration as each voter is registered, and the remaining columns at the times respectively provided. All such columns shall be appropriately entitled to indicate their purpose. In the second column shall be entered the date of the registration of each voter. In the third column shall be entered the surname of such persons in the alphabetical order of the first letter thereof, on the page bearing the index letter of such surname. In the fourth column shall be entered the christian or given name or names of such persons respectively. In the fifth and sixth columns shall be entered the residence number or other designation, and the name of the street or avenue of such residence or a brief description of the locality thereof. In the seventh column shall be entered the number of the floor or room occupied by the elector at the residence given by him. In the eighth column shall be entered the full name of the householder, tenant, subtenant or apartment lessee with whom the elector resides. In the ninth column shall be entered the elector's age. In the tenth, eleventh and twelfth columns shall be entered the length of the elector's residence by years, months and days as the case may be, in the state, county and election district, respectively. In the thirteenth column shall be entered the country of his nativity, which shall mean the country, state or province of the elector's birth, irrespective of his former political allegiance. In the fourteenth and fifteenth columns, if the voter be a naturalized citizen, shall be entered the date of the naturalization certificate under which he claims citizenship and the court issuing such naturalization certificate. In the sixteenth, seventeenth, eighteenth and nineteenth columns shall be entered respectively the name of the state, the city or town, the street number and the name of the street or avenue of the residence of such person from which such person last registered or voted, and the year in which he last registered or voted. In the twentieth column shall be entered, if the elector is in business for himself or with others, the name under which he is so in business, or, if the elector is employed by some other person, the name of his present employer. If he is not in business and has no employment, the word "none" shall be entered, together with the name under which he was

last in business or the name of his last employer, if any. In the twenty-first column shall be entered the street and number, or if it has no street number, a brief description of the location of the place, if any, where he is so in business or employed, or, if unemployed, the place, if any, where he was last in business or employed. The twenty-second column shall be reserved for the signature of any elector who registers personally, at the time of registration, or, in case the elector alleges his inability to write, for entering therein the number of the "identification statement for registration day" made by such elector as hereinafter provided. Above each horizontal line in the said twenty-second column shall be printed the words "the foregoing statements are true" and the elector shall at the time of personal registration, sign his name by his own hand and without assistance, using an indelible pencil or pen and ink, below such words on the horizontal line in the register of electors, which register shall be known as the "signature copy." Said signature copy shall be one of the registers, other than the public copy, which signature copy shall be kept by an inspector of opposite political faith from the chairman, and shall be used at the polls on election day. In the twenty-third column the person who has personally made the entries aforesaid in registering the voter shall sign his own initials in evidence thereof, which signature must be made at the same time that the voter is registered. In the twenty-fourth column shall be entered the number on the enrollment blank which is given to the voter to enable him to enroll in a party as provided in article two of this law. The twenty-fifth column shall be reserved for the entry of the name of the party, if any, in which the voter enrolls, or other statement, as provided in said article two of this law. The twenty-sixth column shall be entitled "No. of Stub, Election Day," and shall be reserved for entering therein the consecutive number on the stub of the official ballot or set of ballots voted by such voter on election day. The twenty-seventh column shall be entitled "No. of Stub, 1st Primary," and shall be reserved for entering therein the consecutive number on the stub of the official ballot cast by such voter at the first official primary, whether spring or fall, following the general election for which such registration was made. The twenty-eighth column shall be entitled "No. of Stub, 2d Primary," and shall be reserved for entering therein the consecutive number on the stub of the official ballot cast by such voter at the next succeeding official primary held prior to the next enrollment, or, should an unofficial primary be held, for the entry of the word "Yes" to indicate that such voter voted at such primary. In preparing the registers for the general election next preceding a presidential election an additional column (the twenty-ninth in such case) shall be included, entitled "No. of Stub, 3rd Primary," and shall be reserved for use at a third primary, if any, as above provided for a second primary in other years. The last column in the register shall be entitled "Remarks regarding challenges, oaths, and other facts required to be recorded," and in such column shall be entered, opposite the name of each voter, with the date

of each such entry, such record of challenges, oaths, and other facts relating to him as this law requires to be entered in the register and are not otherwise provided for.

3. The provisions of this subdivision shall apply to all election districts in which the registration of electors is required to be personal. If the elector alleges his inability to so sign in the cases provided for in either of the foregoing subdivisions, one of the inspectors, designated by the chairman, shall read to the elector the following list of questions from a book to be furnished said inspector and to be known as "identification statements for registration day," and said inspector shall write down in said book the answers of the elector to said questions: What is your true name? What is or was your father's full name? What is or was your mother's full name? What is your occupation? What is the name of your present employer? If unemployed, what is the name of your last employer? Where is or was his place of business? Are you married or single? Where did you actually reside immediately prior to taking up your present residence; state floor and character of premises? At the bottom of each list of questions shall be printed the following statement: "I certify that I have read to the above named elector each of the foregoing questions and that I have truly recorded his answers as above to each of said questions," and said inspector who has made the above record shall forthwith sign his name to said certificate and date the same. The above questions shall be printed on separate sheets of paper which shall be furnished said inspector bound together in book form and numbered consecutively, and the number corresponding to the number on each sheet containing said list of questions shall be entered when the questions have been answered, in the twenty-second column, in the register of electors in which the electors registering have signed their names. Said book of "identification statements for registration day" shall be kept at all times with the register in which the electors sign their names as hereinbefore provided. A sufficient number of identification statements for registration and election days, bound in book form shall be furnished to each board of inspectors in the same manner as the registration and poll-books are now furnished to said boards of inspectors. The lines in the registers and poll-books for election districts in which the registration of electors is required to be personal shall be one-half inch apart.

4. Each page of the registers and poll-books for any election district in the state shall in every case be consecutively numbered. (*Amended by L. 1910, ch. 428, L. 1911, ch. 649, L. 1915, ch. 678, and L. 1916, ch. 537, § 26,*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 32, pt. of subd. 1, as amended by L. 1899, ch. 630, § 5; L. 1901, ch. 113, § 1; L. 1905, ch. 675, § 4, and L. 1908, ch. 521, § 1.

Consolidators' note.—"The register shall be arranged in nineteen columns" changed to "twenty." L. 1905, ch. 675, inserted an additional column but failed to change "nineteen" to "twenty."

References.—False registration, Penal Law, § 752. Procuring fraudulent certifi-

L. 1909, ch. 22.

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cates of naturalization and presenting same, Penal Law, §§ 777, 778. Failure of house-dweller to answer inquiries, Penal Law, § 757. Lodging house keeper in New York, Buffalo and Rochester to keep registers between Sept. 1 and Nov. 15, General City Law, §§ 110-115. Reports by lodging house and hotel keepers, § 480, post.

Registers for 1917 to contain additional column in aid of information for war census, L. 1917, ch. 777. See Elections.

Constitutionality of provisions of this section requiring electors in cities of one million or more inhabitants to sign the public copy of the register when they can write and to truthfully answer the statutory questions propounded to them when they cannot write are not unreasonable; the constitution does not prohibit the regulation of the right of suffrage, but rather enjoins the passage of such laws so long as they do not add to the qualifications required of electors by the constitution; registration laws should be so adapted to local conditions as to permit the elective franchise to such citizens only as possess the constitutional qualifications. Nor are such requirements in violation of constitution article 3, section 18, which prohibits the passage of a private or local law relating to the opening and conducting of elections. *Matter of Ahern v. Elder* (1909), 195 N. Y. 493, 88 N. E. 1059, affg. (1909), 130 App. Div. 900, 115 N. Y. Supp. 1108.

Prompting voters in answering questions.—The provisions that no one shall prompt a voter in answering any question provided in this section refers only to prompting by another person present upon the immediate occasion when the elector is being read the prescribed questions and having his answers thereto written down at the time of registration or when offering to vote on election day. An elector is not prevented from gaining information required to answer such questions from other sources nor from referring to a written or printed memorandum. Rept. of Atty. Genl. (1908) 403.

Books of "identification statements for registration day," shall be left in prominent positions in the respective places of registration from the first day of registration until election day and shall at all reasonable times be open to public inspection. Rept. of Atty. Genl. (1908) 403.

Effect of destruction of "identification statements for registration day."—If the method of identification of electors is impaired by reason of the failure of public officers to safeguard the identification registers, such impairment should not be allowed to disfranchise an otherwise qualified elector. Rept. of Atty. Genl. (1908) 414.

A native of Poland upon becoming a naturalized citizen of the United States of America cannot be deprived of his right to vote or participate at the next primary election because at the registration of voters he refused to give to the board of inspectors of election any further details as to the place of his nativity than to answer that he was born in Poland. *Koninski v. Vleser* (1916), 97 Misc. 259, 161 N. Y. Supp. 129.

The duties of a board of inspectors of election in attending the registration of voters in order to ascertain who are qualified electors are not of an inquisitorial nature but purely ministerial, and the questions they are permitted to ask are for the sole purpose of testing the intending voter's qualifications. *Koninski v. Vleser* (1916), 97 Misc. 259, 161 N. Y. Supp. 129.

§ 156. Register where personal registration is not required.—*Repealed by L. 1911, ch. 649.*

§ 157. Preparation and distribution of registry lists; investigation of false registration.—The board of inspectors of each election district shall, immediately after the close of the last day of registration, make and com-

plete one list of all persons registered in their respective districts, in the numerical order of the street numbers thereof, which list shall be signed and certified by the board of inspectors. Such list shall be delivered by the chairman of the board of inspectors to the police captain of the precinct, if any, in which the election district is located, or an officer thereof, or to the town clerk, who shall forthwith deliver the same to the board of elections in the county in which such election district is located. The board of elections of each county containing a city of the first or second class and the board of elections of the city of New York, as soon as possible after the delivery of such lists, and, in the city of New York, within one hundred and eight hours after the close of each annual registration, and elsewhere not less than six days prior to the day of election, shall print in pamphlet form for each ward of any such city within their respective counties, or for each assembly district in the city of New York, not less than twenty-five times as many copies of said registration lists as there are election districts in such assembly district or ward, so that each assembly district or ward pamphlet shall contain the lists of the several election districts in such assembly district or ward. Upon the written application of the chairman of the executive committee of the county committee of any political party whose candidates are entitled to a place upon the official ballot to be voted at the election for which the registration is made, the board of elections of such city or of any such county, as the case may be, shall respectively deliver to such chairman five copies of each assembly district or ward pamphlet for each election district within such city, or, in the city of New York, within each assembly district of the county which such county committee represents. Two pamphlets containing the lists of the registered persons in the election districts within his precinct shall be furnished to each police captain in all such cities. It shall be the duty of every police captain in every city of the state to forthwith cause an investigation of each name registered in his precinct to be made and to report to the state superintendent of elections at his office in such city or at such other office as such superintendent may in writing designate any case of false registration there found. In any city of the state in which registration lists are not printed, including third class cities, it shall be the duty of the board of elections of the county or of such city to afford necessary facilities, including clerical assistance, to every such police captain in transcribing the whole or any part of the registration lists in aid of the duty of investigation imposed on him under the provisions of this section. The board of elections in each county shall furnish to the state superintendent of elections three copies of each pamphlet printed by it. The remaining pamphlets so printed shall be distributed in the discretion of the said boards, which shall have respectively the power to charge for each pamphlet a sum not exceeding ten cents a copy, and any moneys resulting from the sale thereof shall be paid to the comptroller of the city of New York or county treasurer of the county for the benefit of the treasury of such city or

county. The boards of election shall contract for the printing of such lists of registered electors with whomsoever it may seem to said board to be most advantageous to so contract, but such contract shall only be awarded after proper public notice and to the lowest bidder.

Such lists shall be made and printed as near as may be in the following form, to wit:

GRAND STREET.

Residence number or

other designation.

Name of elector.

14 Smith, John M.

15 Jones, Charles M.

(Amended by L. 1911, ch. 649, L. 1913, chs. 800, 821, L. 1915, ch. 678, L. 1916, ch. 537, § 27, and L. 1917, ch. 703, § 13, in effect June 1, 1917.)

Source.—Former Elec. L. (L. 1896, ch. 909) § 32, subd. 3, as amended by L. 1897, ch. 379, § 8; L. 1899, ch. 649, § 1; L. 1901, ch. 95, § 9; L. 1905, ch. 643, § 7.

Consolidators' note.—The requirement that the police captain shall report any case of false registration "to his commanding officer and to the board of elections and to the said commissioner of elections," has been changed to "to his commanding officer and in cities of the first class to the board of elections or to the commissioner of elections." New York City has a board of elections, and Buffalo a commissioner (the commissioner of Erie County). There are no other cities of the first class, and no other city has either a board or commissioner of elections. (Rochester is now a city of the first class).

Reference.—Willful mutilation or destruction of registry list, Penal Law, § 754.

Failure of inspectors to comply with law in preparing register cannot deprive electors of their votes. *People ex rel. Frost v. Wilson* (1875), 62 N. Y. 186.

§ 158. Registration in cities and in villages of five thousand inhabitants.—In cities and villages having five thousand inhabitants or more, the names of such persons only as personally appear before the inspectors, and who are or will be at the election for which the registration is made, qualified electors, shall be registered for a general election, except that whenever any election district in a village having five thousand inhabitants or more shall embrace within its boundaries territory without the limits of such village, the inspectors shall, at their first meeting for registration for a general election, place upon such register the names of all persons appearing on the register of the last preceding general election who resided without the limits of such village but within the election district and who voted at such last preceding general election, except the names of such electors as are proven to the satisfaction of such inspectors to have ceased to be electors since such general election or to have moved within the limits of such village. They shall also place upon such register, at their first and subsequent meetings, the names of all other persons residing without the limits of the village and within such election district who may then appear before such inspectors and apply for registration and who are or who will be at the election for which the registration is made qualified electors, and also, at

their first and subsequent meetings, the names of all persons not registered under the foregoing provisions who are known or proven to the satisfaction of the inspectors to be then or thereafter entitled to vote at such election and who reside within such election district but without the limits of such city or village. (*Amended by L. 1911, ch. 649, L. 1913, ch. 820, L. 1916, ch. 537, § 28.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 33, subd. 1.

Consolidators' note.—According to the last sentence of the section, the inspectors are required "to register the names of persons known who are or will be entitled to vote, and of persons proven to the satisfaction of the inspectors who are or will be entitled to vote." On its face the provision is meaningless. The intention is to require the inspectors to register the names of persons "known or proven to their satisfaction to be then or thereafter entitled to vote" at the coming elections, and the expression has been made to read so.

References.—False registration, Penal Law, § 752. Procuring fraudulent certificates of naturalization and presenting same to registry board, Penal Law, §§ 777, 778.

§ 159. **Registration elsewhere.**—At the first meeting for registration in any election district where only two meetings for the registration of voters are held for any general election, as provided in section one hundred and fifty of this article, the inspectors shall place upon the register the names of all persons who voted at the last preceding general election, as shown by the register or poll book of such election, except the names of such voters as are proven to the satisfaction of such inspectors to have ceased to be voters in such district since such general election. They shall also place upon the register at their first and second meetings the names of all other persons who then appear before such inspectors and apply for registration and who are or will be, at the election for which the registration is made, qualified electors, and also, at their first and second meetings, the names of all persons not registered under the foregoing provisions who are known or proven to the satisfaction of the inspectors to be then or thereafter entitled to vote at such election. (*Amended by L. 1911, ch. 649, L. 1913, ch. 820, L. 1916, ch. 537, § 29.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 33, subd. 2, as amended by L. 1899, ch. 630, § 7.

Reference.—False registration, Penal Law, § 752.

Amendment of 1911 requiring personal registry of persons who did not vote at last election, held unconstitutional. The provision has been eliminated. *Fraser v. Brown* (1911), 203 N. Y. 136, 96 N. E. 365; *Matter of Daniels* (1911), 74 Misc. 485, 131 N. Y. Supp. 651.

Constitutionality.—This section, as amended by L. 1913, ch. 820, is valid so far as it requires the inspectors at the first meeting to place on the register the names of those who voted at the last preceding general election and also those presenting themselves in person, except such persons as are proven to the satisfaction of the board to have ceased to be electors in the district since such election, and also the names of those proven to the satisfaction of such inspectors to be then or thereafter entitled to vote at the election for which the registration is made, which proof may be made by affidavit or otherwise. But the former provision (elim-

nated in 1916) authorizing registration in districts outside a city or village of over 5000 inhabitants without personal appearance at the first meeting for registration, on presentation of proof by affidavits of the person desiring registration and of two electors is in violation of § 2, Art. 4 of the constitution. *Matter of Rupert v. Rees* (1914), 212 N. Y. 514, 106 N. E. 323.

Duty of inspectors to act independently of formal application.—Under the provision of this section that at the first meeting for registration in any district where only two meetings are held the board of election inspectors shall place upon the registry the names of all voters at the last election and the names of all persons then entitled to vote, it is the duty of the inspectors to act independently of any formal application by a voter and to register his name; and their failure so to do cannot prejudice his rights but an order may be granted compelling them to do so. *Matter of Daniels* (1911), 74 Misc. 485, 132 N. Y. Supp. 303.

Failure of election inspectors to perform a clerical duty in connection with filling out the register of voters for a particular district cannot deprive a citizen of his right to vote. *Matter of Matthews* (1911), 143 App. Div. 561, 128 N. Y. Supp. 537.

§ 160. **Registration for other than general elections.**—At the meeting of the board of inspectors in a city or village having five thousand inhabitants or more, for revising and correcting the register for any election other than a general election, the * inspector shall retain upon the register of their respective districts the names of all persons qualified to vote at such election in such district which appear upon the register of electors for the last preceding general election in such election district, except the names of such electors as are proven to the satisfaction of the inspectors to have ceased to be electors of such districts since their names were placed upon such register, and shall, at such meeting, add only to such register the names of the persons qualified as electors who shall personally appear before the board. If, however, such elector resides within such election district but without the limits of such village, his name shall be placed upon such register, if it is shown to the satisfaction of such board that he is entitled to vote therein.

In cities any elector who was registered in an election district of such city at the last preceding general election, and who since that time shall have removed into another election district in the same city, and who is otherwise qualified to vote at such special election, shall, upon demand, receive from the board of inspectors of the district in which he was registered for such last preceding general election a certificate duly signed by the said board of the fact that his name was upon such register and has been erased therefrom because of such removal, and his name shall thereupon be erased from such register. Upon presentation of such certificate by the elector to the board of inspectors of the election district in which he resides, his name shall be placed upon the register for such district. The inspectors must note upon the register opposite the name of such elector the fact of such removal, specifying the election district from which he has removed. They shall carefully attach such certificate to the register.

No elector shall cause his name to be placed upon the register of an

* So in original.

election district for any election other than a general election, while his name shall appear upon the register of another district to be used at such election.

Any person who shall violate this provision is guilty of a felony, and upon conviction shall be punished by imprisonment in a state prison for not less than two nor more than five years.

In all election districts other than in cities or in villages of five thousand inhabitants or more, the board of inspectors in preparing for an election other than a general election shall add to the register for the last preceding general election the names of such electors as they know are or are satisfied by proof will be on the day of such election entitled to vote thereat, and shall strike therefrom the names of all persons who are known or are proven to their satisfaction to have ceased to be qualified electors of such election district. (*Amended by L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 33, subd. 3, part, as renumbered by L. 1899, ch. 630, § 7.

Consolidators' note.—On the presentation of a certificate of removal from one district to another, subdivision 3 required the inspectors to note on the register "the fact of such *certificate of removal*"; the intent is to require notation of the fact of *removal*, and "certificate of" has been omitted.

Reference.—False registration, Penal Law, § 752.

Change of residence.—An elector who has removed from the election district in which he registered for the last general election and who now lives in an election district in which a special election is to be held in order to become entitled to vote at his new residence should apply to the board of inspectors of the district from which he removed. Rept. of Atty. Genl. (1907) 482.

§ 161. **Registration for town or village elections.**—No registration of voters shall be required for town or village elections, except as provided in the village law, and except that when a town or village election is held at the same time with a general election all voters in such town or village to be entitled to vote at such town or village election must be registered as provided by law for the registration of voters for any general election in such town or village. (*Amended by L. 1910, ch. 424.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 33, pt. of subd. 3, as renumbered by L. 1899, ch. 630, § 7; also § 34, subd. 11, as added by L. 1902, ch. 405, § 2.

Registration at special town meeting not required.—Registration is not required as a prerequisite for voting at a special town meeting held pursuant to an order of a court or judge for the re-submission of questions under section 13 of the Liquor Tax Law. Rept. of Atty. Genl. (1912) 71.

§ 162. **Qualifications of voters.**—A person is a qualified voter in any election district for the purpose of having his name placed on the register if he is or will be on the day of election qualified to vote at the election for which such registration is made. A qualified voter is a male citizen who is or will be on the day of election twenty-one years of age, and who has been an inhabitant of the state for one year next preceding the election, and for the last four months a resident of the county, and for the

last thirty days a resident of the election district in which he offers his vote. If a naturalized citizen, he must, in addition to the foregoing provisions, have been naturalized at least ninety days prior to the day of election. (*Amended by L. 1913, ch. 821, and L. 1915, ch. 678.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 1.

References.—Qualifications of voters generally. Const., art. 2, § 1, and notes. Offering or accepting bribe disqualifies, Id., art. 2, § 2. Interest in bet or wager depending on result of election, disqualifies, Id. Legislature to enact laws excluding from right of suffrage persons convicted of bribery or infamous crime, Id. Voting residence as affected by certain occupations and conditions, Id., § 3. Voting after conviction of infamous crime. Penal Law, § 765. Buying or selling vote. Penal Law, §§ 768–770. Person testifying exempt from prosecution. Penal Law, § 770. Const., art. 2, § 2. Voting by inhabitant of another state or country. Penal Law, § 765. Furnishing money, etc., to induce attendance at polls. Penal Law, § 767. Illegal voting generally. Penal Law, § 765.

Right to vote is subject to regulations lawfully prescribed by the legislature. *People ex rel. Nichols v. Board of Canvassers* (1892), 129 N. Y. 395, 401, 29 N. E. 327, 14 L. R. A. 624.

The age of twenty-one is completed on the beginning of the day preceding the anniversary of a person's birth. *Rept. of Atty. Genl.* (1897) 301; *Rept. of Atty. Genl.* (1898) 283.

A "voting residence" as distinguished from the place where one actually and habitually dwells is not recognized by the law. It is the fixed and permanent home of the elector from which the Election Law contemplates that the elector shall register and vote. *People ex rel. Driscoll v. Bender* (1913), 82 Misc. 671, 674, 141 N. Y. Supp. 145.

Intention of the party generally governs as to residence. Ownership of property or payment of taxes in a town are not controlling. *Rept. of Atty. Genl.* (1911) 216.

The residence of a person for the purpose of registering under the Election Law depends, not upon a mere exercise of his will, but upon his purpose as evidenced by his conduct. *Matter of Rooney* (1916), 172 App. Div. 274, 159 N. Y. Supp. 132.

A person who owns a house in which he originally resided and which he now rents to tenants, can continue to register from such house, although he is employed as caretaker of a cemetery and occupies the caretaker's house within the cemetery grounds, for the latter residence is not permanent and depends upon the duration of his employment. *Matter of Rooney* (1916), 172 App. Div. 274, 159 N. Y. Supp. 132.

A person who owns a saloon where he originally resided but from which he has removed, and who has established a domicile for himself and family in another place, cannot continue to register from the saloon, although he may occasionally go to the saloon and sleep in it. *Matter of Rooney* (1916), 172 App. Div. 274, 159 N. Y. Supp. 132.

A man's residence for the purpose of voting is his domicile—his permanent home, although, it seems, a man may have two homes and two residences, and may elect which shall be his residence for the purposes of his political rights, but he cannot be a political resident of both domiciles. *Matter of Rooney* (1916), 172 App. Div. 274, 159 N. Y. Supp. 132.

There is no such thing as a voting residence as distinguished from an actual residence, and the word "residence" as used in the Election Law and in the Constitution is synonymous with "domicile." *Matter of Rooney* (1916), 172 App. Div. 274, 159 N. Y. Supp. 132.

A person who has once had a domicile may retain the same for voting purposes until he gains a new domicile elsewhere. *Matter of Rooney* (1916), 172 App. Div. 274, 159 N. Y. Supp. 132.

Computation of time for determining legal residence. *Rept. of Atty. Genl.* (1904) 452.

Women not qualified generally. *People v. Barber* (1888), 48 Hun 198. Nor entitled to vote for school commissioner. *Matter of Gage* (1894), 141 N. Y. 112, 35 N. E. 1094, 25 L. R. A. 781.

Inmate of county house.—Proper place to vote. *Rept. of Atty. Genl.* (1902) 324.

Convicts on parole have no right to vote. *Rept. of Atty. Genl.* (1905) 490.

Deserter.—In construing an act of congress, the court held that if the act deprive a deserter of the right to vote his vote could only be rejected upon proof by duly authenticated record of the conviction. *Goetcheus v. Matthewson* (1875), 61 N. Y. 420.

A Porto Rican never naturalized cannot register. *People ex rel. Juarbe v. Board of Inspectors* (1900), 32 Misc. 584, 67 N. Y. Supp. 236.

Location of polling-place outside of election district does not prevent voters of district voting thereat under constitutional provision that voter must vote "in the election district of which he shall at the time be a resident, and not elsewhere." *People ex rel. Lardner v. Carson* (1898), 155 N. Y. 491, 50 N. E. 292, affg. (1895), 86 Hun 617, 35 N. Y. Supp. 1114.

§ 163. Gaining or losing a residence.—For the purpose of registering and voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison. Any person claiming to belong to any class of persons mentioned and referred to in this section shall file with the board of inspectors at the time of registration a written statement showing where he is actually domiciled, his business or occupation, his business address, and to which class he claims to belong. Such statement shall be attached to the register, and be open for public inspection, and the fact thereof shall be noted in the register opposite the name of the person so registered.

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 2.

Reference.—See Const., art. 2, § 3, ante.

Students.—Students are presumed not to have acquired residence. *Matter of Goodman* (1895), 146 N. Y. 284, 40 N. E. 769; *Matter of Garvey* (1895), 147 N. Y. 117, 41 N. E. 439.

A student in a Catholic seminary, in which no person enters unless he intends in good faith to become a priest, and renounces all other residences or homes save the seminary, does not acquire a residence in the district in which the seminary is located so as to entitle him to vote. *Matter of Barry* (1900), 164 N. Y. 18, 58 N. E. 12, 52 L. R. A. 831.

A student at a seminary in this state who before taking up his abode at the seminary had a residence elsewhere within the United States, is not entitled to registration in the election district in which the seminary is situated, unless it appears that, by some unequivocal act, independent of his attendance at the semi-

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nary, he has abandoned such other residence. *Matter of McCormack* (1903), 86 App. Div. 363, 83 N. Y. Supp. 847.

The statute contemplates a bona fide residence on the part of the student. Although the statute is complied with if a student at the time of registration files a written statement or declaration showing where he is actually domiciled, his business or occupation, his business address, and to which class he claims to belong, he should in order to establish his good faith and honesty of intention of becoming a resident, declare his intention a certain length of time before the date of registration. *Rept. of Atty. Genl.* (1909) 900.

FORM OF STUDENT'S AFFIDAVIT.

STATE OF NEW YORK, }
COUNTY OF } ss.

....., being duly sworn, says:

1. I am years old and a student at

2. I reside at No., city and county of

I intend to reside there or elsewhere in county, and to make my domicile there indefinitely, and I have no present intention of residing elsewhere. My business or occupation is, located at No., city and county of

3. Prior to, I resided at, but I have no present intention to reside there again, and have notified in writing the board of inspectors and registration of district that I had changed my residence to the county of, and that my name should no longer remain on the list of registered voters in said district.

Sworn to before me this day of, 1910.

Rept. of Atty. Genl. (1909) 900.

Person employed by the United States may gain a residence where employed. *Rept. of Atty. Genl.* (1904) 443, or may retain former residence unless he elects to abandon it. *Matter of Lewis* (1916), 172 App. Div. 271, 158 N. Y. Supp. 1036.

Inmate of Soldiers' Home does not acquire residence. *Silvey v. Lindsay* (1887), 107 N. Y. 55, 13 N. E. 444.

Prisoners cannot acquire residence. *People v. Cady* (1894), 143 N. Y. 100, 37 N. E. 673, 25 L. R. A. 399.

Person kept at Bellevue Hospital.—A person receiving board and lodging, and occasionally a suit of clothes of a patient, in return for which he performed work as directed, is not entitled to vote in the hospital district. *People ex rel. McShane v. Hagen* (1900), 48 App. Div. 203, 62 N. Y. Supp. 816, *affd.* (1901), 164 N. Y. 570, 58 N. E. 1091.

Inmate of home for aged.—Same holding. *Matter of Batterman* (1895), 14 Misc. 213, 35 N. Y. Supp. 593; *Matter of Griffiths* (1896), 16 Misc. 123, 38 N. Y. Supp. 953.

The "Home for Aged Men and Couples" in the city of Utica, N. Y., is the residence of its members for the purpose of voting. *Matter of Merrill* (1917), 99 Misc. 353.

Voting residence of inmates of sanitarium, see *Rept. of Atty. Genl.* (1911) 264.

Inmates of an institution partly supported by charity do not gain a residence. *Rept. of Atty. Genl.* (1904) 378.

Failure to file statement is not conclusive. *Matter of Lewis* (1916), 172 App. Div. 271, 158 N. Y. Supp. 1036.

A person who, having a certain residence enlisted in the Spanish American War and subsequently accepted employment under the government and actually resided in a Federal arsenal, did not lose his rights to vote because he did not file with

registration officers the statement showing his actual domicile, business or occupation, as required by section 163 of the Election Law, though, it *seems*, he should have complied with said section had it been called to his attention. *Matter of Lewis* (1916), 172 App. Div. 271, 158 N. Y. Supp. 1036.

§ 164. **Illiterate and disabled voters.**—If, at any meeting for the registration of voters, any person entitled to be registered and of whom personal registration is required shall declare to the board of inspectors at the time he applies for registration that he is unable to write by reason of illiteracy, or that he will be unable to prepare his ballot without assistance by reason of blindness, or of such degree of blindness as will prevent him, with the aid of glasses, from seeing the names printed upon the official ballot, loss of both hands, or such total inability of both hands that he can not use either hand for ordinary purposes, or that he will be unable to enter the voting booth without assistance by reason of disease or crippled condition, the nature of which we must specify, it shall be the duty of the said board of inspectors to administer an oath to such person in the following language, namely: "You do solemnly swear (or affirm) that you will be unable to prepare your ballot without assistance, because," and after the word "because," continuing with the statement of the specific disease or crippled condition assigned by the person as the cause of his alleged disability, and the said inspectors and each of them shall make a note upon the register of each instance in which such oath is administered, and of the cause or reason so assigned.

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 3.

References.—Assistance to disabled or illiterate voters, § 357, post. Entry of booth with voter, except as authorized, Penal Law, § 764, subd. 7. Permitting another to be in booth except as authorized, Penal Law, § 764, subd. 8.

Physical disability oath should be in the language of the statute. *Rept. of Atty. Genl.* (1893) 147.

§ 165. **Change of residence within election district.**—If any voter after being registered shall change his place of residence within the same election district, he may appear before the board of inspectors of such district on any day of registration, or on the day of election, and state under oath that he has so changed his residence, and the board of inspectors shall thereupon make the proper correction upon the register of such district.

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 4.

§ 166. **Registration days not holidays.**—No part of a day fixed for the registration of voters shall be deemed a holiday so as to affect any meeting or proceeding of the board of inspectors for registration.

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 5

§ 167. **Preparation of challenge affidavits.**—The secretary of state shall prepare and cause to be printed on good writing paper in book form wherever he deems it desirable for the best interests of the state, at least fifteen blank challenge affidavits for each election district in cities and at least

ten such blanks for each election district outside of cities and shall transmit to each board of elections or other officer to whom or which he is required to deliver the register of voters, at the same time and in the same manner as such register of voters is transmitted, a sufficient number of such books of blank challenge affidavits as shall provide one such book for each board of inspectors in each county, and such officers shall transmit the said books to the respective boards of inspectors in the same manner and at the same time as the register of voters. The secretary of state shall also furnish to such board such additional number of such books of challenge affidavits and copies thereof, as hereinafter provided, as in his judgment shall be necessary to replace lost or damaged books and to provide extra books to any election district in which the supply may be exhausted during the registration of voters. Such extra books shall be furnished by such board to the inspectors upon application by the inspectors or any citizen. (*Amended by L. 1914, ch. 244.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, pt. of subd. 6, as amended by L. 1899, ch. 630, § 8; L. 1901, ch. 544, § 1.

Challenge affidavits are to be furnished, although there is no appropriation therefor. Rept. of Atty. Genl. (1899) 278.

§ 168. **Form of challenge affidavits.**—Each challenge affidavit shall have a stub attached thereto and separated from such affidavit by a perforated line with a space on such stub for writing the name and the address of the challenged person, and both the stub and affidavit shall bear the same printed number and shall be numbered in consecutive order in each book, beginning with number one. Such challenge affidavit shall be printed in the following form, to wit:

(Stub)

“Name of applicant
Address

(Perforated line)

CHALLENGE AFFIDAVIT

State of New York } ss:
County of

Election District
Assembly District (or Ward)

City (or town) of
What is your true name?
Where do you actually reside?
Under what name are you known at that address?
Are you a householder?
What is the name of the householder with whom you reside?.....
.....

What is the character of the house in which you reside? (By character is meant whether it is a hotel, lodging house, tenement, furnished room

house, or private dwelling.)
.....
How old are you?
Where were you born?
If naturalized, give name of court issuing and date of certificate.....
.....
What is your occupation?
What is the name of your present employer?
Where is his place of business?
What is the name of your last employer?.....
Where is or was the place of business?.....
When did you last register or vote?.....
From what address did you last register or vote?.....
City or town.....Street and number.....
How long have you been an inhabitant of this state?.....
How long have you been a resident of this county?.....
How long have you been a resident of this election district?.....
.....
Are you married or single?.....
If married, where does your family reside?.....
If single, where do your parents reside?.....
How long do you contemplate residing in this election district?.....
.....
Give place or places by street and number, the city, town or village of
your residence or residences during the past four months.....
Where did you actually reside immediately prior to taking up your
present residence?
Have you been convicted of felony?.....
If so, have you been pardoned and restored to all the rights of citizen-
ship?
When? By whom?
Have you made any bet or wager, or are you directly or indirectly
interested in any bet or wager depending on the result of the next ensuing
election?
Have you received or offered to receive, or do you expect to receive, any
money or other valuable thing as a compensation or reward for registering
or for giving your vote or refraining from voting at the next election?....
.....
Have you paid, offered or promised to pay, contributed, offered or
promised to contribute, to another, to be paid or used, any money or other
valuable thing, or made any promise, to influence the giving or withholding
of any vote at the next ensuing election?.....
I, the undersigned, do hereby solemnly swear (or affirm) that the answers

to the above questions were given by me and that they are true answers to such questions.

(Signature of applicant.)

Description of applicant.

Height Kind of nose

Weight Hair on face

Color Color of hair

Marks on face or hands

Distinguishing marks

I, the undersigned, an inspector of election of the above designated election district, do hereby certify that the within named person did on this day personally appear before the board of inspectors of this election district and did make application to have his name enrolled upon the register of voters of this said election district; that he was challenged and was sworn by me and did make the answers set opposite the printed questions upon this affidavit and signed the same in my presence.

Dated this day of October, 19..

Name Residence

Inspector of election

(To be signed by the inspector administering oath to applicant.)

Witnesses.

Name.....Residence.....Inspector of Election.

Name.....Residence.....Inspector of Election.

Name.....Residence.....Inspector of Election.

(Board of inspectors.)

Name of challenger

Residence of challenger

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, pt. of subd. 6, as amended by L. 1899, ch. 630, § 8; L. 1901, ch. 544, § 1.

§ 169. Challenging applicants for registration.—1. Any person who applies personally to any board of inspectors for registration for any election may be challenged by any qualified elector present or by any qualified watcher present.

2. If such applicant be so challenged, or if any member of the board of inspectors shall have reason to suspect that such applicant is not entitled to have his name registered, the chairman of the board of inspectors or any member of such board is hereby authorized to and shall administer to such applicant the following oath: "You do solemnly swear (or affirm) that you will true answers make to the questions touching upon your qualifications as an elector and such other questions as may be put you tending to establish your identity," and one of the inspectors shall thereupon read to such challenged person each and every question printed upon the challenge affidavit provided for by section one hundred and sixty-eight and shall enter in ink opposite each question the answer thereto given by such applicant. The applicant shall subscribe his name to such

challenge affidavit, which shall also be subscribed by the inspector administering the above oath and as witnesses by the other inspectors present, who shall certify over their names the fact that the applicant did apply for registration, that he was duly sworn, and that the answers set opposite the printed questions are the true answers given to such questions by the challenged applicant. The inspectors shall also enter in the place provided on the challenge affidavit a description of the person challenged and the name and address of the person challenging. If the applicant shall by his answer satisfy a majority of the board of inspectors of his right to be registered, they shall register his name as an elector; if not, they shall point out to him the qualifications which he lacks as an elector and his name shall not be registered except as provided by section one hundred and fifty-three of this article, and upon any such proceeding the challenge affidavit of such applicant shall be submitted in evidence to such court, justice or judge. If the applicant shall refuse to make oath to the questions put to him and the answers given thereto by him or shall refuse to answer any questions upon the challenge affidavit, his name shall not be placed upon the register, or if recorded thereon previous to his ascertained qualification as an elector, the inspectors shall enter in the remark column after such name the word "disqualified," and no person shall be allowed to vote on such name at the election. When the name of a person who has signed a challenge affidavit shall be registered, the inspectors shall enter in the column headed "remarks" on the register opposite such name the word "affidavit," giving the consecutive number printed on such affidavit. (*Amended by L. 1910, ch. 428 and L. 1911, ch. 649.*)

Source.—Former Elec L. (L. 1896, ch. 909) § 34, pt. of subd. 6, as amended by L. 1899, ch. 630, § 8; L. 1901, ch. 544, § 1.

Consolidators' note.—The last sentence of the new section, relating to the entry of the word "affidavit" in the register in the old section followed what is now § 117, and is unchanged in substance. The sentence relating to false statements, here omitted, is placed in new § 184 with other provisions relating to penalties.

§ 170. **Investigation into truth of affidavits.**—At the close of each day of registration the inspectors of election shall detach from the stubs the challenge affidavits signed by the persons challenged during the day and in cities shall deliver them to the police captain of the precinct in which the election district is located or to an officer thereof, and such police captain or commanding officer of such precinct shall immediately cause an investigation of the truth of such affidavit to be made, and if such investigation shall prove the same to be false in any particular affecting the right of the challenged person to register or vote, the said officer shall deliver the same to the district attorney of the county, together with the evidence of the falsity of such affidavit and the district attorney shall forthwith present the same to the grand jury of such county. In election districts outside of cities such affidavit shall be delivered by the inspectors to the sheriff of the county who shall proceed in like manner. Copies of all such

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challenge affidavits shall be mailed by the police or sheriff forthwith at the close of each day of registration to the state superintendent of elections, who shall proceed in like manner. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, pt. of subd. 6, as amended by L. 1899, ch. 630, § 8; L. 1901, ch. 544, § 1.

Consolidators' note.—Two sentences are omitted after the matter in this section, and appear, the one at the end of § 169 and the other in § 172.

§ 171. Duplicate book of challenge affidavits.—(*Amended by L. 1911, ch. 649 and repealed by L. 1914, ch. 244, § 20.*)

§ 172. Disposition of challenge affidavits.—At the close of the last day of registration the inspectors shall file the book of stubs and unused challenge affidavits with the officer from whom it was received by the inspectors and such officer shall preserve it in his office.

The officer or board with whom the original challenge affidavits or copies thereof are filed may destroy the same six months after the date of the election for which they were made, except those which are to be used in any criminal prosecution.

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, pt. of subd. 6, as amended by L. 1899, ch. 630, § 8; L. 1901, ch. 544, § 1.

Consolidators' note.—In the "old" law, the first sentence of this section followed (with one sentence between) what is now § 170. The second sentence was the last sentence of the old subdivision.

§ 173. Entry requiring challenge by inspectors.—If, at a meeting of the board of inspectors for registration, any voter shall, upon oath, declare that he has reason to believe that any person on the register of voters will not be qualified to vote at the election for which the registration is made, the board of inspectors shall place the words "to be challenged" opposite the name of such person, and when such person shall offer his vote at such election, the general oath as to qualifications shall be administered to him, and if he shall refuse to take such oath he shall not be permitted to vote.

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 7.

§ 174. Production of naturalization papers.—It shall be the duty of every naturalized citizen before being registered to produce to the inspectors, if any inspector shall require, his naturalization papers or a certified copy thereof for their inspection, and to make oath before them that he is the person purporting to have been naturalized by the papers so produced, unless such citizen was naturalized previous to the year eighteen hundred and sixty-seven. If, however, such naturalized citizen can not for any reason produce his naturalization papers, or a certified copy thereof, the board of inspectors, or a majority of such board may place the name of such naturalized citizen upon the register of voters upon his furnishing to such board evidence which shall satisfy such board of his right to be registered.

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Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 8, as amended by L. 1905, ch. 675, § 5.

References.—Procuring or presenting false certificate of naturalization. Penal Law, §§ 777, 778.

Proof of naturalization by secondary evidence.—People ex rel. O'Donnell v. McNally (1880), 59 How. Pr. 500; People ex rel. Noel v. Smith (1894), 10 Misc. 100, 31 N. Y. Supp. 199.

Section cited.—People v. Bromwich (1909), 135 App. Div. 67, 119 N. Y. Supp. 833, *affd.* (1911), 200 N. Y. 385, 93 N. E. 933.

§ 175. **Persons excluded from the suffrage.**—No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or any other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or for registering or refraining from registering as a voter, or who shall make any promise to influence the giving or withholding any such vote or registration, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of an election, shall vote at such election. No person who has been convicted of a felony shall have the right to register for or vote at any election unless he shall have been pardoned and restored to the rights of citizenship.

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, subd. 10, as added by L. 1901, ch. 654, § 2.

References.—See Const., art. 2, § 2, and cases there cited. Qualification of voters generally, § 162, *ante*.

Suspension of sentence.—Conviction within the meaning of this section must be construed to imply a judgment based on a verdict of guilty. Therefore, a person, against whom sentence has been suspended after verdict, has not been convicted, and is not liable to indictment for voting at an election. People v. Fabian (1908), 192 N. Y. 443, 85 N. E. 672, 18 L. R. A. (N. S.) 684, *revd.* (1908), 126 App. Div. 89, 111 N. Y. Supp. 140.

Restoration to citizenship.—Felon must be restored to citizenship before he can vote. Rept. of Atty. Genl. (1905) 531.

Alien minor convicted of felony must be restored to citizenship before he can become a naturalized citizen. Rept. of Atty. Genl. (1904) 257.

A person convicted of counterfeiting may upon restoration to citizenship exercise the right of franchise in this state. Rept. of Atty. Genl. (1911) 407.

A person convicted in a Federal court of a felony has no right to vote at an election unless he has been pardoned and restored to the rights of citizenship. Rept. of Atty. Genl. (1912), Vol. 2, p. 339.

§ 176. **Certification of register.**—At the close of each meeting for the registration of voters, for a general or other election in a city, or in an election district wholly within a village having five thousand inhabitants or more, the inspectors shall append to each book of registration their certificate to the effect that such register as it now is, comprising (here insert the number) names, is a true and correct register of the names and residences of all the voters qualified to vote at such election in such district, who have personally appeared before the board of registration, and

such registers so certified shall be presumptive evidence that the names and places of residence contained therein are the names and places of residence given by the persons registered respectively.

At the close of each meeting for the registration of voters for a general or other election elsewhere than in a city, or in a district wholly within a village having five thousand inhabitants or more, the inspectors shall append to each book of registration a certificate to the effect that such register as it now is, comprising (here insert the number) names, is a true and correct register of all voters qualified to vote at such election in such district who have personally applied for registration, or whose names the board was required by law to place thereon.

Each such certificate shall be signed by all the inspectors, but in case one inspector required to sign such certificate shall fail for any reason so to do, he may be required by the officer with whom such register is filed to sign such register at a subsequent date. In all cases a majority of the inspectors must sign such certificate at the close of each day of registration.

Source.—Former Elec. L. (L. 1896, ch. 909) § 35, subd. 1.

§ 177. Making up the registers; custody thereof after registration.—1. The register of voters made by the chairman of the board of inspectors shall be, and shall be known as, the public copy of registration. Such public copy shall be left in a prominent position in the place of registration from the first day of registration until election day, and shall at all reasonable times be open to public inspection and for making copies thereof. When the place of registration is in a school house, or other public building, authorized to be so used under subdivision three of section two hundred and ninety-nine, such public copy shall be left in the custody of the janitor or some other person in charge of the building, who shall be responsible therefor, and a notice shall be kept publicly posted stating how inspection thereof is to be obtained.

2. Each other inspector shall carefully preserve his register of voters and shall be responsible therefor, until the close of the canvass of the votes on election day, except as hereinafter provided for in cities of the first class.

3. At the close of each day of registration the inspectors shall draw a line in ink immediately below the name of the voter last entered upon each page of each such register. Upon the succeeding day of registration, they shall enter the names of voters in the alphabetical order of the first letter of the surname below the line so drawn upon the proper page after the close of the previous day of registration.

4. Upon the close of the last day of registration, the inspectors shall again carefully compare all the books of registration, to see that they are identical as to their contents, and shall certify as a board in the proper place provided therefor upon each such register that such register is a true and correct register of persons registered by them in such district for

the next ensuing election, and shall state the whole number of such persons so registered. (*Amended by L. 1915, ch. 678.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 35, pt. of subd. 2, as amended by L. 1897, ch. 379, § 9; L. 1899, ch. 630, § 10; L. 1901, ch. 95, § 10; L. 1905, ch. 643, § 8.

Reference.—Mutilation, destruction or loss of registry list, Penal Law, § 754.

Concealing registry lists.—*People v. McKane* (1894), 143 N. Y. 455, 38 N. E. 950.

§ 178. **Custody and filing of registers after registration in cities of first class.**—1. In cities of the first class, at the close of the last day of registration, the chairman of the board of inspectors shall take from an inspector of opposite political faith from himself, the register of voters made by such inspector, and deliver it to the police, who forthwith shall file the same, if in the city of New York, with the board of elections in the borough of Manhattan, and with the chief clerk of the branch office of the board of elections in each other borough, and if in any other city, with the commissioner of elections. Such registers so filed shall be a part of the records of the offices in which they are filed. The two other inspectors of opposite political faith from each other shall retain their respective registers of voters for use on election day, except as provided in subdivision two of this section.

2. In the city of New York at the close of each day of registration the chairman of the board of inspectors shall take the signature copy of the register of voters and the book of identification statements for registration day and deliver them to the police, for safe keeping in the station house of the police precinct in which the polling place is located. The police shall return the same to the inspector having charge thereof immediately before the hour of the beginning of the next meeting for registration or of the opening of polls on election day. Such inspector shall also be entitled to the possession of such register and book whenever necessary under the provisions of section one hundred and fifty-three of this chapter, and the board of elections shall be entitled to the delivery to it of such register and book upon demand.

3. All registers of voters shall at all reasonable hours be accessible for public examination and making copies thereof, and no charge of any kind shall be made for such examination or for allowing any voter to make a copy thereof. In cities of the first class the public copy of registration shall be used, if necessary, on election day by the inspector whose register was filed by the chairman as herein provided. (*Amended by L. 1917, ch. 703, § 14, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 35, pt. of subd. 2, as amended by L. 1897, ch. 379, § 9; L. 1899, ch. 630, § 10; L. 1901, ch. 95, § 10; L. 1905, ch. 643, § 8.

Consolidators' note.—The sentence making it a felony to alter, etc., the public copy of the register is placed in § 184, with other penal provisions.

Reference.—Mutilation, destruction or loss of registry list, Penal Law, § 754.

Filing of registration books. Rept. of Atty. Genl. (1899) 362.

§ 179. **Certifying changes in registers.**—If, in cities, the board of inspectors shall meet on the second Saturday before the election for the purpose of revising and correcting the register of voters in pursuance of an order of the supreme court, a justice thereof or a county judge, as provided in section one hundred and fifty-three of this article, the inspectors shall certify forthwith to the officer with whom the copy of the register is filed the change or changes made upon such register in pursuance of such order. At any revision of registration for an election other than a general election, the quadruplicate register of voters for the last preceding general election shall be furnished to the inspectors of election by the officer or board having the custody thereof, and the inspectors shall certify to the officer or board in cities of the first class with whom the registers are filed the changes, additions or alterations made in such registers for such election.

Source.—Former Elec. L. (L. 1896, ch. 909) § 35, pt. of subd. 2, as amended by L. 1897, ch. 379, § 9; L. 1899, ch. 630, § 10; L. 1901, ch. 95, § 10; L. 1905, ch. 642, § 8.

§ 180. **Custody of registers after election.**—At the close of the canvass of the votes of any election, or within twenty-four hours thereafter, the two copies of the register of electors used by the inspectors and the public copy thereof shall be filed with the board of elections of the county in which the election district is located and in the city of New York with the office located in the borough of Manhattan, and with the chief clerk of the branch office of the board of elections in each other borough of the city of New York. It shall be the duty of the officers with whom such registers of the election districts are filed, to forthwith file one copy of such register for each election district with the state superintendent of elections. Such register of electors shall be carefully preserved for use at any election which may be ordered or held in either of such counties or cities, respectively, prior to the next ensuing general election at which they may be required. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 17.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 35, pt. of subd. 2, as amended by L. 1897, ch. 379, § 9; L. 1899, ch. 630, § 10; L. 1901, ch. 95, § 10; L. 1905, ch. 643, § 8.

Reference.—Mutilation, destruction or loss of registry list, Penal Law, § 754.

§ 181. **Certifying number of registered electors.**—At the close of registration on the last day the board of inspectors shall upon blanks furnished by the secretary of state forthwith certify and file with or mail to the officer or board charged with the duty of furnishing ballots to such district and to the state superintendent of elections the total number of electors registered in such district. The inspectors of each district shall also furnish to the same officials in like manner at the close of each day of registration the total number of electors registered on such day in their respective districts. The chairman of the board of inspectors of election of each district shall also forthwith at the close of each day of registration file with or mail to the state superintendent of elections a certificate showing the total number of voters registered therein in the respective election districts. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 18.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 35, subd. 3, as amended by L. 1899, ch. 630, § 9.

§ 182. **Delivery of blank books for registration; certificates and instructions.**—The secretary of state shall purchase whenever he deems it desirable for the best interests of the state, a suitable number of blank books for registers of voters, with blank certificates and brief instructions for registering the names of voters therein, in the forms respectively provided in sections one hundred and fifty-four and one hundred and fifty-five of this chapter, at least four of such books for each board of inspectors in the state, and such number of extra copies thereof as in his judgment may be necessary for each county or city to replace lost or damaged registers before delivery to the inspectors. Such register of voters shall have the leaves thereof indexed with the letters of the alphabet, beginning with the letter "A" for the first leaf, and so on. At least twenty days prior to the first day of registration for a general election in each year, the secretary of state shall transmit a sufficient number of such registers, certificates and instructions to the board of elections of each county, and to the board of elections of the city of New York located in the borough of Manhattan, and to the chief clerk of the branch office of the board of elections in each other borough within the city of New York, for the use of each board of inspectors within such counties and boroughs, respectively. The board of elections of each county, outside the city of New York shall deliver such books to the town clerks of each town and to the city clerk of each city in the county, by mail or otherwise, at least five days prior to the first day of registration, and such town clerks and city clerks, and the said board of elections and chief clerks of branch offices of the board of elections in the city of New York shall deliver such books to the inspectors of said towns, cities and boroughs, respectively, before the hour set for registering the names of voters on the first day of registration. On each day of registration the board of elections of the city of New York and of each county shall furnish to each board of inspectors in each such county or city, respectively, the blanks for the list of voters provided for in section one hundred and fifty-seven of this article. Such blanks shall be distributed in time and manner as above provided for the distribution for registers. (*Amended by L. 1916, ch. 537, § 30.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 36, subd. 1, as amended by L. 1897, ch. 379, § 10; L. 1901, ch. 95, § 11; L. 1905, ch. 643, § 9.

§ 182-a. **Special instructions to voters to be prepared for the year nineteen hundred and fourteen.**—The secretary of state shall prepare and cause to be printed and furnished to the various boards of elections, in time and manner as provided in section one hundred and eighty-two for other supplies, printed instructions to voters, in brief and concise form, explaining the difference between the form of ballot used at former general elections and the form of ballot provided for in section three hundred and thirty-

one of this chapter as amended by chapter eight hundred and twenty-one of the laws of nineteen hundred and thirteen, and explaining the requirements of marking the latter ballot so that the voter may effectually vote for the candidates for all offices to be filled. The instructions provided for in this section shall only be prepared and supplied prior to the first day of registration in the year nineteen hundred and fourteen. The various boards of elections shall supply the election officers in each election district within the jurisdiction of any such board where personal registration is required, before the opening of registration on the first day of registration, with a sufficient number of copies of such printed instructions to supply each voter with one copy. The delivery of such instructions shall be made through town and city clerks and otherwise as provided in section one hundred and eighty-two for the delivery of other supplies. (*Added by L. 1914, ch. 243.*)

§ 183. Delivery of previous registers and poll books to inspectors.—Each town clerk with whom the register of the last preceding general election in any election district, elsewhere than in a city or wholly within a village having five thousand inhabitants or more, shall have been filed, shall cause such register and one of the poll books to be delivered to the board of inspectors of such district at the opening of its first meeting for the registration for any election.

If a new election district shall have been formed in a town since such general election, the clerk of such town shall, before the first meeting for registration thereafter in such new election district, make a certified copy of each register for such general election of each election district out of which such new district shall have been formed, and shall cause such certified copy to be delivered to the board of inspectors of such new election district at the opening of such meeting for registration. Such board, at such meeting, shall place upon the register of voters all persons whose names are upon such copies who are qualified to vote in such election district at the election for which such meeting is held, except the names of persons who are required to personally appear for registration.

If a new election district shall have been formed in a city since such general election, the clerk or board with whom the register of voters for such last preceding general election shall have been filed shall, before the meeting of the inspectors of election of such new district for registration for any other election, make a certified copy of each register of voters for such last preceding general election of each election district out of which such new election district is formed, and the inspectors of such new election district shall, at such meeting for registration for such election, place upon the register of voters the names of all persons upon such copies who are qualified to vote in such election district at the election for which such meeting is held.

Source.—Former Elec. L. (L. 1896, ch. 909) § 36, subd. 2.

§ 184. **Penalties.**—Any applicant for registration, inspector or other person who shall incorporate or cause to be incorporated any false statement in any challenge affidavit shall be deemed guilty of perjury.

Except as provided in this article any person who shall wilfully suppress, alter, destroy or mutilate any signed challenge affidavit or official copy thereof shall be deemed guilty of a felony.

Any person knowingly taking a false oath before the board of inspectors shall upon conviction thereof be punished as for wilful and corrupt perjury.

Any person who shall alter, mutilate, destroy or remove from the place of registration the public copy of registration shall be guilty of a felony, and shall be punished upon conviction thereof by imprisonment in a state prison for not less than two or more than five years, unless otherwise provided by law.

Any person who signs and mails or delivers to the custodian of primary records an enrollment blank as provided in this chapter, which shall be false in any respect or with intent to mislead, or any person who induces or attempts to induce any person so to do, is guilty of a misdemeanor. The fact that such statement is untrue shall be prima facie proof that it is false and intended to mislead.

Any person who shall make, sign, file or cause to be filed, certify or attest any false application for registration as required by sections one hundred and fifty-eight and one hundred and fifty-nine of this chapter, or any person who shall alter, mutilate, destroy or remove any such application from the place of registration, shall be guilty of a felony and shall be punished upon conviction thereof by imprisonment in a state prison for not less than two years nor more than five years, unless otherwise provided by law. (*Amended by L. 1913, chs. 587 and 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 34, pt. of subd. 6, as amended by L. 1899, ch. 630, § 8; L. 1901, ch. 544, § 1; also § 34, subd. 9; also § 35, pt. of subd. 2, as amended by L. 1897, ch. 379, § 9; L. 1899, ch. 630, § 10; L. 1905, ch. 643, § 2.

Reference.—Misconduct of registry officers, Penal Law, § 753.

ARTICLE VII.

BOARD OF ELECTIONS.

[Title of article thus amended by L. 1911, ch. 649.]

- Section 190. Boards of elections established.
191. Appointment, term and qualifications of commissioners of elections.
192. Organization of board; rules and reports.
193. Salaries of commissioners of elections.
194. Recommendations for appointment of commissioners of elections.
195. Filling vacancies in board.
196. Bi-partisan character of board.
197. Appointment of employees.

- 198. General office and branches.
- 199. Duty of police to aid board of elections.
- 200. Expenses of board of elections.
- 201. Disposition of registers and unused ballots.
- 202. Custodian of primary records.
- 203. Official seal.
- 204. Filing statement of canvass, tally sheets and poll-books.
- 205. Notices.
- 206. Transfer and custody of records; devolution and continuation of powers.
- 207. Office hours, rules and regulations of boards of elections.
- 208. All records to be public; records of transactions of the boards of elections.
- 209-a. Article not applicable to Oneida and Broome counties; powers and duties of county clerks in such counties defined.

§ 190. Boards of elections established.—There shall be a board of elections in every city of the first class in this state which does, or shall, contain within its boundaries more than one county, to consist of four persons. There shall be a board of elections in each of the other counties of the state, but in counties having a population of less than one hundred and twenty thousand inhabitants such board shall consist of two persons. In other counties of the state such board shall consist of two or four members as the board of supervisors of the county may by resolution determine. In every such other county where four commissioners of election have been appointed and the number of said commissioners is reduced to two, the board of supervisors shall within sixty days after this amendment takes effect reduce the number of commissioners to two by designating the two who are to continue; and from the time of such designation the offices of the others shall be deemed abolished. Except in the city of New York the salaries of such commissioners and their expenditures for clerk hire shall be fixed by the board of supervisors of each county, but shall not exceed the following amounts: In each county having a population of less than ninety thousand and which does not contain within its boundaries at least three cities of the third class the salary of a commissioner shall not exceed one thousand dollars, and the expenditure for clerk hire, including stenographer, each year, shall not exceed fifteen hundred dollars. In each county having a population of less than ninety thousand and containing within its boundaries at least three cities of the third class and in each county having a population of ninety thousand and less than one hundred and twenty thousand the salary of a commissioner shall not exceed fifteen hundred dollars, and the expenditure for clerk hire, including stenographer, each year, shall not exceed three thousand dollars each year. In each county having a population of one hundred and twenty thousand and less than five hundred thousand the salary of a commissioner shall not exceed three thousand dollars, and the expenditure for clerk hire, including stenographer each year, shall not exceed five thousand dollars. In each county having a population of five

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hundred thousand and less than a million the salary of a commissioner shall not exceed three thousand dollars. The population of the various counties of the state referred to in this section shall be fixed and determined according to the latest preceding federal census, or state enumeration. Not more than two of such commissioners, if the board of elections consists of four members, and not more than one of such commissioners if said board consists of two members, shall belong to the same political party or be of the same political opinion on state or national politics. The persons composing such boards of elections shall be designated "commissioners of elections." Each of the said boards of elections shall be and is hereby charged with the duty of executing the laws relating to all elections held within their respective cities or counties, except as otherwise provided by law. (*Amended by L. 1911, chs. 649 and 740, L. 1912, ch. 406, and L. 1913, chs. 800 and 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, ¶ a, as added by L. 1901, ch. 95, § 5.

Employees of New York City board are subject to jurisdiction of state civil service commission. *People ex rel. Werner v. Prendergast* (1912), 152 App. Div. 104, 136 N. Y. Supp. 688, revd. (1912), 206 N. Y. 405, 99 N. E. 1047.

Salary of chief clerk may be fixed by board of supervisors. *People ex rel. Simpson v. Snyder* (1916), 173 App. Div. 171, 158 N. Y. Supp. 937.

Duty of board as to publication of notice of local option questions.—Notice that local option questions will be voted on should be published by the board of elections. *Matter of Town of Onondaga* (1914), 163 App. Div. 191, 143 N. Y. Supp. 36, *affd.* (1914), 212 N. Y. 577, 106 N. E. 1043.

Salary of chief clerk of board of elections of Ulster County may be fixed by the board of supervisors under subdivision 5 of section 12 of the County Law. *People ex rel. Simpson v. Snyder* (1916), 173 App. Div. 171, 158 N. Y. Supp. 937.

Section cited.—*Matter of Kane v. Gaynor* (1911), 144 App. Div. 196, 129 N. Y. Supp. 280, *affd.* (1911), 202 N. Y. 615, 96 N. E. 1117.

§ 191. Appointment, term and qualifications of commissioners of elections.—All commissioners of elections shall be appointed by the board of supervisors of the county in which such board of elections is located and in the city of New York by the board of aldermen of such city. The supervisors of each county and the members of the board of aldermen of the city of New York shall appoint the commissioners of elections for their respective counties and the city of New York. Such appointment shall be evidenced by the supervisors of each county or the board of aldermen of the city of New York making such appointments, executing a certificate substantially as follows:

"We, the undersigned, comprising the supervisors of.....county (the members of the board of aldermen of the city of New York) do hereby, pursuant to the election law, appoint, residing at, a commissioner of elections for said county.

"In witness whereof we have hereunto subscribed our names and the towns or wards (aldermanic districts) we represent, this day of, 19..."

and shall acknowledge said certificate. Said certificate shall thereupon be filed in the office of the county clerk of said county and said county clerk shall immediately upon such filing notify the secretary of state of such appointments. All such appointments shall be for the full term of two years, beginning at twelve o'clock noon of January first in each odd numbered year.

Each of the said commissioners of elections shall be at the time of his appointment a resident and an elector of the political subdivision for which he is appointed. A commissioner of elections may, while holding such office, hold one of the following offices: Notary public, commissioner of deeds, police justice of a village, trustee or officer of a common or union school district outside of a city, justice of the peace of a town, and any other office filled by election or appointment within or for a town or village, or district or subdivision of either, except supervisor, town clerk, inspector of election, poll clerk or ballot clerk. Such commissioner shall not hold, while he is commissioner, any other office, except as above provided; nor shall he be a candidate, while he is commissioner, for any elective office which he would not be entitled to hold under the provisions of this section, nor after he has ceased, by resignation or otherwise, to be commissioner, if the election shall occur within fifty days therefrom, and any votes cast for any person for any such office who shall have been a commissioner of elections within fifty days of the election at which such votes were cast shall be void and shall not be counted, except that such commissioner may be a candidate for the office of supervisor or town clerk while he is commissioner, and at any time thereafter, subject to the ensuing provisions of this section. Any votes cast for a person for either of such offices who shall have been a commissioner of elections, and who shall have resigned from or otherwise ceased to hold the office of commissioner at least fifteen days before the election at which such votes were cast shall be valid and shall be counted.

A commissioner of elections may be removed from office by the governor for cause in the same manner as a sheriff. Any vacancy in the office of commissioner of elections shall be filled by the supervisors of such county or in the city of New York by the members of the board of aldermen within five days after the filing of the certificate provided for in section one hundred and ninety-five of this act, and the person appointed to fill such vacancy shall hold office during the remainder of the term of the commissioner in whose place he was appointed. (*Amended by L. 1911, ch. 649, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ b, added by L. 1901, ch. 95, § 5.

Reference.—Recommendations for appointment, § 194, post.

Election commissioner; illegal appointment.—Where a person was certified by the county committee of his party for the office of election commissioner, but the board of supervisors disregarding the certificate appointed another person to the office, the person certified, not having title to the office, may not maintain an

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action as relator to oust the occupant. Until a person is legally appointed and the occupant refuses to surrender the office the Attorney-General in the exercise of his discretion should not bring an action to oust the occupant. Rept. of Atty. Genl. (1913), Vol. 2, p. 616.

§ 192. **Organization of board; rules and reports.**—At their first meeting the commissioners of elections shall organize as a board by electing one of their number as president and one as secretary, and in case no election can be had the members shall draw lots for such places. The president and secretary shall not belong to the same party. The board shall have power to adopt such rules and regulations for the control and conduct of the affairs of such board and of its employees as are not inconsistent with or in violation of law. The board shall keep a record of its proceedings and shall make an annual report in the month of January of the affairs and proceedings of said board to the secretary of state. The board of elections of a county outside of the city of New York shall also make an annual report in the month of January, of its affairs and proceedings, to the board of supervisors. The board shall append to the report to the secretary of state a statement of the number of voters enrolled with each party for that year in each election district. The board shall also collect such data as may be available relating to the expense connected with registrations, enrollments and elections within its county or city each year and include a statement thereof in such report to the secretary of state, together with such other information relating to elections as the secretary of state may prescribe. (*Amended by L. 1911, ch. 649, and L. 1917, ch. 703, § 15, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ b, as added by L. 1901, ch. 95, § 5.

§ 193. **Salaries of commissioners of elections.**—The salary of each commissioner of elections in the city of New York shall be six thousand dollars a year, payable in equal monthly instalments. The salaries of all other commissioners of elections shall be fixed by the board of supervisors appointing said commissioners and may be changed from time to time by resolution of the said board of supervisors, but shall not exceed the amounts specified in section one hundred and ninety. (*Amended by L. 1911, ch. 649, and L. 1912, ch. 406, L. 1913, ch. 800 [Ext. Sess.], and L. 1917, ch. 703, § 16, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ c, as added by L. 1901, ch. 95, § 5.

Consolidators' note.—Election Law, § 11, subd. 2, ¶ c. Heading new. The old paragraph required the mayor to appoint commissioners within ten days after the act took effect, to hold office until noon of January 1, 1903, and to again appoint "upon the expiration of the term of office of the commissioners first appointed and every two years thereafter." The new section defines the term of office generally by referring to "each odd numbered year," also omitting the matter relating to the qualifications of the first board, which was merely a duplication of the general provision retained.

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Salary increase; when effective.—Commissioners of election shall receive the salary fixed by the board of supervisors in force at the time their services were rendered and not at the increased rate for past services provided by resolution of the supervisors adopted and in force after the performance of such services. Rept. of Atty. Genl. (1912), Vol. 2, p. 550.

§ 194. **Recommendations for appointment of commissioners of elections.**—Within ten days after this act takes effect and at least five days before the first day of January in each odd numbered year, the respective chairmen of the county committees within the counties of New York and Kings and the respective chairmen of the county committees of all the other counties in the state excepting the counties of Bronx, Queens and Richmond of each of the two political parties which at the general election last preceding the date of such certificate cast the highest and the next highest number of votes for governor, shall each respectively make and file or cause to be filed in the case of the counties of New York and Kings with the board of aldermen of the city of New York, and in the case of each of the other counties with the board of supervisors of such county a certificate in substantially the following form, each of which certificates shall certify the name of a person who is a resident and qualified voter in the case of the counties of New York and Kings of the city of New York, or in the case of the other counties a resident of such county, and who is recommended as a fit and proper person to be appointed a commissioner of elections: "I,, chairman of the county committee of the.....party, for the county of....., do hereby, in accordance with the provisions of section one hundred and ninety-four of the election law, certify that in the opinion of a majority of the said committee, pursuant to resolution duly adopted,, a resident and qualified elector of the borough of....., city of New York, or of the county of, is a fit and proper person to be appointed a commissioner of elections, and I do hereby recommend him for appointment to said office. In witness whereof, I have made and executed this certificate, this day of, 19..."

Each of such certificates shall be duly acknowledged by the person executing the same, before a notary public or other officer authorized to take acknowledgments to deeds for record in this state. (*Amended by L. 1911, ch. 649, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 1, subd. 2, pt. of ¶ d, as added by L. 1901, ch. 95, § 5.

Consolidators' note.—As in § 193, the obsolete provisions governing the making of nominations to the mayor for the original board are omitted, and the general provision retained is defined by reference to "each odd numbered year." The form of certificate making the nomination is also made a part of the general provision and its place in the section changed accordingly.

The purpose of section 194 is to make provision for pointing out to the mayor persons who are eligible so that there may be no pretext for violating the bipar-

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tisan plan of the statute. *Matter of Kane v. Gaynor* (1911), 144 App. Div. 196, 129 N. Y. Supp. 280, *affd* (1911), 202 N. Y. 615, 96 N. E. 1117.

The power given to the mayor by section 193 to "appoint four persons as commissioners," each of whom shall be a resident and qualified voter of New York City and not more than two of whom shall be of the same political opinion, is not curtailed in any way by this section providing that the respective chairmen of the county committees of New York and Kings counties of each of the two principal political parties shall make and file with the mayor a certificate in a stated form certifying the name of one who is recommended as a fit and proper person to be appointed commissioner. *Matter of Kane v. Gaynor* (1911), 144 App. Div. 196, 129 N. Y. Supp. 280, *affd*. (1911), 202 N. Y. 615, 96 N. E. 1117.

Submission of same name after rejection does not justify the board of supervisors in appointing a person not recommended. *People ex rel. Woods v. Flynn* (1913), 81 Misc. 279, 142 N. Y. Supp. 230.

Disagreement between the chairman and members of the party county committee as to recommendation for appointment.—Where the chairman of a party county committee and the members of said committee are unable to agree upon a person to be recommended for appointment by the board of supervisors, no certificate of recommendation can properly be made. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 562.

§ 195. Filling vacancies in board.—If at any time a vacancy arises in the office of commissioner of elections, through death, resignation, removal or inability to serve, the chairman of the county committee of the political party to which the commissioner creating such vacancy belonged, and if such vacancy arise in the office of commissioner of elections for New York city and if the commissioner creating such vacancy was a resident of the borough of Manhattan or of the borough of the Bronx of said city the chairman of the county committee of New York county of the political party to which the commissioner creating such vacancy belonged and if the commissioner creating such vacancy was a resident of any other borough of said city, the chairman of the county committee of Kings county of the political party to which the commissioner creating such vacancy belonged, shall make and file or cause to be filed with the board of supervisors of the county in which such vacancy arises or if such vacancy arise in the board of elections of New York city, then with the board of aldermen, a certificate in substantially the form and executed and acknowledged as above provided, certifying and recommending the name of a person who is a resident and qualified voter of such county or city wherein such vacancy arises, as a fit and proper person to be appointed a commissioner of elections for the unexpired term of the commissioner creating such vacancy. (*Amended by L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ d, as added by L. 1901, ch. 95, § 5.

§ 196. Bi-partisan character of board.—Each and every certificate filed with the board of supervisors or the board of aldermen in pursuance of the provisions of this article, shall be kept by the board with which the same is filed in some safe and secure place in the office of the clerk of said board, and shall be a public record open at all reasonable hours to the

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inspection of any person who may desire to see the same, it being the intention of this article, and said intention is hereby declared, to secure in the appointment of the members of the board of elections established by this article, and the employees thereof, equal representation of the two political parties which at the general election next preceding such appointment cast the highest and the next highest number of votes for governor, and of which the committees and chairmen of committees have been duly elected as such under and in pursuance of the provisions of article three of this chapter relating to primary elections. (*Amended by L. 1911, ch. 649, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, ¶ e, added by L. 1901, ch. 95, § 5.

§ 197. **Appointment of employees.**—Every board of elections shall have power to fix the number, salaries, duties and rank of its chief clerks, clerks, assistant clerks and stenographers and to appoint and remove at pleasure and to fix the salaries of all employees of said board, but not in excess of the amounts specified in section one hundred and ninety; except that in a county having a population of less than ninety thousand the board may have one clerk only and his salary shall not exceed nine hundred dollars per annum, nor shall the aggregate expenditure for such clerk hire and for stenographer exceed the amount specified in section one hundred and ninety. (*Amended by L. 1912, ch. 406, and L. 1913, chs. 800 and 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ h, as added by L. 1901, ch. 95, § 5.

§ 198. **General office and branches.**—The board of elections in the city of New York shall have power to provide and maintain an office for such board in the borough of Manhattan which shall be the headquarters of said board, and to furnish the same with necessary furniture and office fixtures, and shall also provide, maintain and furnish an office in each other borough of the city of New York and shall place the same in the charge of a competent person. Said board of elections shall have full and complete control of the said branch offices of the board of elections and of all the offices, employees, affairs and administration of said branch offices.

In each county the board of supervisors or other body or official charged with the duty of providing public offices shall provide the said board of elections for said county with proper and suitable offices. The expenses for said offices shall be a part of the expenses of said board of elections. (*Amended by L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ i, as added by L. 1901, ch. 95, § 5.

Consolidators' note.—The provisions covering the temporary location of offices of the new board, and the turning over of the records of the old police bureau abolished by the act, are omitted, as obsolete. The remainder of the paragraph has been made § 199.

§ 199. **Duty of police to aid board of elections.**—It shall be the duty of the commissioner of police and the officers and members of the police force, whenever called upon by the board of elections, to render said board all practicable assistance in the enforcement of this chapter, including the use of the police telephone service. The commissioner of police shall detail to the service of the board of elections upon its written request such patrolmen and other members of the police force as may be necessary from time to time for the faithful performance by said board of its functions and duties. All copies of police reports to commanding officers of precincts under section one hundred and fifty-seven of this chapter, shall be forthwith transmitted by the precinct commander to the board of elections. All statements of canvass delivered to any officer in command of a precinct under section three hundred and seventy-two of this chapter shall be forthwith transmitted by such precinct commander to the board of elections to be by them preserved with the same force and effect as if preserved by the police.

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ 1, as added by L. 1901, ch. 95, § 5.

§ 200. **Expenses of board of elections.**—All sums necessary to pay the expenses of the board of elections of the city of New York, including the salaries of the commissioners of elections, chief clerks, clerks, assistant clerks and other employees, and to meet and defray the charges and expenses of all elections lawfully held in the city of New York or in any territory included therein, shall be a charge against the said city, and shall upon proper certificates and vouchers be paid in the same manner as other expenses and charges against the said city are by law provided to be paid. Said charges and expenses, as estimated, shall be included in the annual budget of said city each year and in the yearly taxes levied upon the estates, real and personal, in the city of New York.

The board of elections in each county, excepting those counties comprising the city of New York, shall on or before the fifteenth day of December in each year certify to the clerk of the board of supervisors creating said board of elections the total amount of the expenses of said board of elections, including salaries, for the preceding year, and, if the board of supervisors of any county shall so direct, shall certify to said clerk the portions of said expenses which under provisions of law are to be borne by any city or cities in said county and the portion thereof which is to be borne by the rest of said county, and the said clerk of the board of supervisors shall thereupon notify the proper local official or officials, who, in spreading upon the assessment-rolls the taxes to be levied upon the taxable property in the city, or any of the said cities, and in the rest of the county, shall include in the amount so spread the amounts certified by the said board of elections to be borne by the said city or cities, respectively, and in the amount spread upon the assessment-rolls of the taxable property in the several towns or other political subdivisions

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of the rest of the county the amount so certified by said board of elections to be borne by the said towns or political subdivisions respectively. (*Amended by L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, pt. of ¶ j, as added by L. 1901, ch. 95, § 5.

Consolidators' note.—The provisions directing the city comptroller to turn over to the new board the appropriation of the year 1901, and for further financing the new board in that year are omitted, being obsolete.

Expense of publication of notices is a city charge. *Morning Telegraph Co. v. City of New York* (1909), 132 App. Div. 634, 117 N. Y. Supp. 496, *affd.* (1910), 197 N. Y. 536, 91 N. E. 1117.

§ 201. **Disposition of registers and unused ballots.**—The board of elections of the city of New York is hereby authorized and directed, not less than two years after each election, to sell or destroy all registers of voters in the possession of such board; provided, that one copy of such register of voters for each election district shall be excepted and preserved by such board from such sale or destruction. The board of elections is also authorized to sell to the highest bidder the unused ballots furnished for the last preceding election, but such unused ballots shall not be sold until at least six months after the election for which they were provided. All moneys realized by sales under this section shall be paid over to the proper fiscal officer of the city of New York to the credit of the account of the board of elections.

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 2, ¶ k, as added by L. 1901, ch. 95, § 5.

§ 202. **Custodian of primary records.**—The board of elections shall be the custodian of primary records for each political subdivision for which such board is appointed. The board of elections for New York city shall also be the custodian of primary records for the several counties in said city. (*Added by L. 1911, ch. 649.*)

Reference.—Custodian of primary records, defined, § 3, subd. 7, *ante*.

§ 203. **Official seal.**—Each board of elections is hereby authorized to adopt an official seal which shall be provided at the expense of the city or county for which said board of elections is appointed, and shall cause a description of said seal with impressions from it to be filed in the office of the county clerk of said county and of the secretary of state. Such description of the official seal of the board of elections of New York city shall be filed in the office of the county clerk of each county in said city. (*Added by L. 1911, ch. 649.*)

§ 204. **Filing statement of canvass, tally sheets and poll-books.**—All statements of canvass, tally sheets and poll-books, void and protested ballots, and any and all other packages and documents required by law to be filed by the inspectors, except certified copies of statements of canvass, ballot lists and tally sheets which are required by law to be filed with the

county clerk shall be filed with the board of elections of said county or, in the city of New York, with the board of elections of said city. In the city of New York the said statements, documents and packages shall be filed in the branch office in each borough. (*Added by L. 1911, ch. 649.*)

§ 205. **Notices.**—All notices of elections to which this chapter applies which are required by law to be published, advertised or posted in any county or any political subdivision thereof or therein shall be published, advertised or posted by the custodian of primary records of said county or of the city of New York. (*Added by L. 1911, ch. 649.*)

§ 206. **Transfer and custody of records; devolution and continuance of powers.**—All books, documents, papers, records and election appliances or appurtenances now or heretofore held or used by or under the control of any officer or officers of any county or of any political subdivision thereof or therein, relating to or used in the conduct of general, special or primary elections, shall be transferred to or continue in the care, custody and control of the board of elections; and the said board of elections in any such county shall continue to be charged with the duty of performing each, every and all of the duties of the county clerk or commissioner of elections of said county, relating to elections heretofore devolved upon such board by the former provisions of this section, except as otherwise provided in this chapter. In the city of New York the board of elections shall continue to exercise the same powers and duties now exercised by it, excepting as otherwise provided in this chapter. All books, documents, papers, records and election appliances held or used by any commissioner or commissioners of election, in any county whose powers and duties have been heretofore terminated shall continue in the custody of the board of elections for such county. (*Added by L. 1911, ch. 649, and amended by L. 1916, ch. 537, § 31.*)

§ 207. **Office hours, rules and regulations of boards of elections.**—The offices of each board of elections shall be public and open during every business day of the year. The board of elections in each county shall designate the hours when said offices shall open and close. Each board of elections may adopt its own rules and regulations for the transaction of its business. (*Added by L. 1911, ch. 649.*)

§ 208. **All records to be public; records of transactions of the boards of elections.**—All the records in the office of the board of elections shall be public and open for inspection by any citizen of the state of New York during the hours when the said office shall be open, and the said board of elections shall provide ample and sufficient facilities for keeping said records and making copies of the same.

Each board of elections shall keep a record of its proceedings, which shall be public and transcribed in a book or books within twenty-four hours after the adjournment of said board. Minutes of all meetings of the board

of elections shall show how each commissioner of elections voted upon any resolution or motion proposed at said meeting of the board. (*Added by L. 1911, ch. 649.*)

§ 209-a. Article not applicable to Oneida and Broome counties; powers and duties of county clerks in such counties defined.—After this section takes effect the foregoing provisions of this article shall not apply to the counties of Oneida and Broome, excepting section one hundred and ninety-nine. For the purpose of applying such section, the county clerk in each of such counties shall be deemed a board of elections. In each of such counties, except as otherwise provided in this section, the county clerk shall have therein the powers and duties of a board of elections, as well as those of a county clerk, prescribed by this chapter or other statute, and references to such board shall be deemed to mean and include, with respect to any such county, the county clerk thereof. All books, documents, papers, records and election appliances or appurtenances held or used by or under the control of the board of elections in the county of Oneida or county of Broome, pursuant to the provisions of this chapter, shall, when this section takes effect, be transferred to the care, custody and control of the respective county clerks of such counties. Each such county clerk may adopt rules and regulations, not inconsistent with the provisions of this chapter, for conducting the business of his office in relation to carrying out the provisions of this chapter. The official papers, records and documents in the office of such county clerk from time to time relating to general, special or primary elections, or in his custody under any provision of this chapter, shall be public and open to inspection by any citizen of the state during office hours. The county clerk of each such county shall be the custodian of primary records of his county. Notwithstanding the provisions of any other statute, either general or local, the board of supervisors of Broome county may from time to time provide by resolution for the appointment by the county clerk of such county of additional assistants, at the expense of the county, in the office of such clerk, and the board of supervisors of Oneida county may in like manner provide for the appointment by the county clerk of Oneida county of two additional deputies representing each of the two political parties which at the last general election preceding such appointment cast the highest and the next highest number of votes for governor and of additional assistants, whenever such board of either county, respectively, shall determine that such deputies or assistants are necessary for the proper performance of the additional duties devolved upon such clerk by this section; but the aggregate compensation of such additional assistant appointed on account of such additional powers and duties in the county of Broome shall not exceed one thousand dollars annually, and of such deputies and assistants in the county of Oneida shall not exceed three thousand two hundred dollars annually, exclusive of necessary emergency employees. (*Added by L. 1916, ch. 454.*)

L. 1916, ch. 454, § 3, abolished the board of elections in each of the counties of Oneida and Broome.

ARTICLE 7-A.

(Added by L. 1916, ch. 7.)

COMMISSIONER OF ELECTIONS IN THE COUNTY OF MONROE.

- Section 210. Commissioner of elections for Monroe county.
211. Appointment, qualifications and removal of commissioner.
212. Appointment, removal and examination of inspectors of election, poll clerks and ballot clerks.
213. Office for commissioner.
214. Custody of records.
215. Employees.
216. Notices.
217. Filing papers; general powers and duties of commissioner.
218. Purchase of supplies, including voting machines; expenses of commissioner.
219. Apportionment of expenses.
220. Publication of notices.
221. Polling places, election districts, et cetera.
222. Voting machines.
223. Construction of article.

§ 210. Commissioner of elections for Monroe county.—The office of commissioner of elections in the county of Monroe is hereby created, and all the rights, powers, authority, duties and obligations immediately heretofore by law vested in and imposed upon any officer or officers of the county of Monroe or any political subdivision thereof or therein, excepting the appointment, duties and obligations of inspectors of election, poll clerks and ballot clerks, who shall be appointed as hereinafter provided and serve as provided by law with respect to general or special elections and official primaries in the county of Monroe or in any political subdivision thereof or therein, except elections held at a time other than the time of the general election, or of village and school district officers, and special elections for town, village and school district purposes held at such other time, shall, by force of and as an effect of this article, be transferred to and be continued in the commissioner of elections in the county of Monroe hereby created from and after the time of appointment and qualification of the first commissioner hereunder. (*Added by L. 1916, ch. 7.*)

Reference.—See note to art. 7-b, post, as to constitutionality of this article.

§ 211. Appointment, qualifications and removal of commissioner.—Within five days after this article takes effect the county judge, special county judge and the surrogate of Monroe county, or a majority of them, shall appoint a commissioner of elections who must be a resident voter of such county and shall file in the office of the clerk of such county a certificate of the appointment. Such commissioner of elections shall take the

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constitutional oath of office and file the same in the county clerk's office and shall hold office for a term of four years; his successor to be appointed in like manner. Such term of office, except as otherwise provided in this section, shall begin on the first day of May in every fourth year, beginning with the year nineteen hundred and twenty. The term of the commissioner first appointed hereunder shall begin on the day the appointment is made and expire on May first, nineteen hundred and twenty. In case of a vacancy in the office of commissioner of elections, such county judge, special county judge and surrogate, or a majority of them, shall appoint a resident voter of Monroe county to fill such vacancy and shall file a certificate of such appointment in the office of the clerk of Monroe county. The person so appointed shall take the constitutional oath of office and serve the remainder of the term. The commissioner of elections appointed pursuant to this article shall be subject to removal by the governor in like manner as sheriffs of counties. Upon the appointment and qualification, pursuant to this section, of the first commissioner for such county, the board of elections therein shall be deemed abolished; and the terms of office of its members shall then expire. The provisions of article seven of this chapter shall not thereafter apply to the county of Monroe except section one hundred and ninety-nine; and the commissioner provided for herein shall be deemed a board of elections for the purpose of applying such section. (*Added by L. 1916, ch. 7.*)

§ 212. **Appointment, removal and examination of inspectors of election, poll clerks and ballot clerks.**—Inspectors of election, poll clerks and ballot clerks in and for the various election districts in the county of Monroe shall be appointed as follows: The chairmen of the county committees of the two political parties which at the last preceding general election of a governor cast the highest number of votes for governor shall each file with the commissioner of elections, on or before the first day of April of each year, a list of persons who are duly qualified to serve as inspectors of election, poll clerks and ballot clerks. The commissioner of elections shall thereafter examine each person whose name appears on such lists as to their qualifications for such offices. Such commissioners shall give each person whose name appears on such lists not less than three days' notice of such examination. Such notice must be either written or printed and state the date, time and place such examination is to be held and must be sent either by mail or special messenger. Any person receiving the notice shall appear before such commissioner of elections at the place fixed for such examination at the time stated in the notice, and the said commissioner of elections shall examine such person as to his qualifications for the office of inspector of election, poll clerk or ballot clerk, as the case may be. Such examination may be either written or oral or both, and if the person so examined is found by the commissioner to be qualified and is, in the judgment of the commissioner a fit and proper person for such office, the commis-

sioner or some person designated by him shall administer the constitutional oath of office and issue to him a certificate of appointment and he shall serve until his successor is appointed; but if such person is found disqualified or is, in the judgment of the commissioner, not a fit and proper person for such office, his name shall be stricken from the list. A supplemental list of persons for election officers may also be filed containing not more than ten names for each office. Additional supplemental lists for any election district may be filed at any time before the appointments for such district are made, or when a vacancy shall exist for any cause, and all appointments shall be made from the original list if those named therein are found disqualified as herein provided; if not so qualified, then from a supplemental list so filed. If no list is filed by a party, and if within three days after notice in writing by the commissioner to the chairman of the county committee of such party, no list is filed, the commissioner of elections may appoint qualified persons, members of the party in default, to act as election officers, and the enrollment of such person shall be sufficient evidence of the party affiliation of such person. If a qualified person cannot be obtained for any election office from the list or lists filed by a party, and if within three days after notice in writing by the commissioner of elections to the chairman of the county committee of such party, an additional list is not filed containing the name or names of one or more qualified persons, the commissioner of elections may fill such office by the appointment of a qualified person, a member of the party in default. The commissioner of elections shall from time to time, as he may deem necessary, hold a school for the instruction of inspectors of election and poll clerks. Such school shall not be held at any hour earlier than seven o'clock in the evening, and notice shall be given by the commissioner to each inspector of election and poll clerk stating the time and place such school will be held. The notice shall be by mail and either written or printed. If any inspector of election or poll clerk shall fail to attend such school after receiving notice thereof, the commissioner may remove him from office and fill the vacancy in the manner provided for in this article. Each election officer shall be paid one dollar for the time spent in attending a school of instruction, and the election officers of the towns of Monroe county, if such school be held at any place outside the town in which they respectively reside, shall be paid in addition the car fare going and returning from the school. The money due an election officer for attending a school of instruction shall be paid at the same time and in the same manner as the pay for his other services. The commissioner of elections shall have the power on any day of election, registration or primary election to remove from office forthwith any inspector of election, poll clerk or ballot clerk for intoxication or failure to perform his duty in a satisfactory manner and to make a temporary appointment to fill the vacancy caused by such removal. (*Added by L. 1916, ch. 7.*)

§ 213. Office for commissioner.—It shall be the duty of the board of

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supervisors of Monroe county to provide an office for such commissioner of elections suitable for the preservation of the records of said office and for the doing of the work devolved upon such commissioner under and by reason of this article and the necessary furniture thereof. The expense of providing and furnishing such office shall be a county charge and be audited and paid as other county expenses are paid. (*Added by L. 1916, ch. 7.*)

§ 214. **Custody of records.**—All books, documents, papers, records and election appliances or appurtenances held or used by or under the control of any officer or officers of Monroe county or of any political subdivision thereof or therein and relating to or used in the conduct of general or special elections or official primaries, including voting machines used and owned by any political subdivision of Monroe county shall, upon request of the commissioner of elections be transferred to the care, custody and control of such commissioner. (*Added by L. 1916, ch. 7.*)

§ 215. **Employees.**—The commissioner of elections may appoint such employees as the board of supervisors of Monroe county shall by resolution from time to time authorize, and such employees shall receive such salaries and compensation as such board shall by resolution fix and determine. Each employee shall perform such duties as the commissioner of elections shall prescribe and shall hold office at the pleasure of such commissioner. The salary of the commissioner of elections of Monroe county shall be three thousand dollars per annum. Such salaries and compensation shall be paid in the same manner as the salaries of the county officers are paid. (*Added by L. 1916, ch. 7.*)

§ 216. **Notices.**—All notices which are now or which hereafter may be required by law to be given by the secretary of state or any other officer to any officer of Monroe county or of any political subdivision thereof or therein relating to the holding of any election or official primary, and stating the officers to be elected or nominated or party positions to be filled thereat, or the questions to be voted upon by the people from and after the appointment and qualification of the first commissioner hereunder shall be communicated by the secretary of state or other officer to the commissioner of elections of Monroe county. (*Added by L. 1916, ch. 7.*)

§ 217. **Filing papers; general powers and duties of commissioner.**—All certificates of nomination for office to be voted for by the electors of Monroe county or any political subdivision thereof or therein at any election to which this article applies, all declinations of nomination for office, all certificates of nomination to fill vacancies caused by such declinations or by death, all designations, all declinations of designations, all certificates of designations to fill vacancies caused by such declinations, all statements of candidates' expenses, expenses of election or nomination, and all rules

and regulations of political parties otherwise required by law to be filed with any officer of Monroe county or any political subdivision thereof or therein, shall be filed in the office of the commissioner of elections hereby established, and such commissioner shall be the custodian of primary records for Monroe county and secretary of the county board of canvassers. The office of the commissioners shall be public and open on every business day of the year, during such reasonable hours as the commissioner shall designate. The commissioner may adopt rules and regulations for the conduct of his office, not inconsistent with this chapter. The official papers, records and documents of his office shall be public and open to inspection by any citizen of the state during office hours. Except as otherwise provided in this article, such commissioner shall have the powers and duties of a board of elections prescribed by this chapter or other statute and references to such board shall be deemed to mean and include such commissioner. (*Added by L. 1916, ch. 7.*)

§ 218. **Purchase of supplies, including voting machines; expenses of commissioner.**—When the common council of any city, the town board of any town or the board of trustees of any village in the county of Monroe shall have adopted voting machines, the commissioner of elections shall direct the purchase of the number of machines authorized by such local authorities, and may thereafter, when authorized by such local authorities, direct the purchase of new or additional machines for such city, town or village. The commissioner may direct the purchase of any kind of voting machines approved by the state board of voting machine commissioners or the use of which has been specifically adopted by law. All supplies or election appliances to be used or furnished by the commissioner of elections for election purposes shall be purchased by the purchasing agent of Monroe county as other county supplies are purchased. The commissioner is hereby authorized to cause all necessary repairs and alterations to be made and employ such help as may be necessary in making such repairs and in moving, setting up and caring for all election materials and appliances. All expenses for supplies, advertising, posting and circulation of election notices and printing lists of registered voters and other expenses arising from the conduct of elections in Monroe county or in any political subdivision thereof or therein, incurred by or under the direction of the commissioner of elections except the compensation of inspectors of election, poll clerks and ballot clerks, shall hereafter be a charge against the county or political subdivision thereof or therein, as specified in this chapter and shall be certified by the commissioner of elections and audited and paid as are other claims against such county; provided, however, that any city, town or village may, upon request of the local authorities, assume the payment of the cost of purchasing voting machines and shall have the power to issue bonds, certificates of indebtedness or other obligations which shall be a charge on the city, town or village, payable at such time or times as such

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authorities may determine, issued with or without interest and not issued or sold at less than par. (*Added by L. 1916, ch. 7.*)

§ 219. **Apportionment of expenses.**—Such commissioner of elections shall, on or before the first day of October in each year, certify to the clerk of the board of supervisors of Monroe county the total amount of the expenses of his office, including salaries for the preceding year, and shall certify to such clerk the portion of such expenses which under the provisions of law is to be borne by the county at large and the portions thereof which are to be borne by each political subdivision thereof or therein, and the clerk of such board in spreading taxes levied upon taxable property of such county or any political subdivision thereof or therein shall include in the amount spread upon the county at large and the political subdivision thereof or therein the amount so certified by the commissioner to be borne by the county at large or the political subdivision respectively. (*Added by L. 1916, ch. 7.*)

§ 220. **Publication of notices.**—All publications, advertising or posting of election notices required by law relating to general and special elections or official primaries to which this article applies and all notices of such elections or primaries as are required by law to be published, advertised or posted shall be published, advertised or posted by the commissioner of elections. (*Added by L. 1916, ch. 7.*)

§ 221. **Polling places, election districts, et cetera.**—It shall be the duty of the commissioner of elections at least thirty days before each primary day to fix the polling places for each primary district in Monroe county and on or before the first Tuesday in September in each year to fix the polling places for registration and election in each election district in Monroe county. It shall be the duty of the commissioner to create, alter or divide the various political subdivisions of Monroe county into election districts as provided for in sections two hundred and ninety-six and four hundred and nineteen of this chapter. Whenever the commissioner shall have created, altered or divided the election districts in any political subdivision of Monroe county he shall execute a certificate giving the boundaries of the new districts and file it in his office and make and file a copy thereof in the office of the city or town clerk, as the case may be, and also publish a description of such boundaries once in the paper designated to publish election notices. (*Added by L. 1916, ch. 7.*)

§ 222. **Voting machines.**—It shall be the duty of the commissioner of elections to cause the proper ballot labels to be placed on voting machines, and to cause the machines to be placed in proper order for voting and to examine all voting machines before they are sent out to the different polling places, and see that all the registering counters are set at zero (000), and lock all voting machines so that the counting machinery cannot be operated, and seal each one with a numbered metal seal. The commissioner

of elections may appoint a custodian of voting machines who shall, under the direction of the commissioner of elections, have charge of and represent the commissioner of elections during the preparation of the voting machines and serve at the pleasure of the commissioner, but not to exceed forty days for any one election. Before preparing a voting machine for an election written notice shall be mailed to the chairmen of the county committees of the two political parties which polled the greatest number of votes at the last preceding election of a governor, stating the time and place where the machines will be prepared; at which time and place one representative of each of such political parties, certified by the respective chairmen of the county committees of such parties, shall be entitled to be present and see that the machines are properly prepared and placed in proper condition for use at election. The custodian of voting machines and the party representatives shall take the constitutional oath of office and shall be paid five dollars for each day so employed, which shall be paid in the same manner as the salaries of county officers are paid. It shall be the duty of such representatives to be present at the preparation of voting machines for election and to see that the machines are properly prepared and that all the registering counters are set at zero (000). When a machine has been prepared for election it shall be the duty of such representatives to make a certificate in writing, which shall be filed in the office of the commissioner of elections, stating the number of the machine, whether or not all of the counters are set at zero (000), the number registered on the protective counter, if one is provided, and the number on the metal seal with which the machine is sealed. Such representatives shall perform their duties under the direction of the commissioner. It shall be the duty of the commissioner to cause the voting machines to be delivered at the respective polling places in which they are to be used at least one hour before the time set for the opening of the polls. (*Added by L. 1916, ch. 7.*)

§ 223. Construction of article.—Nothing in this article shall be construed to affect or limit the powers of the board of supervisors of Monroe county or the town board of any town, or the village trustees of any village, in such county, as boards of canvassers for the county, towns and villages respectively. Nor shall this article apply to elections held in cities, towns or villages where elections are held at a time other than at the time of general elections. Where the provisions of this article are inconsistent with other provisions of this chapter or other statutes, the provisions of this article shall be controlling. (*Added by L. 1916, ch. 7.*)

ARTICLE 7-B.

(Added by L. 1917, ch. 202, in effect Apr. 17, 1917.)

COMMISSIONER OF ELECTIONS IN THE COUNTY OF NIAGARA.

Constitutionality.—L. 1917, ch. 202 adding this article, entitled "An act to amend the election law, in relation to commissioner of elections in Niagara County," has been held unconstitutional at a special term of the supreme court.

Section 225. Commissioner of elections for Niagara county.

226. Appointment, qualifications and removal of commissioner.

227. Appointment, removal and examination of inspectors of election, poll clerks and ballot clerks.

228. Office for commissioner.

229. Custody of records.

230. Employees.

231. Notices.

232. Filing papers; general powers and duties of commissioner.

233. Purchase of supplies, including voting machines; expenses of commissioner.

234. Apportionment of expenses.

235. Publication of notices.

236. Polling places, election districts, et cetera.

237. Voting machines.

238. Construction of article.

§ 225. **Commissioner of elections for Niagara county.**—The office of commissioner of elections in the county of Niagara is hereby created, and all the rights, powers, authority, duties and obligations immediately heretofore by law vested in and imposed upon any officer or officers of the county of Niagara or any political subdivision thereof or therein, excepting the appointment, duties and obligations of inspectors of election, poll clerks and ballot clerks, who shall be appointed as hereinafter provided and serve as provided by law with respect to general or special elections and official primaries in the county of Niagara or in any political subdivision thereof or therein, except elections held at a time other than the time of the general election, or of village and school district officers, and special elections for town, village and school district purposes held at such other time, shall, by force of and as an effect of this article, be transferred to and be continued in the commissioner of elections in the county of Niagara hereby created from and after the time of appointment and qualification of the first commissioner hereunder. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 226. **Appointment, qualifications and removal of commissioner.**—Within five days after this article takes effect the county judge, county clerk and the district attorney of Niagara county, or a majority of them, shall appoint a commissioner of elections who must be a resident voter of such county and shall file in the office of the clerk of such county a certificate of the appointment. Such commissioner of elections shall take the constitutional

oath of office and file the same in the county clerk's office and shall hold office for a term of five years; his successor to be appointed in like manner. Such term of office, except as otherwise provided in this section, shall begin on the first day of May in every fifth year, beginning with the year nineteen hundred and twenty-two. The term of the commissioner first appointed hereunder shall begin on the day the appointment is made and expire on May first, nineteen hundred and twenty-two. In case of a vacancy in the office of commissioner of elections, such county judge, county clerk and district attorney, or a majority of them, shall appoint a resident voter of Niagara county to fill such vacancy and shall file a certificate of such appointment in the office of the clerk of Niagara county. The person so appointed shall take the constitutional oath of office and serve the remainder of the term. The commissioner of elections appointed pursuant to this article shall be subject to removal by the governor in like manner as sheriffs of counties. Upon the appointment and qualification, pursuant to this section, of the first commissioner for such county, the board of elections therein shall be deemed abolished; and the terms of office of its members shall then expire. The provisions of article seven of this chapter shall not thereafter apply to the county of Niagara except section one hundred and ninety-nine; and the commissioner provided for herein shall be deemed a board of elections for the purpose of applying such section. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 227. **Appointment and removal of inspectors of election, poll clerks and ballot clerks.**—Inspectors of election, poll clerks and ballot clerks in and for the various election districts in the county of Niagara shall be appointed as follows: The chairmen of the county committees of the two political parties which at the last preceding general election of a governor cast the highest number of votes for governor shall each file with the commissioner of elections, on or before the first day of April of each year, a list of persons who are duly qualified to serve as inspectors of election, poll clerks and ballot clerks. If the person so named is found by the commissioner to be qualified and is, in the judgment of the commissioner, a fit and proper person for such office, the commissioner or some person designated by him shall administer the constitutional oath of office and issue to him a certificate of appointment and he shall serve until his successor is appointed; but if such person is found disqualified or is, in the judgment of the commissioner, not a fit and proper person for such office his name shall be stricken from the list. A supplemental list of persons for election officers may also be filed containing not more than ten names for each office. Additional supplemental lists for any election district may be filed at any time before the appointments for such districts are made, or when a vacancy shall exist for any cause, and all appointments shall be made from the original list if those named therein are found disqualified as herein provided; if not so qualified, then from a supplemental list so filed. If no list is filed by a party, and if

within three days after notice in writing by the commissioner to the chairman of the county committee of such party no list is filed, the commissioner of elections may appoint qualified persons, members of the party in default, to act as election officers, and the enrollment of such persons shall be sufficient evidence of the party affiliation of such person. If a qualified person cannot be obtained for any election office from the list or lists filed by a party, and if within three days after notice in writing by the commissioner of elections to the chairman of the county committee of such party an additional list is not filed containing the name or names of one or more qualified persons, the commissioner of elections may fill such office by the appointment of a qualified person, a member of the party in default. The commissioner of elections may from time to time, as he may deem necessary, hold a school for the instruction of inspectors of election and poll clerks. Such school shall not be held at any hour earlier than seven o'clock in the evening, and notice shall be given by the commissioner to each inspector of election and poll clerk stating the time and place such school will be held. The notice shall be by mail and either written or printed. If any inspector of election or poll clerk shall fail to attend such school after receiving notice thereof, the commissioner may remove him from office and fill the vacancy in the manner provided for in this article. Each election officer shall be paid one dollar for the time spent in attending a school of instruction, and the election officers of the towns of Niagara county, if such school be held at any place outside the town in which they respectively reside, shall be paid in addition the car fare going and returning from the school. The money due an election officer for attending a school of instruction shall be paid at the same time and in the same manner as the pay for his other services. The commissioner of elections shall have the power on any day of election, registration or primary election to remove from office forthwith any inspector of election, poll clerk or ballot clerk for intoxication or failure to perform his duty in a satisfactory manner and to make a temporary appointment to fill the vacancy caused by such removal. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 228. Office for commissioner.—It shall be the duty of the board of supervisors of Niagara county to provide an office for such commissioner of elections suitable for the preservation of the records of said office and for the doing of the work devolved upon such commissioner under and by reason of this article and the necessary furniture thereof. The expense of providing and furnishing such office shall be a county charge and be audited and paid as other county expenses are paid. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 229. Custody of records.—All books, documents, papers, records and election appliances or appurtenances held or used by or under the control of any officer or officers of Niagara county or of any political subdivision thereof or therein and relating to or used in the conduct of general or spe-

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cial elections or official primaries, including voting machines used and owned by any political subdivision of Niagara county, shall, upon request of the commissioner of elections, be transferred to the care, custody and control of such commissioner. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 230. **Employees.**—The commissioner of elections is hereby authorized and empowered to appoint a deputy commissioner of elections, who shall perform such duties as the commissioner of elections shall prescribe, and also a secretary to the commissioner, who shall each hold office at the pleasure of the said commissioner, and such additional employees as the board of supervisors of Niagara county shall, by resolution, from time to time authorize; and such additional employees shall receive such salaries and compensation as the said board of supervisors shall, by resolution, fix and determine. Each of such employees shall perform such duties as the commissioner of elections shall prescribe and shall each hold office at the pleasure of said commissioner. The salary of the commissioner of elections of Niagara county shall be two thousand dollars per annum, the salary of the deputy commissioner of elections shall be fixed by the commissioner at not to exceed one thousand four hundred dollars per annum, and the salary of the secretary to the commissioner shall be fixed by the commissioner at not to exceed one thousand one hundred dollars per annum. Such salaries and compensation shall be paid in the same manner as the salaries of the county officers are paid. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 231. **Notices.**—All notices which are now or which hereafter may be required by law to be given by the secretary of state or any other officer to any officer of Niagara county or of any political subdivision thereof or therein relating to the holding of any election or official primary, and stating the officers to be elected or nominated or party positions to be filled thereat, or the questions to be voted upon by the people from and after the appointment and qualification of the first commissioner hereunder, shall be communicated by the secretary of state or other officer to the commissioner of elections of Niagara county. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 232. **Filing papers; general powers and duties of commissioner.**—All certificates of nomination for office to be voted for by the electors of Niagara county or any political subdivision thereof or therein at any election to which this article applies, all declinations of nominations for office, all certificates of nomination to fill vacancies caused by such declinations or by death, all designations, all declinations of designations, all certificates of designations to fill vacancies caused by such declinations, all statements of candidates' expenses, expenses of election or nomination, and all rules and regulations of political parties otherwise required by law to be filed with any officer of Niagara county or any political subdivision thereof or

therein, shall be filed in the office of the commissioner of elections hereby established, and such commissioner shall be the custodian of primary records for Niagara county and secretary of the county board of canvassers. The office of the commissioner shall be public and open on every business day of the year, during such reasonable hours as the commissioner shall designate. The commissioner may adopt rules and regulations for the conduct of his office not inconsistent with this chapter. The official papers, records and documents of his office shall be public and open to inspection by any citizen of the state during office hours. Except as otherwise provided in this article, such commissioner shall have the powers and duties of a board of elections prescribed by this chapter or other statute and references to such board shall be deemed to mean and include such commissioner. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 233. **Purchase of supplies, including voting machines; expenses of commissioner.**—When the common council of any city, the town board of any town or the board of trustees of any village in the county of Niagara shall have adopted voting machines, the commissioner of elections shall direct the purchase of the number of machines authorized by such local authorities, and may thereafter, when authorized by such local authorities, direct the purchase of new or additional machines for such city, town or village. The commissioner may direct the purchase of any kind of voting machines approved by the state board of voting machine commissioners or the use of which has been specifically adopted by law. All supplies or election appliances to be used or furnished by the commissioner of elections for election purposes shall be purchased by such commissioner. The commissioner is hereby authorized to cause all necessary repairs and alterations to be made and employ such help as may be necessary in making such repairs and in moving, setting up and caring for all election materials and appliances. All expenses for supplies, advertising, posting and circulation of election notices and printing lists of registered voters and other expenses arising from the conduct of elections in Niagara county or in any political subdivision thereof or therein, incurred by or under the direction of the commissioner of elections, except the compensation of inspectors of election, poll clerks and ballot clerks, shall hereafter be a charge against the county or political subdivision thereof or therein, as specified in this chapter, and shall be certified by the commissioner of elections and audited and paid as are other claims against such county; provided, however, that any city, town or village may, upon request of the local authorities, assume the payment of the cost of purchasing voting machines and shall have the power to issue bonds, certificates of indebtedness or other obligations which shall be a charge on the city, town or village, payable at such time or times as such authorities may determine, issued with or without interest and not issued or sold at less than par. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 234. **Apportionment of expenses.**—Such commissioner of elections shall, on or before the first day of October in each year, certify to the clerk of the board of supervisors of Niagara county the total amount of the expenses of his office, including salaries for the preceding year, and shall certify to such clerk the portion of such expenses which under the provisions of law is to be borne by the county at large and the portions thereof which are to be borne by each political subdivision thereof or therein and the clerk of such board in spreading taxes levied upon taxable property of such county or any political subdivision thereof or therein shall include in the amount spread upon the county at large and the political subdivision thereof or therein the amount so certified by the commissioner to be borne by the county at large or the political subdivision respectively. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 235. **Publication of notices.**—All publications, advertising or posting of election notices required by law relating to general and special elections or official primaries to which this article applies and all notices of such elections or primaries as are required by law to be published, advertised or posted shall be published, advertised or posted by the commissioner of elections. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 236. **Polling places, election districts, et cetera.**—It shall be the duty of the commissioner of elections at least thirty days before each primary day to fix the polling places for each primary district in Niagara county and on or before the first Tuesday in September in each year to fix the polling places for registration and election in each election district in Niagara county. It shall be the duty of the commissioner to create, alter or divide the various political subdivisions of Niagara county into election districts as provided for in sections two hundred and ninety-six and four hundred and nineteen of this chapter. Whenever the commissioner shall have created, altered or divided the election districts in any political subdivision of Niagara county he shall execute a certificate giving the boundaries of the new districts and file it in his office and make and file a copy thereof in the office of the city or town clerk, as the case may be, and also publish a description of such boundaries once in the paper designated to publish election notices. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 237. **Voting machines.**—It shall be the duty of the commissioner of elections to cause the proper ballot labels to be placed on voting machines, and to cause the machines to be placed in proper order for voting and to examine all voting machines before they are sent out to the different polling places, and see that all the registering counters are set at zero (000), and lock all voting machines so that the counting machinery cannot be operated, and seal each one with a numbered metal seal. The commissioner of elections may appoint a custodian of voting machines who shall, under the direction of the commissioner of elections, have charge of and represent the com-

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missioner of elections during the preparation of the voting machines and serve at the pleasure of the commissioner, but not to exceed forty days for any one election. Before preparing a voting machine for an election written notice shall be mailed to the chairmen of the county committees of the two political parties which polled the greatest number of votes at the last preceding election of a governor, stating the time and place where the machines will be prepared; at which time and place one representative of each of such political parties, certified by the respective chairmen of the county committees of such parties, shall be entitled to be present and see that the machines are properly prepared and placed in proper condition for use at election. The custodian of voting machines and the party representatives shall take the constitutional oath of office and shall be paid five dollars for each day so employed, which shall be paid in the same manner as the salaries of county officers are paid. It shall be the duty of such representatives to be present at the preparation of voting machines for election and to see that the machines are properly prepared and that all the registering counters are set at zero (000). When a machine has been prepared for election it shall be the duty of such representatives to make a certificate in writing, which shall be filed in the office of the commissioner of elections, stating the number of the machine, whether or not all of the counters are set at zero (000), the number registered on the protective counter, if one is provided, and the number on the metal seal with which the machine is sealed. Such representatives shall perform their duties under the direction of the commissioner. It shall be the duty of the commissioner to cause the voting machines to be delivered at the respective polling places in which they are to be used at least one hour before the time set for the opening of the polls. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

§ 238. Construction of article.—Nothing in this article shall be construed to affect or limit the powers of the board of supervisors of Niagara county or the town board of any town, or the village trustees of any village, in such county, as boards of canvassers for the county, towns and villages respectively. Nor shall this article apply to elections held in cities, towns or villages where elections are held at a time other than at the time of general elections. Where the provisions of this article are inconsistent with other provisions of this chapter or other statutes, the provisions of this article shall be controlling. (*Added by L. 1917, ch. 202, in effect April 17, 1917.*)

Art. 8, §§ 210–221. Commissioner of elections in Erie county.—*Repealed by L. 1911, ch. 649, in effect July 13, 1911; § 216 amended by L. 1910, ch. 433; §§ 218, 219, 221 amended by L. 1910, ch. 431.*

Art. 9, §§ 230–242. Commissioner of elections in Monroe county.—*Repealed by L. 1911, ch. 649.*

Art. 10, §§ 250–260. Commissioners of election in Onondaga county.—*Repealed by L. 1911, ch. 649; § 253 amended by L. 1910, ch. 172.*

Art. 11, §§ 270-281. Commissioner of elections in Westchester county.—
Repealed by L. 1911, ch. 649.

ARTICLE XVIII.

(Former Art. 12, renumbered by L. 1913, ch. 800.)

TIMES, PLACES, NOTICES, OFFICERS AND EXPENSES OF ELECTIONS.

- Section 290. Date of general election.
291. Time of opening and closing polls.
292. Filling vacancies in elective offices.
293. Notices of elections.
294. Notice of submission of proposed constitutional amendments or other propositions or questions.
295. Publication of concurrent resolutions, proposed constitutional amendments and other propositions.
296. Creation, division and alteration of election districts.
297. Abolition, consolidation or changing of election districts in towns.
298. Maps and certificates of boundaries of election districts.
299. Designation of places for registry and voting.
300. Equipment of polling places.
- 300-a. Display of American flag.
301. Publication of list of registration and polling places.
302. Election officers; designation, number and qualifications.
303. Appointment of election officers in cities.
304. Authentication of party lists.
305. Examination as to qualifications.
306. Party selection in the city of New York.
307. Oath of office; certificate of appointment.
308. Removals; vacancies; transfers.
309. Certificates of service; exemption from jury duty; payment.
310. Special penalties.
311. Appointment of inspectors of election in towns.
312. Appointment of poll clerks and ballot clerks in towns.
313. Supplying vacancies and absences.
314. Organization of boards of inspectors.
315. Preservation of order by inspectors.
316. Ballot boxes.
317. Voting booths and guard-rails.
318. Apportionment of election expenses.
319. Fees of election officers and others.
320. Delivery of election laws to clerks, boards and election officers.

§ 290. Date of general election.—A general election shall be held annually on the Tuesday next succeeding the first Monday in November.

Source.—Former Elec. L. (L. 1896, ch. 909) § 2.

References.—Elections in cities of first or second-class to be in odd year. Const., art. 12, § 3. Public holiday. General Construction Law, § 24. Negotiable Instruments Law, § 145. Sale of liquor on. Liquor Tax Law, § 30. Tolls on plank-road, etc., not to be exacted from voters on election day. Transportation Corporation Law, § 130.

L. 1909, ch. 22. Times, places, notices, officers, etc., of elections. §§ 291, 292.

§ 291. Time of opening and closing polls.—The polls of every general election, and, unless otherwise provided by law, of every other election shall be opened at six o'clock in the forenoon and shall close at five o'clock in the afternoon. There shall be no adjournment or intermission until the polls are closed. Electors entitled to vote who are in the polling place at or before five o'clock in the afternoon shall be allowed to vote. (*Amended by L. 1911, ch. 649, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 3, as amended by L. 1898, ch. 335; L. 1901, ch. 654.

Consolidators' note.—The last two sentences of the old section making it unlawful to sell, etc., liquor on any general or special election day within a quarter of a mile of any voting place, while the polls are open, and making a violation a misdemeanor, are here omitted. L. 1904, ch. 205, amended a similar provision in § 31 of the Liquor Tax Law (L. 1896, ch. 112), and being the later act, superseded the provision here omitted.

Statute directory as to time of opening and closing. *People v. Cook* (1853), 8 N. Y. 67, 91; but whether permissive or mandatory, the election officers are bound to obey the provisions of the statute. *Newcomb v. Leary* (1908), 128 App. Div. 329, 112 N. Y. Supp. 657.

The delivery of official ballots to electors must cease at five o'clock, and no person who has not received a ballot before that time can vote. *Newcomb v. Leary* (1908), 128 App. Div. 329, 112 N. Y. Supp. 657.

Electors who have received their ballots before five o'clock should be permitted to cast them. Rept. of Atty. Genl. (1908) 409.

Where voting machines are used, each voter whose qualifications have been passed upon and approved by the inspectors at five o'clock are entitled to complete the act of voting after that hour. Rept. of Atty. Genl. (1908) 548.

Inapplicable to town meeting held at a different time than that of a general election. *People ex rel. Fisher v. Hasbrouck* (1897), 21 Misc. 188, 47 N. Y. Supp. 109; *People ex rel. Van Sickle v. Austin* (1897), 20 App. Div. 1, 46 N. Y. Supp. 526.

Village elections.—Inapplicable to election on question of incorporating a village. *Matter of Taylor* (1896), 3 App. Div. 244, 38 N. Y. Supp. 348, *affd.* (1896), 150 N. Y. 242, 44 N. E. 790.

Village Law governs the opening and closing of the polls at a village election. Rept. of Atty. Genl. (1896) 93.

§ 292. Filling vacancies in elective offices.—A vacancy occurring before October fifteenth of any year in any office authorized to be filled at a general election, shall be filled at the general election held next thereafter, unless otherwise provided by the constitution, or unless previously filled at a special election. Upon the failure to elect to any office, except that of governor or lieutenant-governor, at a general or special election, at which such office is authorized to be filled, or upon the death or disqualification of a person elected to office before the commencement of his official term, or upon the occurrence of a vacancy in any elective office which can not be filled by appointment for a period extending to or beyond the next general election at which a person may be elected thereto, the governor may in his discretion make proclamation of a special election to fill such office, specifying the district or county in which the

election is to be held, and the day thereof, which shall be not less than thirty nor more than forty days from the date of the proclamation.

A special election shall not be held to fill a vacancy in the office of a representative in congress unless such vacancy occurs on or before the first day of July of the last year of the term of office, or unless it occurs thereafter and a special session of congress is called to meet before the next general election, or be called after October fourteenth of such year; nor to fill a vacancy in the office of state senator, unless the vacancy occurs before the first day of April of the last year of the term of office; nor to fill a vacancy in the office of a member of assembly, unless occurring before the first day of April in any year, unless the vacancy occurs in either such office of senator or member of assembly after such first day of April and a special session of the legislature to be called to meet between such first day of April and the next general election or be called after October fourteenth in such year. If a special election to fill an office shall not be held as required by law, the office shall be filled at the next general election. (*Amended by L. 1911, ch. 891, § 62.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 4, as amended by L. 1907, ch. 119.

References.—Legislature to provide for filling of vacancies, Const., art. 10, § 5. Vacancies in office of judge of court of appeals, justice of supreme court, county judge or surrogate, Const., art 6, §§ 8, 4, 15. What constitutes vacancy. Public Officers Law, § 30. Filling vacancies in elective offices generally. Public Officers Law, §§ 40, 41. Term of office of officer chosen to fill vacancy, Id. § 38.

Application.—This section relates only to general elections and does not apply to a town meeting held at a time different than a general election. *People ex rel. Lovett v. Randall* (1895), 12 Misc. 619, 34 N. Y. Supp. 450, *affd.* (1895), 91 Hun 266, 36 N. Y. Supp. 202, *affd.* (1897), 151 N. Y. 597, 45 N. E. 841.

Power of Governor to call special elections.—The provision which limits the power of the Governor to call an election when vacancies occur within the term, to cases where the office "cannot be filled by appointment" does not refer to a failure to elect before the term begins. *Atty. Genl. Opin.* (1915), 6 State Dep. Rep. 416.

The Governor may, in his discretion, under the provisions of this section, proclaim a special election to fill the office of supervisor in the wards of a city of the second class, where there has been a tie vote. *Atty. Genl. Opin.* (1915), 6 State Dep. Rep. 416.

The Governor may call a special election to fill a vacancy caused by the death of a sheriff after October 15, 1916. *People ex rel. Conklin v. Boyle* (1917), 98 Misc. 364, 163 N. Y. Supp. 72.

Vacancy in office of city recorder to be filled pursuant to this provision. *Rept. of Atty. Genl.* (1903) 503; *Rept. of Atty. Genl.* (1904) 205.

The provision that vacancies in an office such as sheriff occurring before October fifteenth shall be filled at the following general election, and so impliedly holding that vacancies occurring after that date and before election day shall not be filled at that election, is a reasonable and valid enactment. *People ex rel. Conklin v. Boyle* (1917), 98 Misc. 364, 163 N. Y. Supp. 72.

Newly-created office constitutes a vacancy. *Matter of Collins* (1896), 16 Misc. Rep. 598, 40 N. Y. Supp. 517.

Vacancies in office of representative in congress.—Where a Representative in Congress elected for the term beginning March 4, 1913, and ending March 4, 1915, died

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on September 1, 1913, a board of elections may, under this section of the Election Law, place the name of a candidate to fill the vacancy upon the official ballot, although the Governor of the State has not issued a certificate of election to fill said vacancy as provided by article 1, section 2, subdivision 4, of the Constitution of the United States. *Matter of Wilkins* (1913), 158 App. Div. 523, 143 N. Y. Supp. 758.

Where a vacancy in office of Congressman is caused by death, after July 1st, unless there is a special session of Congress called as specified in section 292 of the Election Law, the vacancy should be filled at the next general election. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 368.

Where a member of Congress dies on or after October 15th and before the general election, the vacancy so caused may not be filled at the general election. *Rept. of Atty. Genl.* (1912), Vol. 2, p. 502.

The Governor is authorized in his discretion to make a proclamation of a special election to fill the anticipated vacancy created by the death of a Representative in Congress who died on the 4th day of December following his election. *Rept. of Atty. Genl.* (1914) 392.

Where a vacancy occurs in the office of sheriff between the fifteenth of October and the general election day in November following, it cannot be filled at that election, but a special election should be called for that purpose, of which not less than thirty or more than forty days' notice must be given. *Matter of Mitchell v. Boyle* (1916), 219 N. Y. 242, 114 N. E. 382, revg. (1916), 175 App. Div. 905, 161 N. Y. Supp. 1135.

§ 293. **Notices of elections.**—The secretary of state shall, at least two months before each general election, make and transmit to the custodian of primary records a notice under his hand and official seal, stating the day upon which such election shall be held, and stating each officer, except city, village and town officers, who may be lawfully voted for at such election by the electors of such county or any part thereof. If any such officer is to be elected to fill a vacancy, the notice shall so state. The secretary of state shall forthwith, upon the filing in his office of the governor's proclamation ordering a special election, make and transmit to the custodian of primary records, a like notice of the officers to be voted for at such special election in such county or city or any part thereof, and cause such proclamation to be published in the newspapers published in such county having large circulation therein, at least once a week until such election shall be held.

Each custodian of primary records shall forthwith, upon the receipt of either such notice, file and record the same in his office, and shall cause a copy of such notice to be published once in each week, if it relates to a special election, until the election therein specified, and otherwise twice in each of the two months preceding the election, in the newspapers designated to publish election notices. They shall also publish, as a part of such notice, a list of all city, village and town officers who may lawfully be voted for at such election by the electors of such county or any part thereof; and the city, village and town clerks of each county shall, at least two months before each general election, make and transmit to the custodian of primary records a notice under their respective hands and official seals, stating each city, village or town officer to be voted for at

such election. They shall not publish, as a part of such notice, the text of proposed constitutional amendments or other propositions or questions included in the notice of the general election received from the secretary of state under this section nor the abstract of such proposed amendment, proposition or question, included in such notice by the secretary of state. (*Amended by L. 1911, ch. 649, and L. 1913, ch. 820.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 5, as amended by L. 1897, ch. 379; L. 1901, chs. 95 and 232; L. 1905, ch. 643.

References.—Designation of newspapers for publication of session laws and election notices. County Law, §§ 20–22.

Expense of publishing election notice.—Where the county clerk delivers to the publisher of a newspaper a quantity of matter with instructions to publish only that portion thereof which is necessary to comply with the Election Law, the publisher assumes the responsibility of preparing from the material delivered to him a proper election notice, and of publishing the same. He is not entitled to receive compensation for matter published which should not have been published. *People ex rel. Herrick v. Supervisors of Allegany* (1905), 105 App. Div. 40, 93 N. Y. Supp. 426.

Publication of election notices in New York City.—The board of aldermen of the city of New York, and not the board of elections, is authorized to designate newspapers to publish notices of elections, and when newspapers have been designated for such purpose by the board of aldermen, they can recover from the city the amount to be paid for publishing such notices. *Standard Pub. Co. v. City of New York* (1906), 111 App. Div. 260, 97 N. Y. Supp. 740.

§ 294. Notice of submission of proposed constitutional amendments or other propositions or questions.—Every amendment to the constitution proposed by the legislature, unless otherwise provided by law, shall be submitted to the people for approval at the next general election, after action by the legislature in accordance with the constitution; and whenever any such proposed amendment to the constitution or other proposition, or question provided by law to be submitted to a popular vote, shall be submitted to the people for their approval, the secretary of state shall include in his notice of the general election, a copy of the text of such amendment, proposition or question, setting out all new matter in italics and inclosing in brackets all matter to be eliminated from existing law, and at the bottom of each page shall be appended the words, *Explanation*—Matter in italics is new; matter in brackets [] is old law to be omitted. In addition to the text, such notice shall contain an abstract of such proposed amendment, proposition or question, prepared by said secretary with the advice of the attorney-general, concisely stating the purpose and effect thereof. If more than one such amendment, proposition or question is to be voted upon at such election, such amendments, propositions or questions respectively shall be separately and consecutively numbered. The clerk of each county, except the clerk of any county having a commissioner or board of elections, the commissioner of elections of each county wherein such commissioner has been appointed and the board of elections of the city of New York shall forthwith, upon

receipt of such notice, cause printed copies thereof to be made and on the first day of registration shall cause an adequate number of such printed copies to be placed in the places designated pursuant to the provisions of this act, for the meetings for registration and distributed therein by the chairman of the board of inspectors on each day of registration to the electors applying for registration. If such amendment, proposition or question is to be submitted at a special election, the secretary of state shall, at least twenty days before the election, make and transmit to each county clerk, except the clerk of any county having a commissioner or board of elections, the commissioner of elections of each county wherein such commissioner has been appointed, and the board of elections of the city of New York a like notice. Each county clerk and commissioner of elections aforesaid and the board of elections of the city of New York, shall, forthwith upon the receipt of such notice, file and record it in his office, and shall cause a copy of such notice to be published once a week until the election therein specified in the newspapers designated to publish election notices, and in addition thereto on the day of registration for such special election, each clerk of a county, except the clerk of any county having a commissioner or board of elections, the commissioner of elections of each county wherein such commissioner has been appointed and the board of elections of the city of New York shall cause an adequate number of such notices to be printed and placed in the places designated for the meeting for registration for such special election, and distributed therein by the chairman of the board of inspectors to the electors applying for registration. In election districts where personal registration of electors is not required, after the last day of the registration the inspectors of election shall deliver to the town clerk all of the printed copies of such notices remaining in their hands and the town clerk shall within five days after receipt of the same mail a copy thereof to each registered elector in such town, who has not received such copy from the inspectors. The expense thus incurred shall be a county charge and paid accordingly. The inspectors of election at the time of making up their registry list shall indicate in a suitable manner the name of each elector to whom they have delivered in person printed copies of such proposed amendment, proposition or question, and abstract. (*Amended by L. 1910, ch. 446.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 6, as amended by L. 1897, ch. 379; L. 1901, ch. 95; L. 1905, ch. 643.

Consolidators' note.—After "notice" the words "to the county clerk and the board of elections of the city of New York, and the commissioner of elections of the county of Erie," are omitted as unnecessary, the character of the notice being fully prescribed in the preceding section.

References.—Submission of constitutional amendments, Const., art. 14. Designation of newspapers to publish election notices, County Law, § 22.

Numbering propositions.—Provision not applicable to questions relating to the selling of liquor. *Matter of Webster* (1906), 50 Misc. 253, 100 N. Y. Supp. 508, *affd.* (1906), 113 App. Div. 888, 98 N. Y. Supp. 1116.

Details of a plan adopted by two municipalities and submitted to the electors for their approval need not be separately stated and numbered, provided that they are all germane to the main question submitted and facilitate its accomplishment. *Mead v. Turner* (1909), 134 App. Div. 691, 119 N. Y. Supp. 526, affg. (1908), 60 Misc. 145, 112 N. Y. Supp. 127.

Form of election notice containing constitutional amendments and other propositions. Rept. of Atty. Genl. (1909) 317. Election notices, containing constitutional amendments, form of. Rept. of Atty. Genl. (1905) 276.

Erroneous direction of legislature.—Proposed amendments to the Constitution cannot be submitted, under this section, where the Legislature has erroneously directed that they be referred to the Legislature to be chosen at the next general election. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 535.

§ 295. Publication of concurrent resolutions, proposing constitutional amendments and other propositions.—The secretary of state shall cause each concurrent resolution of the two houses of the legislature agreeing to a proposed amendment to the constitution, which is referred to the legislature to be chosen at the next general election of senators, to be published once, three months before such election, and thereafter twice in each of the three months next preceding such election in two newspapers published in each county representing the two political parties polling the highest number of votes at the then last preceding general election and in one additional newspaper published in each county for every one hundred thousand people in such county as shown by the then last preceding federal or state enumeration. Such additional newspapers shall be selected by the secretary of state with reference to making such publication in newspapers having the largest circulation in the county in which they are published. If such resolution does not state that such proposed amendment is so referred to such legislature, the secretary of state shall publish, in connection with the publication of such concurrent resolution, a statement that such amendment is referred to the legislature to be chosen at the next general election.

The secretary of state shall cause such proposed amendment to the constitution or other proposition or question, which is by law to be submitted to the voters of the state at a general or special election, to be published for a like period before such election in newspapers selected in like manner, together with a brief statement of the law or proceedings authorizing such submission, the fact that such submission will be made and the reading form in which it is to be submitted. If such proposed amendment or other proposition or question is to be submitted at a special election, to be held less than three months from the time of appointing it, the first publication in each newspaper shall be made as soon as practicable after such appointment, and shall continue once in each week to the time of the election. (*Amended by L. 1913, ch. 820 and L. 1914, ch. 244.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 7.

References.—Additional publication, County Law, § 20; Legislative Law, § 48.

Designation of papers to publish concurrent resolutions.—It seems that it was the legislative intent to leave the time of the selection and designation of news-

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papers to the secretary of state, provided, however, that the publication commence at least three months before the general election of senators. Rept. of Atty. Genl. (1908) 160.

Certiorari to review arbitrary designation of newspapers. People ex rel. Press Co. v. Martin (1894), 142 N. Y. 228, 36 N. E. 885.

Notice, what to contain.—The notices of election published by the commissioners of elections need not include the text of a proposition printed in the notice issued by the Secretary of State. Rept. of Atty. Genl. (1912), Vol. 2, p. 384. See also Rept. of Atty. Genl. (1909) 317. Rept. of Atty. Genl. (1909) 320.

§ 296. Creation, division and alteration of election districts.—Every town or ward of a city not subdivided into election districts shall be an election district. The town board of every town containing more than four hundred voters and the common council of every city except New York and Buffalo, in which there shall be a ward containing more than four hundred voters, shall, on or before the first day of July in each year, whenever necessary so to do, divide such town or ward respectively into election districts, to take effect on the sixth Wednesday before the general election in such year, each of which shall be compact in form, wholly within the town or ward, and shall contain respectively as near as may be, three hundred voters, but no such ward or town shall be again divided into election districts until, at some general election, the number of votes cast in one or more districts thereof shall exceed three hundred and fifty; and in such case the redivision shall apply only to the town or ward in which such district is situated; provided, however, that in cities of the third class the common council, or other board or body charged with like duties, by resolution duly adopted at the time and to take effect as hereinbefore provided for the division of wards into election districts, may direct that wards in such city having five hundred and fifty voters or less shall not be divided but shall constitute one election district; or, that wards having five hundred voters or less, which have been divided into election districts pursuant to the foregoing provisions of this section, shall be consolidated into one election district. Such resolution shall fix and determine the polling place for such election district or consolidated districts and in all such cases it shall be the duty of the common council, or other board or body charged with like duties, to furnish such polling place with one booth for each seventy-five voters in such election district or consolidated districts, as shown by the last preceding registration of voters in such ward. If any part of a city shall be within a town, the town board shall divide into election districts only that part of the town which is outside of the city. No election district including any part of a city shall include any part of a town outside of a city.

A town or ward of a city containing less than four hundred voters, or an election district of a town containing less than three hundred voters may, in any year not later than the first day of July, be divided into election districts by the board or other body charged with such duty, to take effect on the sixth Wednesday before the general election in such year,

when, in the judgment of such board or body, the convenience of the voters shall be promoted thereby. Upon the creation, division or alteration of an election district outside of a city, and on or before September first the town board shall appoint four inspectors of election for each election district so created, divided or altered, to take effect on or before the first day of registration thereafter and not earlier than the second Wednesday following the next fall primary, who shall be equally divided between the two parties entitled to representation on boards of inspectors. If the creation, division or alteration of an election district is rendered necessary by the creation, division or alteration of a town, ward or city or rendered necessary or occasioned by the division of a county into assembly districts after a reapportionment by the legislature of members of assembly, such creation, division or alteration of an election district shall be made and shall take effect immediately; and inspectors of election for the new election district as so created, divided or altered shall be appointed, in the manner provided by law, a reasonable time before the next official primary or meeting for registration and such appointments shall take effect immediately. If a town shall include a city, or a portion of a city, only such election districts as are wholly outside of a city shall be deemed election districts of the town, except for the purpose of town meetings.

The board of elections of the city of New York and county of Erie shall divide the cities of New York and Buffalo, respectively, into election districts on or before the first day of July in any year whenever necessary so to do as herein provided, to take effect on the sixth Wednesday before the general election in such year. Each election district in the counties within the city of New York shall contain, so far as possible, four hundred voters, provided, however, that any election district containing less than two hundred voters, in such counties, made necessary by the crossing of congressional lines with other political divisions, may be consolidated with a contiguous election district in any year when no representative in congress is to be voted for in such district. Such election districts so established in the city of New York shall not again be changed until at some general election the number of registered voters therein shall exceed four hundred and fifty, except where changes are made necessary by a change in the boundaries of congressional, senate, assembly, aldermanic or municipal court districts or ward lines, provided, however, that when the number of registered voters in an election district shall, in any year, be less than two hundred and fifty, such district may be consolidated with a contiguous election district in the discretion of said board of elections. In the city of New York each election district shall be compact in form, entirely within an assembly district and numbered in consecutive order therein respectively. In the year of any decennial reapportionment the board of elections of the city of New York shall rearrange the election districts throughout the city within assembly district lines as constituted pursuant to such reapportionment, to conform as to the

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number of voters to the provisions of this section, which re-arrangement shall take effect before the fall primary in that year; and the appointment of inspectors of election for such election district, as altered or newly created, shall be made and shall take effect a reasonable time before such primary.

No election district shall contain portions of two counties, or two senate or assembly districts. (*Amended by L. 1914, ch. 244, L. 1916, ch. 537, § 32 and L. 1917, ch. 703, § 17, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 8, as amended by L. 1897, ch. 379, § 3; L. 1900, ch. 648, § 1; L. 1901, ch. 95, § 3; L. 1903, ch. 44, § 1; L. 1905, ch. 643, § 3, and ch. 675, § 1; L. 1906, ch. 570, § 1; L. 1907, ch. 472, § 1.

Consolidators' note.—A provision as to the bipartisan character of the board similar in effect to that omitted from new § 419 is here changed in a similar manner and for this same reason.

Creation of districts.—In the creation of districts a reasonable discretion may be exercised. So held in relation to the creation of assembly districts by Board of Supervisors. *Matter of Baird* (1894), 142 N. Y. 523, 37 N. E. 619, *affg.* (1894), 75 Hun 545, 27 N. Y. Supp. 525 (1893), see also *Matter of Smith* (1895), 90 Hun 568, 63 N. Y. Supp. 40, *revd.* on another point (1896), 148 N. Y. 187, 42 N. E. 592.

Polling place for district.—All that the Constitution requires is that an elector must vote at the polling place designated by law for casting the vote of the district where he resides, and the validity of his vote is not affected by the fact that the place is located outside the boundary line of the district. *People ex rel. Lardner v. Carson* (1898), 155 N. Y. 491, 50 N. E. 292, *affg.* (1895), 86 Hun 617, 35 N. Y. Supp. 1114.

Section directory as to time.—Section is not mandatory with reference to the date on which the alteration, division or creation shall be made. *Rept. of Atty. Genl.* (1895) 215.

§ 297. Abolition, consolidation or changing of election districts in towns.—If at a general election at which a governor is elected, the number of votes cast for governor in an election district in any town be less than two hundred, the town board of the town may, if such town contains two election districts, abolish the division of the town into election districts, or if the town contain more than two election districts, may annex the territory of such district to one or more of the other districts therein, in such manner as will best promote the convenience of the voters; but no district shall be abolished pursuant to this section if thereby in case of the abolition of election districts, the number of voters in the town will exceed four hundred, as indicated by the last preceding vote for governor, or thereby in the case of the abolition of an election district and its annexation to one or more other districts, the number of voters in any new district so created will exceed three hundred and fifty as indicated by such vote. An alteration of election districts, pursuant to this section, must be made on or before July first in any year, to take effect on the sixth Wednesday before the general election in such year. If the election districts in a town are abolished pursuant to this section, the town board shall, on or before September first, appoint from the inspectors of election in such town

four inspectors of election for the town as an election district, to take effect on or before the first day of registration thereafter and not earlier than the second Wednesday following the next fall primary, who shall be equally divided between the two parties entitled to representation on boards of inspectors.

If a town has been divided into three or more election districts, and if at any general election at which a governor is elected, the number of votes cast for governor in any district in such town does not exceed two hundred, the town board of such town may on or before the first day of August succeeding, if it deems that the convenience of voters will be promoted thereby, divide such town into such number of election districts, to take effect on the sixth Wednesday before the next general election, as it deems desirable, or change the boundaries of the existing districts, in such manner that no district shall contain more than three hundred voters as indicated by the last preceding vote for governor. If, in pursuance of this section, the boundaries of an election district in such town should be changed, or a new election district is created by the consolidation of two or more districts or parts of districts, the town board shall on or before September first appoint for each such district so created, or changed, four inspectors of election, to take effect on or before the first day of registration thereafter and not earlier than the second Wednesday following the next fall primary, who shall be equally divided between the two parties entitled to representation on boards of inspectors. Such inspectors of election shall hold office until their successors are regularly elected in such election districts, in pursuance of law. (*Amended by L. 1914, ch. 244, and L. 1916, ch. 537, § 33.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 8-a, as added by L. 1906, ch. 159, and § 8-b, as added by L. 1907, ch. 470.

Consolidators' note.—Two provisions as to the bipartisan character of the board similar in effect to that omitted from new § 419 are here changed in a similar manner and for the same reason.

§ 298. Maps and certificates of boundaries of election districts.—When a ward of a city or an assembly district within a city shall be divided into two or more election districts, the officers or board creating, dividing or altering such election districts shall forthwith make a map or description of such division, defining it by known boundaries, and cause such map or description to be kept open for public inspection in the office of the city clerk, and cause one copy thereof to be posted not less than ten days prior to the first day of registration in each year at the last polling place of each former election district, or of each ward not previously divided into two or more election districts, which is affected by such alteration. division or creation of an election district or districts, and one copy thereof at each police station house in the ward or assembly district, and shall, prior to the first day of registration in each year, furnish copies of such map or description to the inspectors of election in each election district

of such ward or assembly district; such maps to be posted in the place of registration and remain posted until the close of the general election. The remaining maps so printed shall be distributed in the discretion of said boards of elections, which shall have respectively the power to charge for each map a price not exceeding the cost of printing the same; and any moneys resulting from the sale thereof shall be paid to the comptroller of the city of New York or to the county treasurer of the county, in counties outside of the city of New York, for the benefit of the treasury of said city or county. The scale of such maps shall, so far as possible, be uniform and large enough to permit the printing of the street corner numbers of the block or blocks defining the extreme boundaries of each election district within or outside the lines of such block or blocks respectively; and such street corner numbers shall be printed in or outside such block lines upon said maps, so that the lowest and highest street numbers within the election district of every street bounding such election district shall be plainly shown thereon. The copies furnished to the inspectors of election shall have printed on each or affixed to each in some secure way the list of places designated pursuant to the next section as places at which the meetings for the registration of voters and the election shall be held during the year within such ward or assembly district.

The officers creating, dividing or altering an election district in a town shall forthwith make a certificate or map thereof, exhibiting the districts so created, divided or altered, and their numbers respectively, and file the same in the county clerk's office except in the county of Erie, and in the county of Erie in the office of the commissioner of elections, and a copy thereof in the town clerk's office, and cause copies of the same to be posted in at least five of the most public places in each election district of such town, and the county clerk or commissioner of elections as the case may be, shall, prior to every general election, furnish copies of such maps or certificates, to the inspectors of election in each election district of such town, provided such election district is not co-terminous with the town lines. (*Amended by L. 1917, ch. 703, § 181, in effect June 11, 1917.*)

Maps are not confined to new districts only, but to all districts. Rept. of Atty. Genl. (1896) 227.

§ 299. Designation of places for registry and voting.—1. On the first Tuesday of September in each year, the town board of each town, and the common council of each city, except Buffalo, and the board of elections of the city of New York, shall designate the place in each election district in the city or town at which the meeting for the registration of voters and the election shall be held during the year; provided, however, that in the city of New York the place so designated, if a schoolhouse or other public building, may be in a contiguous election district. In the city of Buffalo the board of elections of the county of Erie shall designate such places for registry and election on the first Monday in August in each

year. (*Subd. 1 as amended by L. 1910, ch. 428, and L. 1915, ch. 678, amended by L. 1916, ch. 537, § 34.*)

2. Each room so designated shall be of a reasonable size, sufficient to admit and comfortably accommodate at least ten voters at one time outside of the guard-rail, and in cities containing a population of one million or over such room must in addition be of sufficient size to allow of the placing of the furniture and equipment of such polling place as provided in the election law.

3. In cities containing a population of over one million, a school-house or other public building may be designated, provided that the board of education consent and that the use of the same as a registration and polling place shall not interfere with their customary use. The expense, if any, incidental to their use under such designation shall be paid like the expense of other registration and polling places. Whenever a school or other public building is located in an election district and the registration and polling place of such district is not located in a school or other public building, a statement of the reason for not designating such a building must be entered by the board or officer charged with the duty of making such designations in the minutes or other record making the designation.

4. No building, or part of a building, shall be so designated in any city, if within thirty days before such designation, intoxicating liquors, ale or beer, shall have been sold in any part thereof. No room shall be designated elsewhere than in a city, if within thirty days before such designation, intoxicating liquors, ale or beer, shall have been sold in such rooms, or in a room adjoining thereto, with a door or passageway between the two rooms.

5. In the event that the registration shall be so large that the polling place already designated would be unreasonably crowded on election day, the board of elections may between the last day of registration and election day change the polling place so as to obtain a larger room. If for any reason said board of elections changes a polling place said change must be made at least ten days before the day of election and at least five days before election day said board must send a written notice to each registered voter, notifying him of such change in the location of said polling place.

6. No intoxicating liquors, ale or beer shall be sold in such building in a city or such room or adjoining room elsewhere after such designation and before the general election next thereafter, or be allowed in any room in which an election is held during the day of election or canvass of the votes. Any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor.

7. If any place so designated shall thereafter and before the close of the election be destroyed, or for any reason become unfit for use, or cannot for any reason be used for such purpose, the officers charged with the designation of a place for such election shall forthwith designate some other

L. 1909, ch. 22. Times, places, notices, officers, etc., of elections. §§ 300, 301-a, 301.

suitable place for holding such election. Not more than one polling place shall be in the same room, and not more than two polling places shall be in the same building. (*Amended by L. 1910, ch. 428, and L. 1915, ch. 678, § 19.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 10, as amended by L. 1897, ch. 379, § 4; L. 1901, ch. 95, § 4; L. 1903, ch. 197, § 1; L. 1904, ch. 249, § 1; L. 1905, ch. 643, § 5; L. 1906, ch. 259, § 1.

Section directory.—When town board has neglected to designate polling places within time specified by law, such designation may be made subsequently. Rept. of Atty. Genl. (1896) 231.

Location of place for registration.—The place for registration and for election must be within the borders of the election district. Rept. of Atty. Genl. (1897) 205; but see *People ex rel. Lardner v. Carson* (1898), 155 N. Y. 491, 50 N. E. 292, cited under § 296.

Proximity of polling place to bar-room.—The fact that a room designated for polling place and the bar-room are on different floors does not avoid the prohibition of this section where it clearly appears that there is a passageway between the room designated and the bar-room. Rept. of Atty. (1908) 532.

Political club-room.—Election may be held in room formerly used as a political club. Rept. of Atty. Genl. (1896) 231.

Burning of the building in which the election is being held does not *per se* vitiate the election, if finished in vicinity. Rept. of Atty. Genl. (1903) 280.

§ 300. Equipment of polling places.—The officers authorized to designate such places in any town or city shall provide for each polling place at such election, the necessary ballot and other boxes, guard-rails, voting booths and supplies therein, and the other furniture of such polling place, necessary for the lawful conduct of each election thereat, shall preserve the same when not in use, and shall deliver all such ballot and other boxes for each polling place, with the keys thereof, to the inspectors of each election district at least one-half hour before the opening of the polls at each election.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 10, as amended by L. 1897, ch. 379, § 4; L. 1901, ch. 95, § 4; L. 1903, ch. 197, § 1; L. 1904, ch. 249, § 1; L. 1905, ch. 643, § 5; L. 1906, ch. 259, § 1.

References.—Supplies to be furnished, § 341, post. Supplies where ballot machines are used, §§ 398, 404–406, post. Instruction cards and markers not to be taken down or defaced, § 350, post. Defacement, removal or injury of furniture, etc., Penal Law, § 758.

Supplies referred to in this section means such articles as are not required to be furnished by the county clerk. Rept. of Atty. Genl. (1896) 227.

§ 300-a. Display of American flag.—The American flag shall be displayed in each polling place in this state by the board of inspectors during the hours when such boards are in session. The board, body or officer now charged with the duty of defraying the expenses of conducting primaries and elections shall furnish said flag, which shall be approximately three feet by five feet in size. (*Added by L. 1913, ch. 783.*)

§ 301. Publication of list of registration and polling places.—The officers

authorized to designate the registration and polling places in any city, except the city of New York, shall cause to be published in two newspapers within such city a list of such places so designated, and the boundaries of each election district in which such registration and polling place is located and shall at the same time file said list with the state superintendent of elections. Such publication shall be made in the newspapers so selected upon each day of registration and the day of election, except that if such newspaper be an evening newspaper it shall be made on the day prior to each of such days. One of such newspapers so selected shall be one which supports the candidates nominated that year by the political party polling the highest number of votes in the state at the last preceding election for governor, and the other newspaper so designated shall be one which supports the candidates nominated that year by the political party polling the next highest number of votes for governor at said election.

The board of elections of the city of New York shall cause to be published in two newspapers in each borough within such city a list of the registration and polling places so designated in each borough and the boundaries of each election district therein in which such registration and polling place is located and shall at the same time file said list with the state superintendent of elections; except that in the borough of Brooklyn, such publication shall be made in the newspapers designated to publish corporation notices therein and in one daily newspaper published in the Jewish language; and except also that in the borough of the Bronx such publication shall be made in four newspapers published in the borough of the Bronx; and except also that in the borough of Manhattan such publication shall be made in five daily newspapers published in the borough of Manhattan which support the candidates nominated that year by the political party polling the highest number of votes in the state at the last preceding election for governor, and also in five daily newspapers published in the borough of Manhattan which support the candidates nominated that year by the political party polling the next highest number of votes for governor at said election, one of which newspapers may be a daily newspaper published in the German language and two of which newspapers may be daily newspapers published in the Jewish language; which publication shall include the list of such registration and polling places and their boundaries, in the respective counties in which the newspapers are published. Such publication shall be made in such newspapers upon each day of registration and the day of election excepting if such newspaper be an evening newspaper it shall be made on the day prior to each of such days or if such day be Sunday, on the preceding Saturday. Such publications shall be made in newspapers published in such boroughs which shall respectively support the candidates nominated that year by the political parties which at the last preceding election for governor respectively cast the largest and next largest number of votes in the state for such office.

The said board shall also cause to be published in the City Record on or

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before the first day of registration in each year a complete list of all the registration and polling places so designated and the boundaries of the election districts in which such places are located arranged in numerical order under the designation of the respective boroughs in which they are located.

In selecting the newspapers in which such publications are to be made the said board shall keep in view the object of giving the widest publicity thereto. (*Amended by L. 1913, ch. 587, L. 1914, ch. 238, and L. 1916, ch. 537, § 35.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 10, as amended by L. 1897, ch. 379, § 4; L. 1901, ch. 95, § 4; L. 1903, ch. 197, § 1; L. 1904, ch. 249, § 1; L. 1905, ch. 643, § 5; L. 1906, ch. 259, § 1.

Expense of publication under this section is not limited by Code Civ. Pro. § 3317. *Mack v. City of Buffalo* (1900), 32 Misc. 330, 66 N. Y. Supp. 679.

Newspaper selected.—The newspaper selected for the publication of a registration and polling place must be one advocating the principles of the party holding the highest and the next highest number of votes; it is not necessary that the newspaper support the candidates of the party nominated to be voted for at that election. *People ex rel. Quinn v. Voorhis* (1907), 187 N. Y. 327, 80 N. E. 196, *aff.* (1906), 115 App. Div. 218, 100 N. Y. 927. (1906).

If a newspaper is supporting the principles of a party it is eligible to designation, even though it be not supporting the candidates. The board may not change the designation after it has once been legally made. Upon such designation the newspaper acquires vested contract rights. *People ex rel. Quinn v. Voorhis* (1906), 115 App. Div. 218, 100 N. Y. Supp. 927, *aff.* (1907), 187 N. Y. 327, 80 N. E. 196.

Contract may be separate as to different dates.—The board is required to "cause to be published" these notices on certain specified dates, and there is nothing which prevents the board from directing that the notices be published for two days in one set of newspapers and for the subsequent days in another set of newspapers. *Morning Telegraph Co. v. City of New York* (1909), 132 App. Div. 634, 117 N. Y. Supp. 496, *aff.* (1910), 197 N. Y. 536, 91 N. E. 1117.

Effect of designation.—Where there is but one designation there is but one contract and but one cause of action. *City of N. Y. v. N. Y. Evening Post Co.* (1913), 155 App. Div. 530, 120 N. Y. Supp. 776.

§ 302. Election officers; designation, number and qualifications.—There shall be in every election district of this state the following election officers, namely, four inspectors, two poll clerks and two ballot clerks, whose term of office, except as hereinafter prescribed, shall be for one year from the date of their appointment or election, and who shall serve at every general, special or other election held within their districts during such term. The term of office of inspectors of election in towns shall be for two years.

No person shall be appointed or elected an inspector of election, poll clerk or ballot clerk, who is not a qualified voter of the county if within the city of New York, or of the city if in any other city, or of the election district of the town in which he is to serve, of good character, able to speak and read the English language understandingly, and to write it legibly, and who does not possess a general knowledge of the duties of the office to which he is elected or appointed, or who is a candidate for any office to be

voted for by the voters of the district in which he is to serve, or who has been convicted of a felony and not restored to citizenship, or who holds any public office except that of notary public or commissioner of deeds, town or village assessor, justice of the peace, police justice of a village, village trustee, water commissioner, officer of a school district, or overseer of highways, whether elected or appointed, or who is employed in any public office or by any public officer whose services are paid for out of the public money other than is excepted herein.

Each class of such officers shall be equally divided between the two political parties which at the general election next preceding that for which such officers are to serve, cast the highest and the next highest number of votes. Where election officers are appointed the qualifications required of them by this section shall be determined by an examination by or under the direction of the appointing board or officer. (*Amended by L. 1914, ch. 239.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 11, subd. 1, as amended by L. 1897, ch. 410, § 1; L. 1898, ch. 335, § 2; L. 1899, ch. 630, § 1; L. 1901, ch. 95, § 5; L. 1901, ch. 536, § 1.

Consolidators' note.—Until L. 1901, ch. 95, the matter in subdivision 1 constituted the whole section. That act added a new subdivision 2 creating the board of elections in New York City, and also corrected a defective expression in subdivision 1 that had been put in by L. 1899, ch. 630, which had provided that no inspector, etc., should be appointed "who is not a qualified elector of the county, if within the city of New York or of any other city or of the election district of the town in which he is to serve." L. 1901, ch. 95, had corrected this by making "or of any other city" read "or of the city if in any other city"; but chapter 536 (the succeeding and last amendment) followed the previous amendment (the draftsman presumably being ignorant of ch. 95) and revived the defect, at the same time wholly neglecting to recognize that the matter amended had become *subdivision 1*, and referring to it as "section eleven," and likewise ignoring the new subdivision 2. The defective expression is here cured again.

References.—Bipartisan boards required, except at town or village election, Const., art. 2, § 6. Oath of office, Public Officers Law, § 10; Const., art. 13. Failure to file, Public Officers Law, §§ 13, 30; Penal Law, § 1820. Effect of failure to file on official acts, Public Officers Law, § 15; Penal Law, § 1821. Exempt from civil service examination, Civil Service Law, § 9. Ballot clerks not required where voting machines are used, § 418, post. Compensation generally, § 319, post. Acting without being qualified, a misdemeanor, Penal Law, § 764. Misconduct by, Penal Law, §§ 762, 764.

Construction.—This provision as to "the highest and the next highest number of votes" refers to the votes in the state. *Matter of Knollin* (1908), 59 Misc. 373, 112 N. Y. Supp. 332, *affd.* (1908), 128 App. Div. 908, 112 N. Y. Supp. 1134, *affd.* (1909), 196 N. Y. 526, 89 N. E. 1105.

The two political parties which, at the general election next preceding that for which such officers are to serve, cast the highest and next highest number of votes in the state, are the parties entitled to appointment of inspectors of election, ballot clerk and poll clerks. The two political parties which, at the last general election preceding the date of the certificates recommending persons for appointment as commissioners of election, cast the highest and next highest number of votes for Governor are the parties entitled to the appointment of such commissioners of election. *Opinion of Atty. Genl.* (1913) 307.

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Ballot clerks and poll clerks are election officers. Rept. of Atty. Genl. (1896) 230.

Poll clerks in towns hold office for two years. Rept. of Atty. Genl. (1902) 310.

Who may serve as election officer.—An elector, resident of a city, who is otherwise qualified, may serve as an inspector, poll clerk or ballot clerk in a district of the city other than that in which he resides. Rept. of Atty. Genl. (1896) 229.

Candidates for office cannot serve as election officers. Rept. of Atty. Genl. (1903) 463; Rept. of Atty. Genl. (1905) 533; Rept. of Atty. Genl. (1901) 296.

Inspector, employee of public officer ineligible. Rept. of Atty. Genl. (1889) 323.

An inspector of election in a town or village may accept the office of village clerk. Rept. of Atty. Genl. (1898) 261.

A deputy sheriff is a public officer. Rept. of Atty. Genl. (1897) 246.

A postmaster is a public officer. Rept. of Atty. Genl. (1897) 247; Rept. of Atty. Genl. (1896) 226.

A person appointed to the office of inspector of election, who is later chosen to serve in the office of the village treasurer, may perform the duties of the office of inspector of election while holding the office of village treasurer. Rept. of Atty. Genl. (1911) 451.

This section does not apply to a person who is employed by a public officer in a private capacity, clerk in store, coachman, gardener, etc. Rept. of Atty. Genl. (1896) 221.

On the merger of a village and towns to form a city the Legislature may direct the trustees of the village to appoint the necessary election officers to hold and carry out the ensuing election of city officials, the appointment to be made on a bipartisan basis. *People ex rel. Haight v. Brown* (1915), 169 App. Div. 695, 155 N. Y. Supp. 564, *affd.* (1915), 216 N. Y. 674, 110 N. E. 171.

§ 303. Appointment of election officers in cities.—The board of elections of the city of New York and the mayor of each other city shall, on or before the first day of September of each year, select and appoint election officers for each election district therein, and may fill any vacancy which may occur before the opening of the polls on election day.

Each political party entitled to representation in any board of election officers may, not later than the first day of July in each year, file with such board or mayor an original list of persons, members of such party duly qualified to serve as election officers. A supplemental list of persons may also be filed containing not more than ten names for each office. Additional supplemental lists for any election district may be filed at any time before the appointments for such districts are made and certified by such board or mayor or when a vacancy shall exist in the original list by reason of the disqualification, resignation, declination, or withdrawal of the name by the person or persons submitting the same, of any person on such list, and all appointments shall be made from the original list if those named therein are found qualified; if not so qualified, then from a supplemental list so filed. If within ten days after notice in writing by the board or mayor to the chairman of the committee or other person by whom the list is filed or authenticated, such chairman or other person shall neglect to file an additional list, the board or mayor may appoint qualified persons, members of the party in default, to act as election officers.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 12, as amended by L. 1897,

ch. 379, § 5; L. 1898, ch. 675, § 1; L. 1899, ch. 630, § 2; L. 1901, ch. 95, § 6; L. 1904, ch. 70, § 1.

References.—See note to preceding section.

Election officers to be chosen from regular organization. *People v. Gleason* (1896), 18 Misc. 511, 42 N. Y. Supp. 1084.

Failure to appoint within time prescribed by law. *People ex rel. McMackin v. Board of Police* (1887), 46 Hun 296, *affd.* (1887), 107 N. Y. 235, 13 N. E. 920.

§ 304. **Authentication of party lists.**—In the city of New York such lists shall be authenticated and filed by the chairman of the county committee of the party in the respective counties within such city; in other cities, by the chairman or secretary of the general city committee of such party, if there be such a committee, or if not, then by the chairman or secretary of the general county committee of such party, if there be such a committee, or if not, then by the corresponding officer or any committee performing the usual functions of a city or county committee; provided, however, that if in any city more than one such list be submitted in the name or on behalf of the same political party, only that list can be accepted which is authenticated by the proper officer or officers of the faction or section of such party, which was recognized as regular by the last preceding state convention of such party; or, where no such convention has been held within the year, by the proper officer of the faction or section of said party which at the time of the filing of said list is recognized as regular by the state committee of such party which was organized by or pursuant to the direction of the last preceding state convention of such party. (*Amended by L. 1915, ch. 678, § 20.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 12, as amended by L. 1897, ch. 379, § 5; L. 1898, ch. 675, § 1; L. 1899, ch. 630, § 2; L. 1901, ch. 95, § 6; L. 1904, ch. 70, § 1.

Construction.—In determining the right to authenticate lists of election officers, this section must be read with subdivision 1 of § 9 of the Primary Election Law (now repealed), and such construction placed upon them as shall give effect to the evident intention of the legislature. *People ex rel. McCarren v. Dooling* (1908), 128 App. Div. 1, 112 N. Y. Supp. 71, *affd.* (1908), 193 N. Y. 604, 86 N. E. 1130.

Selection of election officers in New York County rests solely with the county committee. *Sheehan v. McMahon* (1899), 44 App. Div. 63, 60 N. Y. Supp. 452.

§ 305. **Examination as to qualifications.**—All persons so proposed for appointment shall be examined as to their possessing the qualification required by section three hundred and two of this chapter by or under the direction of the mayor or board, who shall give five days' notice in writing of such examination to the person to be examined, and also the chairman of the committee or other person by whom the list is filed and authenticated, and such chairman or other person may appear and be heard at such examination, either in person or by counsel. If a person so nominated after examination is found qualified, under section three hundred and two of this chapter, he shall be appointed to the position for which he was recommended. If a person so proposed is found disqualified

Failure to take oath does not affect validity of election. *People v. Cook* (1853), 8 N. Y. 67, 84.

§ 308. Removals; vacancies; transfers.—Any election officer so appointed may be removed for cause by the board or mayor making the appointment, in which case such removal, unless made while such officer is actually on duty on the day of registration, revision of registration or election, and for improper conduct as election officer, shall only be made after notice in writing to the officer to be removed, which notice shall set forth clearly and distinctly the reasons for his removal. In cities of the first class, it shall be the duty of the board or mayor making the appointment of an election officer, to remove forthwith such officer, without preferring any charges and without notice to such officer, upon the written request of the official of the political party who certified the name of such election officer or his successor. All such vacancies so created shall be filled in the same manner as the original appointment was made. Any election officer who shall at any time be appointed to fill a vacancy, which fact shall be stated in his certificate of appointment, shall hold office only during the unexpired term of his predecessor.

No election officer shall be transferred from one election district to another after he has entered upon the performance of his duties and no election officer shall serve in any county save that in which he shall reside.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 12, as amended by L. 1897, ch. 379, § 5; L. 1898, ch. 675, § 1; L. 1899, ch. 630, § 2; L. 1901, ch. 95, § 6; L. 1904, ch. 70, § 1.

Consolidators' note.—The provisions regarding penalties which in the original section appear between the two paragraphs of this section are here made § 310.

§ 309. Certificates of service; exemption from jury duty; payment.—The chairman of each board of inspectors of each election district shall, within twenty-four hours of any election, furnish to the mayor or board appointing such officers, if required so to do by such mayor or board, under his hand, a certificate stating the number of days of actual service of each member of such board, the names of the persons who served as poll clerks and ballot clerks on election day and the number of days during which the store, building or room hired for registration and election purposes was actually used for such purposes. Any person acting as such chairman, who shall wilfully make a false certificate, shall be guilty of a misdemeanor.

All persons appointed and serving as election officers on any of the days of registration or of election or of count of votes in cities of the first class shall be exempt from jury duty for one year from the date of the general election at which they serve. Such officers shall be paid by the comptroller of the respective cities within twenty days after the election at which such officers served, upon the certificate of the board or mayor appointing them.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 12, as amended by L. 1897,

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ch. 379, § 5; L. 1898, ch. 675, § 1; L. 1899, ch. 630, § 2; L. 1901, ch. 95, § 6; L. 1904, ch. 70, § 1.

§ 310. **Special penalties.**—Every person appointed as an election officer, failing to take and subscribe the oath of office as hereinbefore prescribed or who shall wilfully neglect or refuse to discharge the duties which he was appointed to perform, shall, in addition to the other penalties prescribed by law, be liable to a fine of one hundred dollars, to be sued for and recovered by the mayor or board making the appointment, in a court of record, for the use and benefit of the treasury of such city. Any election officer who, being removed for cause, shall fail upon demand to deliver over to his successor the register of the voters, or any tally sheets, book, paper, *mmorandum or document relating to the registration of voters or the election in his possession, so far as he has made it, shall be liable to a like penalty to be recovered in a like manner for the benefit of such city.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 12, as amended by L. 1897, ch. 379, § 5; L. 1898, ch. 675, § 1; L. 1899, ch. 630, § 2; L. 1901, ch. 95, § 6; L. 1904, ch. 70, § 1.

Reference.—Criminal misconduct, Penal Law, §§ 762, 764.

§ 311. **Appointment of inspectors of election in towns.**—Except as provided in section two hundred and ninety-six, inspectors of election in towns shall be appointed by the town board in each year in which a town meeting is held for the election of town officers, and within thirty days thereafter. Such appointments shall be made from lists to be prepared, certified and filed in the manner hereinafter provided, by the two political parties entitled to representation on a board of election officers. The town caucus or primary held by each such political party for the purpose of nominating town officers shall prepare a list containing the names of at least two persons, qualified to serve as inspectors of election, for each election district in said town, which lists shall be certified by the presiding officer and a secretary of said caucus or primary, and filed with the town clerk in the same manner and at the same time as the party certificate of nomination filed by said party. From each of the two lists so filed, the town board shall appoint two persons who possess the qualifications prescribed by law for election officers. If in any town more than one such list be submitted on behalf or in the name of the same political party, only that list can be accepted which is certified by the proper officer or officers of the faction of such party which was recognized as regular by the last preceding state convention of such party; or if no such convention was held during the year, by the proper officer or officers of the faction of such party, which at the time of the filing of such list is recognized as regular by the state committee of such party.

Such appointment shall be made in writing and filed with the town clerk, who shall forthwith notify each person so appointed of his appoint-

* So in original.

ment to said office, in the manner in which he is now by law required to give notice to a person of his election to a town office when his name does not appear upon the poll list at the town meeting at which he was elected to said office. From the additional names, if any, contained on the lists so filed, of persons qualified to serve as such, the town board shall appoint inspectors of election in case of the resignation, declination or other incapacity of persons appointed to such office. If such lists contain no additional names of such persons, the town board shall fill vacancies caused by such resignation, declination or other incapacity by appointing persons known, or proved to the satisfaction of a majority of the members of said board to be members of the same political party in which such vacancy occurred. All appointments to fill vacancies shall be made in writing and filed with the town clerk, and notices thereof given by him as hereinbefore provided in the case of an original appointment.

Sources.—Former Elec. L. (L. 1896, ch. 909) pt. of § 13, as amended by L. 1898, ch. 335; L. 1901, ch. 536.

Consolidators' note.—Section 296 (old § 8) prescribes that inspectors of election shall be *elected* in towns, where election districts are changed. This section provides that they shall be *appointed* by the town board. The last amendment to § 296 having been made in 1906, while the last amendment to this section was made in 1901, the provisions of § 296 would govern in cases of conflict. Accordingly the words "except as provided in section two hundred and ninety-six" have been supplied.

References.—Oath, Town Law, § 83; Public Officers Law, § 10. Failure to take, Public Officers Law, § 13; Penal Law, § 1820. Effect of failure to take, Public Officers Law, § 15; Penal Law, § 1821. Accounts, how made out, Town Law, § 175. Compensation, § 319, post. Criminal misconduct, Penal Law, §§ 762, 764.

Acts of election officers not reviewable by certiorari.—Inspectors of elections are simply ministerial officers, their acts and conduct cannot be reviewed by certiorari. *People ex rel. Brooks v. Bush* (1897), 22 App. Div. 363, 48 N. Y. Supp. 13 and cases there cited. See also *People ex rel. Stapleton v. Bell* (1890), 119 N. Y. 175, 23 N. E. 533.

An irregularity in the appointment of inspectors will not invalidate the election at which they officiate. *Rept. of Atty. Genl.* (1895) 253.

§ 312. Appointment of poll clerks and ballot clerks in towns.—At the first meeting in each year of the board of inspectors in every district in a town, one poll clerk and one ballot clerk shall be appointed by the two inspectors of election representing one of the political parties entitled to representation on such board, and one poll clerk and one ballot clerk shall be appointed by the two inspectors representing the other political party. Such appointments shall be in writing, signed by the inspectors making the appointments respectively, and shall be filed by them with the town clerk of the town in which such election district is situated, and a copy thereof with the post-office address of each person so appointed shall be mailed to the clerk of the county.

The poll clerks and ballot clerks so appointed shall hold their office during the term of office of the inspectors appointing them, except as hereinafter

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provided. The persons so appointed as poll clerks and ballot clerks shall be voters in the district in which they are appointed to serve, and shall possess the qualifications required of such officers by section three hundred and two of this article.

If at the time of any election at which poll clerks and ballot clerks are required to be present at the polling place in any election district, the office of a poll clerk or of a ballot clerk of such district shall be vacant, or a poll clerk or a ballot clerk shall be absent, the inspectors of election in such district shall forthwith appoint a person to fill such vacancy. Such person so appointed shall, before he acts as such poll clerk or ballot clerk, take the constitutional and statutory oaths of office.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 13, as amended by L. 1898, ch. 335; L. 1901, ch. 536.

§ 313. **Supplying vacancies and absences.**—If at the time of any meeting of the inspectors there shall be a vacancy or if any inspectors shall be absent from such meeting, the inspector present who shall be a member of the same political party as the absent inspector shall appoint a qualified voter of the district, who shall also be a member of the same political party as the absent inspector, to act in the place of such absent inspector for the whole of that day. And the person so appointed shall be paid the amount which the absent inspector, if he had been present, would have been entitled to be paid for his services upon that day, and the absent inspector shall not be paid for any services for that day.

If two inspectors, who are members of the same political party, shall be absent from any such meeting on election day, the poll clerk, if he be present, and if he be absent then the ballot clerk, who is a member of the same political party as the absent inspectors, shall appoint two qualified voters of the district, who shall be members of the same political party as the absent inspectors, to act in the place of such absent inspectors for the whole of that day; and the persons so appointed shall be paid the amounts which the absent inspectors, if they had been present, would have been entitled to be paid for their services upon that day, and the absent inspectors shall not be paid for any services for that day.

If two inspectors, who are members of the same political party, shall be absent on any of the days of registration, the inspector or inspectors present shall appoint qualified voters of the district, who shall be members of the same political party as the absent inspectors, to act until such absent inspectors, or their successors duly appointed as hereinbefore provided, shall appear and such persons, so serving temporarily, shall serve without pay.

If, at any such time, the offices of all inspectors are vacant, or no inspector shall appear within one hour after the time fixed by law for the opening of such meeting, the qualified voters of the district present, not less than ten, may designate four qualified voters of the district belonging

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to the political parties as specified in section three hundred and two, to fill such vacancies, or to act in the place of such inspectors respectively, until the absent inspectors respectively appear.

If at any time there shall be a vacancy in the office of any poll clerk or ballot clerk, or if any poll clerk or ballot clerk shall be absent from such meeting, the inspector or inspectors present, who shall be a member or members of the same political party as the absent poll clerk or ballot clerk, shall appoint a qualified elector of the district, who shall also be a member of the same political party as the absent poll clerk or ballot clerk to fill such vacancy.

Every person so appointed or designated to act as an inspector, poll clerk or ballot clerk shall take the constitutional and statutory oath as prescribed by this chapter.

Source.—Former Elec. L. (L. 1896, ch. 909) § 14, as amended by L. 1904, ch. 487.

References.—Taking of oath; failure to take and effect. See note to § 302, ante.

§ 314. **Organization of boards of inspectors.**—Before otherwise entering upon their duties the inspectors of each district shall then immediately appoint one of their number chairman; or, if a majority shall not agree upon such appointment, they shall draw lots for that position.

In all proceedings of the inspectors acting as registrars, inspectors or canvassers, they shall act as a board, and, in case of a question arising as to matters which may call for a determination by them, a majority of such board shall decide.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 14, as amended by L. 1904, ch. 487, and pt. of § 103, subd. 1.

Performance of duties of poll-clerks and ballot-clerks by inspectors does not invalidate election. *People v. Cook* (1853), 8 N. Y. 88.

§ 315. **Preservation of order by inspectors.**—All meetings of the board of inspectors shall be public. Such board and each individual member thereof shall have full authority to preserve peace and good order at such meetings, and around the polls of elections, and to keep the access thereto unobstructed, and to enforce obedience to their lawful commands. The said board may appoint one or more voters to communicate their orders and directions, and to assist in the performance of their duties in this section enjoined. If any person shall refuse to obey the lawful commands of the inspectors, or by disorderly conduct in their presence or hearing shall interrupt or disturb their proceedings, they shall make an order directing the sheriff or any constable of the county, or any peace or police officer to take the person so offending into custody and retain him until the registration of voters or the canvass of the votes shall be completed, but such order shall not prohibit the person taken into custody from voting. Such order shall be executed by any sheriff, constable, peace or police officer, to whom the same shall be delivered, but if none shall be present, then by any other person deputed by such board in writing. The said board or any member thereof may order the arrest of any person other than an election officer

L. 1909, ch. 22. Times, places, notices, officers, etc., of elections. §§ 316, 317.

violating or attempting to violate any of the provisions of this chapter.

Source.—Former Elec. L. (L. 1896, ch. 909) § 15.

References.—Disobeying order of inspector wilfully, a misdemeanor, Penal Law, § 764. Arrest without warrant, Code Crim. Pro. §§ 177, 183.

§ 316. **Ballot boxes.**—Separate ballot boxes appropriately and conspicuously marked must be provided as occasion shall require, to receive,

1. Ballots for presidential electors.
2. Ballots for general officers.
3. Ballots upon constitutional amendments and questions submitted.
4. Ballots upon town propositions and upon town appropriations.
5. Ballots defective in printing or spoiled and mutilated.
6. Stubs detached from ballots.

Each box shall be supplied with a sufficient lock and key and with an opening in the top large enough to allow a single folded ballot to be easily passed through the opening, but no larger. It shall be large enough to receive all the ballots which may be lawfully deposited therein at any election, and it shall be well and strongly made and be free from checks and blemishes.

Each and every inspector of elections shall be personally responsible for the custody of each box and its contents from the time the election begins until the box is delivered, according to law, to the person entitled to receive it. Upon making any such delivery each inspector of elections shall be entitled to a receipt for each box delivered. (*Amended by L. 1911, ch. 649, L. 1913, ch. 821 and L. 1917, ch. 703, § 19, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 16, as amended by L. 1900, ch. 381; L. 1902, ch. 405; L. 1904, ch. 733.

§ 317. **Voting booths and guard-rails.**—There shall be in each polling place during each election a sufficient number of voting booths, not less than one for every seventy-five registered voters in the district. Each such booth shall be at least three feet square, shall have four sides inclosed, each at least six feet high, and the one in front shall open and shut as a door swinging outward, and shall extend within two feet of the floor. Each such booth shall contain a shelf which shall be at least one foot wide, extending across one side of the booth at a convenient height for writing, and shall be furnished with such supplies and conveniences including pencils having black lead only, as will enable the voters to conveniently prepare their ballots for voting. Each booth shall be kept clearly lighted while the polls are open, by artificial lights if necessary.

A guard-rail shall be placed at each polling place at least six feet from the ballot boxes and the booths, and no ballot box or booth shall be placed within six feet of such rail. Each guard-rail shall be provided with a place for entrance and exit. The arrangement of the polling place shall be such that the booths can only be reached by passing within the guard-rail,

§ 318. Times, places, notices, officers, etc., of elections. L. 1909, ch. 22.

and that the booths, ballot boxes, election officers and every part of the polling place except the inside of the booths shall be in plain view of the election officers and the persons just outside the guard-rail. Such booths shall be so arranged that there shall be no access to intending voters or to the booths through any door, window or opening, except by the door in front of said booth.

Source.—Former Elec. L. (L. 1896, ch. 909) § 17.

References.—Removal, mutilation or destruction of election booths, supplies, etc., Penal Law, § 758.

§ 318. **Apportionment of election expenses.**—The expense of providing polling places, voting booths, supplies therefor, guard-rails and other furniture of the polling place, and distance markers, and the compensation of the election officers in each election district, shall be a charge upon the town or city in which such election district is situated, except that such expenses incurred for the purpose of conducting a village election not held at the same time as a general election shall be a charge upon the village.

The expense of printing and delivering the official ballots, sample ballots and cards of instruction, poll books, tally sheets, return sheets for inspectors and ballot clerks, and distance markers to be used at a town meeting or city or village election not held at the same time as a general election, and of printing the lists of nominations therefor shall be a charge upon the town, city or village in which the meeting or election is held. The expense of printing and delivering the official ballots, sample ballots and cards of instruction, poll books, tally sheets, return sheets for inspectors and ballot clerks, and distance markers to be used in any county, except such counties or portions thereof as are included within the city of New York, at any other election, if no town meeting or city or village election be held at the same time therewith, and of printing the lists of nominations therefor, shall be a charge upon such county. The expense of printing and delivering the official ballots, sample ballots and cards of instruction, poll books, tally sheets, return sheets for inspectors and ballot clerks, and distance markers, to be used in any such county at any other election, and of printing the lists of nominations therefor, if the town meeting or city or village election be held in such county at the same time therewith, shall be apportioned by the county clerk between such town, city or village and such county, in the proportion of the number of candidates for town, city or village officers on such ballots, respectively, to the whole number of candidates thereon, and the amount of such expense so apportioned to each such municipality shall be a charge thereon.

Whenever voting machines are used in an election by any city, town or village, only such expenses as are caused by the use of such machines, and such as are necessary for the proper conduct of the elections as required by this chapter shall be charged to such city, town or village.

All expenses relating to or connected with elections lawfully incurred by the board of elections of the city of New York shall be a charge on

L. 1909, ch. 22. Times, places, notices, officers, etc., of elections.§ 319.

such city, and after being audited by the proper officer, shall be paid by the comptroller of said city upon the certificate of such board.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 18, as amended by L. 1897, ch. 379, § 6; L. 1899, ch. 467, § 1, and ch. 630, § 3; L. 1900, ch. 381, § 2, and ch. 711, § 1; L. 1901, ch. 95, § 7.

Application.—Provisions apply in case of charges by a newspaper designated to publish election notices under section 11, *ante*. *Morning Telegraph Co. v. City of New York* (1909), 132 App. Div. 634, 117 N. Y. Supp. 496, *affd.* (1910), 197 N. Y. 536, 91 N. E. 1117.

§ 319. **Fees of election officers and others.**—1. The county clerk of each county, not salaried, shall be paid by such county a reasonable compensation for his services in carrying out the provisions of this chapter, to be fixed by the board of supervisors of the county, or the board acting as such board of supervisors. The town clerk of each town shall be paid by such town a reasonable compensation for his services in carrying out the provisions of this chapter, to be fixed by the other members of the town board of the town. Ballot clerks shall receive the same compensation for their attendance at an election as inspectors of election for the election and be paid in like manner. Poll clerks shall receive the same compensation for their attendance at an election and canvass of the votes as inspectors of election and be paid in like manner. An inspector of election lawfully required to file papers in the county clerk's office shall, unless he resides in the county if within the city of New York, or in any other city or town in which such office is situated, be entitled to receive as compensation therefor five dollars, and also four cents a mile for every mile actually and necessarily traveled between his residence and such county clerk's office in going to and returning from such office.

2. In cities of the first class having a population of two million or more inhabitants the persons appointed and serving as inspectors of election shall receive four dollars for the hours fixed by law for each day of registration from Monday to Friday inclusive, and ten dollars for such hours on the last day of registration and on the day of revision of registration for a special election, and seven dollars for the hours fixed by law for the election, and five dollars for the count and return of the votes. The poll clerks in such city shall each receive the same compensation as inspectors for the election and for the count of the votes, and the ballot clerks shall receive eight dollars each. Such officers shall be paid by the comptrollers of the respective cities upon the certificate of the board or officer appointing them.

3. Election officers required to meet at a different time from the regular count of the votes cast at a general election for the purpose of counting and returning the votes of electors absent from their election districts in time of war in the actual military or naval service of this state or of the United States shall be paid five dollars each. (*Amended by L. 1915, ch. 678, § 21.*)

§ 320. Times, places, notices, officers, etc., of elections. L. 1909, ch. 22.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 18, as amended by L. 1897, ch. 379, § 6; L. 1899, ch. 467, § 1, and ch. 630, § 3; L. 1900, ch. 381, § 2, and ch. 711, § 1; L. 1901, ch. 95, § 7.

References.—Compensation in towns, Town Law, § 85.

Compensation of town clerk.—Town board may fix a reasonable compensation for services of the town clerk in carrying out the provisions of this section. People ex rel. Gedney v. Sippell (1907), 116 App. Div. 753, 102 N. Y. Supp. 69.

§ 320. Delivery of election laws to clerks, boards and election officers.—The secretary of state shall at least sixty days before each general election cause to be prepared a compilation of the election law with explanatory notes and instructions, properly indexed, and procure the same to be printed by the legislative printer, and transmit to the board of elections of each county, and to the board of elections of the city of New York, located in the borough of Manhattan, and to the branch office of the board of elections in each of the other boroughs of the city of New York, a sufficient number of copies thereof to furnish one such copy to each member of each such board and to each of said branch offices of the board of elections of the city of New York and one to each county, town, village and city clerk and to each election officer in any such county and said boroughs, together with such number of extra copies as may in his judgment be necessary to replace copies lost or mutilated before delivery thereof to election officers.

The board of elections of each county, except those counties the whole of which is included within the city of New York, shall forthwith transmit one of such copies to each of such officers in such county, and the board of elections of the city of New York shall cause to be delivered one of such copies to each of such officers in the city of New York. Each copy so received by each such officer shall belong to the office of the person receiving it. Every incumbent of the office shall preserve such copy during his term of office and upon the expiration of his term or removal from office deliver it to his successor. The secretary of state shall also transmit to the state superintendent of elections a sufficient number of such copies to furnish one of such copies to the superintendent and to each deputy. (*Amended by L. 1916, ch. 537, § 36.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 19, as amended by L. 1897, ch. 379, § 7; L. 1899, ch. 630, § 4; L. 1901, ch. 95, § 8; L. 1905, ch. 643, § 6.

Constitutionality.—The provision of this section authorizing the secretary of state to print a compilation of the Election Laws does not violate the provision of the U. S. Constitution prohibiting the passage of laws impairing the obligation of contracts. People ex rel. Weed-Parsons Printing Company v. Palmer (1896), 18 Misc. 103, 41 N. Y. Supp. 878.

ARTICLE IX.

(Former Art. 13, renumbered by L. 1913, ch. 800.)

BALLOTS AND STATIONERY.

Section 330. Official ballots for elections.

- 331. Classification of ballots; form of ballots for candidates.
- 332. Form of ballot for questions submitted.
- 333. Sample ballots, instruction cards and stationery.
- 334. Blank forms for election officers.
- 335. Form of ballot clerk's return.
- 337. Forms of return and tally of votes cast for presidential electors.
- 338. Forms of return and tally of votes for officers other than presidential electors.
- 339. Forms of return and tally of votes upon question submitted.
- 340. Number of official ballots.
- 341. Officers providing ballots and stationery.
- 342. Public inspection of ballots.
- 343. Distribution of ballots and stationery.
- 344. Errors and omissions in ballots.
- 345. Unofficial ballots.

§ 330. Official ballots for elections.—Official ballots shall be provided at public expense at each polling place for every election at which public officers are to be elected directly by the people, except an election of school district officers or school officers of a city or village at which no other public officer is to be elected, and except an election of officers of a fire district outside of cities and incorporated villages, at which excepted elections any form of ballot which may be adopted and used by the meeting at which such election shall be had shall be legal.

Source.—Former Elec. L. (L. 1896, ch. 909) § 80, as amended by L. 1897, ch. 609.

References.—Officers to provide, § 341, post. Expense of ballots, § 318, ante. Destruction, concealment or suppression of official ballots, Penal Law, § 760, sub. 5. Removal from polling place before close of polls, Penal Law, § 764, sub. 5.

Village elections.—Official ballots required for officers. *People ex rel. March v. Beam* (1907), 117 App. Div. 374, 103 N. Y. Supp. 818, mod. (1907), 188 N. Y. 266, 80 N. E. 921.

§ 331. Classification of ballots; form of ballots for candidates.—1. General provisions. There shall be five kinds of ballots, called respectively ballots for presidential electors, ballots for general officers, ballots upon constitutional amendments and questions submitted, ballots upon town propositions, and ballots upon town appropriations, which shall be used for the purposes which their names severally indicate and not otherwise. Ballots for general officers shall contain the names of all candidates except presidential electors. All ballots shall be printed in black ink, on book paper of good quality free from ground wood, five hundred sheets of which twenty-five by thirty-eight inches in size shall weigh sixty pounds and shall test for that size and weight at least twenty points on a Morrison tester. They shall be rectangular in shape, not less than eight inches in width and

twelve inches in length, and shall have a margin extending beyond any printing thereon.

All ballots of the same kind for the same polling place shall be of precisely the same size, quality and shade of paper, and of precisely the same kind and arrangement of type and tint of ink. A different, but in each case uniform, kind of type shall be used for printing the names of candidates, the titles of offices, political designations, and the reading form of constitutional amendments and other questions and propositions submitted. The names of candidates shall be printed in capital letters in black-faced type not less than one-eighth nor more than three-sixteenths of an inch in height.

Each ballot shall be printed on the same sheet with a stub and shall be separated therefrom by a horizontal line of perforations extending across the entire width of the ballot. On the face of the stub shall be printed the instructions to voters hereinafter provided. On the back of the stub, immediately above the center of the indorsement on the back of the ballot hereinafter referred to, shall be printed "No.," the blank to be filled with the consecutive number of the ballot, beginning with "No. 1," and increasing in regular numerical order.

On the back of the ballot, below the line of perforations, just to the right of the center, and outside when the ballot is folded, shall be printed the following indorsement, the blanks being properly filled and the numbers running from one upward, consecutively:

Official ballot (for presidential electors).

County of.....

.....assembly district (ward or town).

.....election district.

(Date of election.)

(Facsimile of the signature of officer causing the ballot to be printed).

Each ballot shall be printed in sections, on which the candidates' names, emblems and political designations, or the constitutional amendment, or other question submitted, with the voting squares, and other requisite matter shall be boxed in by heavy black lines in the manner indicated in the illustration of the ballot hereinafter provided. The voting squares and the spaces occupied by emblems shall have a depth and width of five-sixteenths of an inch.

In case the sections shall be so numerous as to make the ballot unwieldy if they are printed in one column, they may be printed in as many columns as shall be necessary, and in that case, in order to produce an exactly rectangular ballot, blank sections may be used.

On each ballot shall be voting squares in which voters may make their voting marks. All voting squares shall be bounded by heavy black lines, the perpendicular lines to be not less than one-sixteenth of an inch wide. In all ballots there shall be a perpendicular column of these squares, and in the ballot for general officers, in the case of a candidate for governor or

member of assembly nominated by two or more political organizations, the additional squares arranged horizontally as provided in subdivision three of this section. No voting squares shall be provided in the blank spaces for written names.

The ballots bearing the same number at the same election shall constitute a set of ballots.

Each political organization whose party name contains more than eleven letters shall select an abbreviated form thereof containing not more than eleven letters which shall be used upon the ballot whenever the necessities of space shall so require. The abbreviated form shall be certified at the same time and in the same manner as party names are required to be certified. In printing the names of candidates whose full names contain sixteen letters or more not more than one name other than the surname shall be printed in full, and each candidate may indicate in writing to the officer or officers charged with the duty of preparing the ballots the form in which, subject to this restriction, his name shall be printed. No emblem shall occupy a space longer in any direction than the voting square to which it relates.

In conformity with the foregoing provisions and with the provisions of subdivision three of this section the face of the ballot for general officers shall be substantially in the following form:

[Face of ballot]

1. To vote for a candidate on this ballot make a single cross X mark in one of the squares to the right of an emblem opposite his name.
2. To vote for a candidate NOT on this ballot write his name on a blank line under the candidates for that office.
3. Mark only with a pencil having black lead.
4. Any other mark, erasure or tear on this ballot renders it void.
5. If you tear, or deface, or wrongly mark this ballot, return it and obtain another.

 Vote for one!

GOVERNOR

1

JERRY COLLINS { Republican
Prohibition
Social labor

HOSEA CLARK Democratic

WILLIAM HIGGS { Progressive
Ind. League

PAUL PRY Liberal

 Vote for one!

LIEUTENANT GOVERNOR

2

PERRY PRINDLE	Republican Prohibition Social labor
RALPH HUNTER	Democratic
JOHN SMITH	Progressive
PATRICK DOYLE	Ind. League
HENRY SPENCER	Liberal

2. Ballots for presidential electors. The names of the presidential electors of each party shall be printed in one column indicating:

First. The electors at large, whose names shall be arranged in the alphabetical order of the surnames; and

Second. The electors of each district, whose names shall be arranged in the numerical order of their district.

The columns shall be parallel to each other and shall be separated by heavy black lines. In addition to the party columns a blank column with lines for writing shall also be provided in which voters may write the names of candidates for presidential electors not on the ballot and which shall be sufficient to contain as many names as there are electors to be chosen. It shall be designated as the blank column and shall contain no voting spaces. At the head of each party column shall be printed the party emblem; below this a blank circle three-quarters of an inch in diameter; below this the party name in large type; below this the names of the candidates for president and vice-president; and below this a heavy line dividing the heading from the names of the presidential electors. Above the name of the first elector shall be printed the words "presidential electors." The names of the presidential electors shall be printed in spaces one-quarter of an inch in depth, except that the first space containing also the words "for presidential electors" shall be half an inch in depth. The spaces shall be divided from each other by light horizontal lines. At the left of the name of each elector shall be printed a voting space one-quarter of an inch square, except the space opposite the first name, which shall be half an inch in depth.

Each party circle shall be surrounded by the following instructions, plainly printed: "For a straight ticket, mark within this circle."

The columns for the presidential electors of independent bodies shall be similar to the party columns except that above the emblem in each column

shall be printed the words "independent nominations" in large type like that used for the party names.

In the blank column the space occupied by the emblem and voting circle in the party column shall be occupied by the following instructions, plainly printed: "In the column below, the voter may write the name of any person for whom he desires to vote whose name is not printed on the ballot." Below the line dividing the heading from the blank spaces shall be printed, as in the other columns, the words "presidential electors."

The columns shall be arranged upon the ballot as directed by the secretary of state, precedence, however, being given to the several parties according to the number of votes for governor polled at the last preceding gubernatorial election.

On the stub at the top of the ballot shall be printed in heavy black type the following instructions:

"1. To vote for all the electors of one party make a cross X mark within the circle above the party column.

2. To vote for some, but not all, of the electors of one party make a cross X mark in the square at the left of the name of every candidate printed on the ballot for whom you desire to vote.

3. To vote for any candidate not on the ballot write his name in the blank space provided therefor.

4. Mark only with a pencil having black lead.

5. Any other mark or any erasure or tear on the ballot renders it void.

6. If you tear, or deface, or wrongly mark this ballot, return it and obtain another."

3. Ballots for general officers. The names of all candidates for any one office shall be printed in a separate section, and the sections shall be in the customary order of the offices and shall be numbered from one upward by a numeral printed in the upper right hand corner of the section. The names of candidates shall be printed in their appropriate section in such order as the board of elections may direct, precedence, however, being given, except as herein otherwise provided, to the candidate of the party which polled the highest number of votes for governor at the last preceding election for such officer, and so on. At the top of each section in the center shall be printed on one line the title of the office. On the same line, to the left of such title and immediately above the emblems and voting squares, there shall be printed a direction as to the number of candidates for whom a vote may be cast, which direction shall be punctuated by an exclamation point. If two or more candidates are nominated for the same office for different terms, the term for which each is nominated shall be printed as a part of the title of the office. At the bottom of each section as many separate spaces as there are candidates to be elected shall be left blank in which the voter may write the names of any candidates not on the ballot. Except as herein otherwise provided with respect to a candidate for the office of governor or of member of as-

sembly who is nominated by more than one political organization, there shall be printed on each line below the top, in the following order, from left to right, the party emblem, the voting square, the candidate's name and the name of the party by which he is nominated. The width of the enclosure containing the name of the candidate and of such party shall not exceed three and one-half inches. In any case where a candidate for public office is nominated by more than one political organization, the party names and emblems shall appear in the order of priority based on the relative number of votes cast for governor by each organization at the preceding election of a governor. In any such case, the emblems shall be arranged horizontally before the voting square, beginning next to the square immediately preceding the name of the candidate with the emblem of the party casting the highest number of such votes. When any candidate for the office of governor or member of assembly is nominated by more than one political organization, there shall be one voting square, in the same horizontal row as the emblems, to the right of each emblem before the name of a candidate so nominated for such office. The final letter of the party name or names shall be close to the right hand perpendicular line of the box, and any space between the candidate's name and his party name or names shall be filled with dotted or waved lines.

On the stub at the top of the ballot shall be printed the following directions to the voter:

1. To vote for a candidate on this ballot make a single cross × mark in one of the squares to the right of an emblem opposite his name.
2. To vote for a candidate not on this ballot write his name on a blank line under the candidates for that office.
3. Mark only with a pencil having black lead.
4. Any other mark, erasure or tear on this ballot renders it void.
5. If you tear, or deface, or wrongly mark this ballot, return it and obtain another.

In direction number one the words "right" and "emblem" shall be underlined. (*Former § 331 as amended by L. 1911, chs. 649 and 872, repealed and new section added by L. 1913, ch. 821, and amended by L. 1914, chs. 87, 244, and L. 1916, ch. 537.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 81.

References.—Forging or destroying official ballots, Penal Law, § 760. Correction of errors in, § 344, post. Form where voting machine is used, § 397, post.

Former provision as to party columns.—Chapter 649 of the Laws of 1911, amending this section so that although a person shall have been nominated by more than one political party for the same office his name shall be printed but once upon the ballot and in the column of the party nominating him which first appears upon the ballot, unless the candidate requires it to be printed in the column of some other party which nominated him, is unconstitutional. *Hopper v. Britt* (1911), 203 N. Y. 144, 96 N. E. 371, 37 L. R. A. (N. S.) 825, revg. (1911), 146 App. Div. 363, 131 N. Y. Supp. 135, revg. (1911), 73 Misc. 369, 132 N. Y. Supp. 730. Other decisions of the courts and opinions of attorney-general construing this section before the adoption of the Massachusetts ballot are omitted as obsolete.

Nominations by different factions.—Matter of Wheeler (1895), 10 Misc. 55, 30 N. Y. Supp. 854; Matter of Mitchell (1894), 81 Hun 401, 30 N. Y. Supp. 962; Matter of Broat (1894), 6 Misc. 445, 27 N. Y. Supp. 176.

Printing and inspection of official ballots.—An official ballot should be printed and subject to inspection and ready for use a long enough time before election day to enable candidates and voters to see that it complies with the law. Matter of Holtzman (1914), 87 Misc. 115, 150 N. Y. Supp. 270.

Certificates of nomination are only guide for county clerk. Matter of Madden (1895), 148 N. Y. 136, 42 N. E. 534.

Ballots for presidential electors when voting machines used.—The provision of the Election Law requiring that there shall be a separate ballot for presidential electors at elections at which such electors are to be voted for applies to the form of ballot used on voting machines and such machines must be provided with a separate ballot for presidential electors. Rept. of Atty. Genl. (1912), Vol. 2, p. 348.

Ballots for town assessors.—Where, at a town meeting, the ballots for two assessors contained no designation as to length of term, there was no legal and proper choice and at the coming town meeting one assessor should be elected for four years and two assessors for two years. Opinion of Atty. Genl. (1913) 68.

A proposition to change the site of a county jail is a county proposition and must be submitted to the voters upon the same ballots with "constitutional amendments and questions submitted." Opinion of Atty. Genl. (1916), 9 State Dept. Rep. 427.

§ 332. **Form of ballot for questions submitted.**—The reading form of each proposed constitutional amendment or other question submitted as provided in section two hundred and ninety-five of this chapter shall be printed in a separate section. At the left of each question shall appear two voting squares, one above the other, each at least one-half inch square. At the left of the upper square shall be printed the word "Yes," and at the left of the lower square shall be printed the word "No." On the stub at the top of the ballot shall be printed the following directions to the voter:

1. To vote "Yes" on any question make a cross X mark in the square opposite the word "Yes."

2. To vote "No," make a cross X mark in the square opposite the word "No."

3. Mark only with a pencil having black lead.

4. Any other mark, erasure or tear on the ballot renders it void.

5. If you tear, or deface, or wrongly mark this ballot, return it and obtain another.

The questions shall be numbered consecutively on the face of the ballot, and on the back of each voting section shall be printed the number of the question which it contains.

So far as possible the ballots upon town propositions shall conform to the directions herein contained respecting the ballot on constitutional amendments and questions submitted.

All ballots for the submission of town propositions for raising or appropriating money for town purposes, or for incurring a town liability, to be voted at any town meeting in any town, shall be separate from all other

ballots for the submission of other propositions or questions to the electors of such town to be voted at the same town meeting or election. Such ballots shall be indorsed "ballot upon town appropriations." (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 82, as amended by L. 1900, ch. 381; L. 1901, ch. 598.

Reference.—See note to § 331.

Inapplicable to election on question of incorporating a village. *Matter of Taylor* (1896), 3 App. Div. 244, 38 N. Y. Supp. 348, *affd.* (1896), 150 N. Y. 242, 44 N. E. 790. See also *Matter of Village of LeRoy* (1898), 35 App. Div. 177, 55 N. Y. Supp. 149.

Liquor tax law propositions may properly be included on same ballot with constitutional amendments. *Matter of Arnold* (1900), 32 Misc. 439, 66 N. Y. Supp. 557; but see *Matter of Webster* (1906), 50 Misc. 253, 100 N. Y. Supp. 508, *affd.* (1906), 113 App. Div. 888, 98 N. Y. Supp. 1116, and opinion of attorney-general, 1903, p. 300. A failure to number such propositions from one to four as required in liquor tax law is not fatal. *Matter of Merow* (1906), 112 App. Div. 562, 99 N. Y. Supp. 9.

Ballots for raising money must be separate. *Rept. of Atty. Genl.* (1903) 271.

Additional matter improperly placed upon a ballot for the submission of a proposition, does not necessarily render the ballot void. *People ex rel. Williams v. Board of Canvassers* (1905), 105 App. Div. 197, 94 N. Y. Supp. 996, *affd.* (1905), 183 N. Y. 538, 76 N. E. 1116.

Mere details of one proposition need not be separately numbered. *Everett v. Village of Potsdam* (1906), 112 App. Div. 727, 98 N. Y. Supp. 963.

Manner of voting.—In view of section 368, post, and section 13 of the liquor tax law, an elector in order to cast a legal vote upon a constitutional amendment, or any other amendment, proposition or question, must mark his ballot by the cross-mark within the voting square at the left thereof. His ballot must be marked in the same manner and with the same degree of care as though he were voting for candidates. *People ex rel. Bell v. Board of Canvassers* (1909), 65 Misc. 223, 121 N. Y. Supp. 365.

A proposition to change the site of a county jail is not a town proposition, within the meaning of this section, but is a county proposition, and must be submitted to the voters upon the same ballot with the constitutional amendments and other questions submitted. *Opinion of Atty. Genl.* (1916), 9 State Dept. Rep. 427.

§ 333. **Sample ballots, instruction cards and stationery.**—Sample ballots of each kind equal in number to ten per centum of the number of official ballots provided therefor, shall also be provided for every polling place for which official ballots are required to be provided. Such sample ballots shall be printed on paper of a different color from any of the official ballots and without numbers on the stubs, but shall, in all other respects, be precisely similar to the official ballots to be voted at that polling place. One of each kind of such sample ballots shall, at any time on the day of election, be furnished upon application to any voter entitled to vote at that polling place, and may be taken by him away from such polling place before receiving his official ballot or ballots.

Two instruction cards, printed in English, and two printed in each of such other languages as the officer or officers charged with providing them

shall deem necessary, shall also be provided for each such polling place, containing in clear large type, in red ink, brief but clear instructions to voters as to the manner of voting, and, in smaller type, a copy of such sections of the penal law relating to crimes against the election franchise as the board of elections shall select. Two sets of the sample ballots shall also be mounted on cards and displayed conspicuously at each polling place. The sample ballots so mounted shall not be defaced and shall be kept free from marks of any kind. There shall also be provided two poll books, a suitable number of markers, designated as "distance markers," to indicate the distance of one hundred feet from the polling place, a sufficient supply of all blanks and forms which are needed by the election officers, heavy manila envelopes for returns and excess ballots, labels, sealing wax, pencils having black lead only, pens, penholders, blotting paper and red and black ink. All such articles herein enumerated are hereby designated as "stationery." (*Amended by L. 1913, ch. 821, and L. 1917, ch. 703, § 20, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 83.

References.—Officers to provide, § 341, post. Sample ballots where voting machine is used, § 398, post.

§ 333-a. Additional sample ballots in the year 1914.—*Added by L. 1914, ch. 243, and repealed by L. 1916, ch. 537, § 38.*

§ 334. Blank forms for election officers.—1. General provisions. At each election at which official ballots shall be used the officers charged with the duty of furnishing official ballots shall furnish to the board of inspectors of each election district printed blanks upon which the election officers shall make written returns showing the performance of their duties as such officers. These blanks shall include blanks for a return by the ballot clerks, tally sheets for tallying the votes as canvassed, and blanks for a return by the inspectors of the votes as tallied. There shall be furnished for each election district three copies of each of the return sheet blanks and two copies of each of the tally sheet blanks required at that election district and no more. Each blank shall have at the top in large letters a descriptive title according to the nature of the blank. It shall also contain immediately under the title a heading, showing the kind of election, whether special or general, the date, the name of the county, and the number of the assembly district and of the election district in which it is to be used. The other printed matter to appear on the several blanks shall be as hereinafter provided.

2. Forms of returns and tally sheets. The return blanks and tally sheet blanks shall be as nearly as possible in the forms hereinafter provided, and all returns and tally sheets must be kept and filled out according to the forms so provided and in accordance with the instructions contained therein.

In printing the forms, the matter in brackets, [] being instruc-

tions to the printers, is to be omitted. The printer shall also omit the names and figures which are inserted in the forms for the purpose of illustration.

A separate tally sheet shall be provided for each office or constitutional amendment or question submitted for which votes are to be canvassed.

3. Penalty for refusal to fill out returns and tally sheets. Any election officer who shall willfully neglect or refuse to fill out any return or tally sheet according to the directions of this chapter shall be guilty of a misdemeanor. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 84.

Cited as part of system of the nomination of candidates for public office. *Matter of Greene* (1907), 121 App. Div. 693, 106 N. Y. Supp. 425.

§ 335. Form of ballot clerk's return.—The ballot clerk's return shall be in the following form:

BALLOT CLERK'S RETURN.

General Election.

County of.....

.....Assembly District.

November19 .

.....Election District.

Total number of Official Ballots for [General Officers] received	800
Number cancelled before delivery to voters	2	
Number spoiled and returned by voters	25	
Number remaining unused	288	315
Number remaining to be accounted for in the ballot box.....	485

Number of detached stubs

Number of stubs on unused ballots

Total

N. B. This total must exactly equal the number of ballots received.

[Repeat the foregoing form for a return of each additional kind of ballot.]

STATE OF NEW YORK } ss:
COUNTY OF

The undersigned, being duly sworn, do depose and say, each for himself, that they have actually counted the cancelled ballots, and the ballots spoiled and returned by voters, and the detached stubs, and that the foregoing is a correct return of the ballots delivered to us for the election held on the day of November, 19 , at the Election District in the Assembly District in the County of , and of the disposition thereof at such election.

Sworn to before me this

.....Ballot Clerk.
.....Ballot Clerk.

Inspector of Elections.

(*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 84.

§ 336. Description of tally sheets.—(*Repealed by L. 1913, ch. 821.*)

§ 337. Forms of return and tally of votes cast for presidential electors.—

1. Return. The official return of votes cast for presidential electors shall be in the following form:

OFFICIAL TALLY OF VOTES CAS

General Election.	Total number of Presidential ballots voted .
	Straight Ballots : For [Republican] candidates For [Democratic] candidates [Print the names of the parties] Split Ballots Ballots wholly blank (no vote being cast the Void Ballots (no vote being counted there N. B.—This total must exactly equal number of ballots voted.
November.....19	

[REPUBLICAN] ELECTORS	NUMBER OF STRAIGHT VOTES	TALLY HERE VOTES ON SPLIT BALLOTS AS COUNTED	NUMBER OF SPLIT VOTES	TOTAL OF VOTES	[DEMOCRATIC] ELECTORS
[Print here the names of the electors as they appear on the ballot.]	185		7	192	[Print here the names of the electors as they appear on the ballot.]
	185		3	188	
	185			185	
	Total of split votes for [Repub- lican] electors		10		

SPECIAL TALLY FOR BLANK VOTES ON SPLIT BALLOTS			DIRECTIONS FOR PROOF OF	
N. B.—For each split ballot on which the voter has not voted for the full number of presidential electors, enter here the number of votes which he has omitted to cast.	BLANK VOTES		TO PROVE THE TALL	
	83		Add to	
	34		1.—The total of split votes cast for	
	35		2.—The total of votes cast for can	
	37		3.—The total of blank votes on spl	
	37		THE GRA	
Total blank votes on split ballots	38		must exactly equal the whole num	
	251		by the number of electors to be el	

The whole number of

INSTRUCTIONS FOR TALLYING.

Tally in ink with downward stroke, thus; tallying every fifth vote thus.

Be careful to tally once in special section provided, for each blank vote on split ballots. Other-
wise your tally will not prove.

FOR PRESIDENTIAL ELECTORS

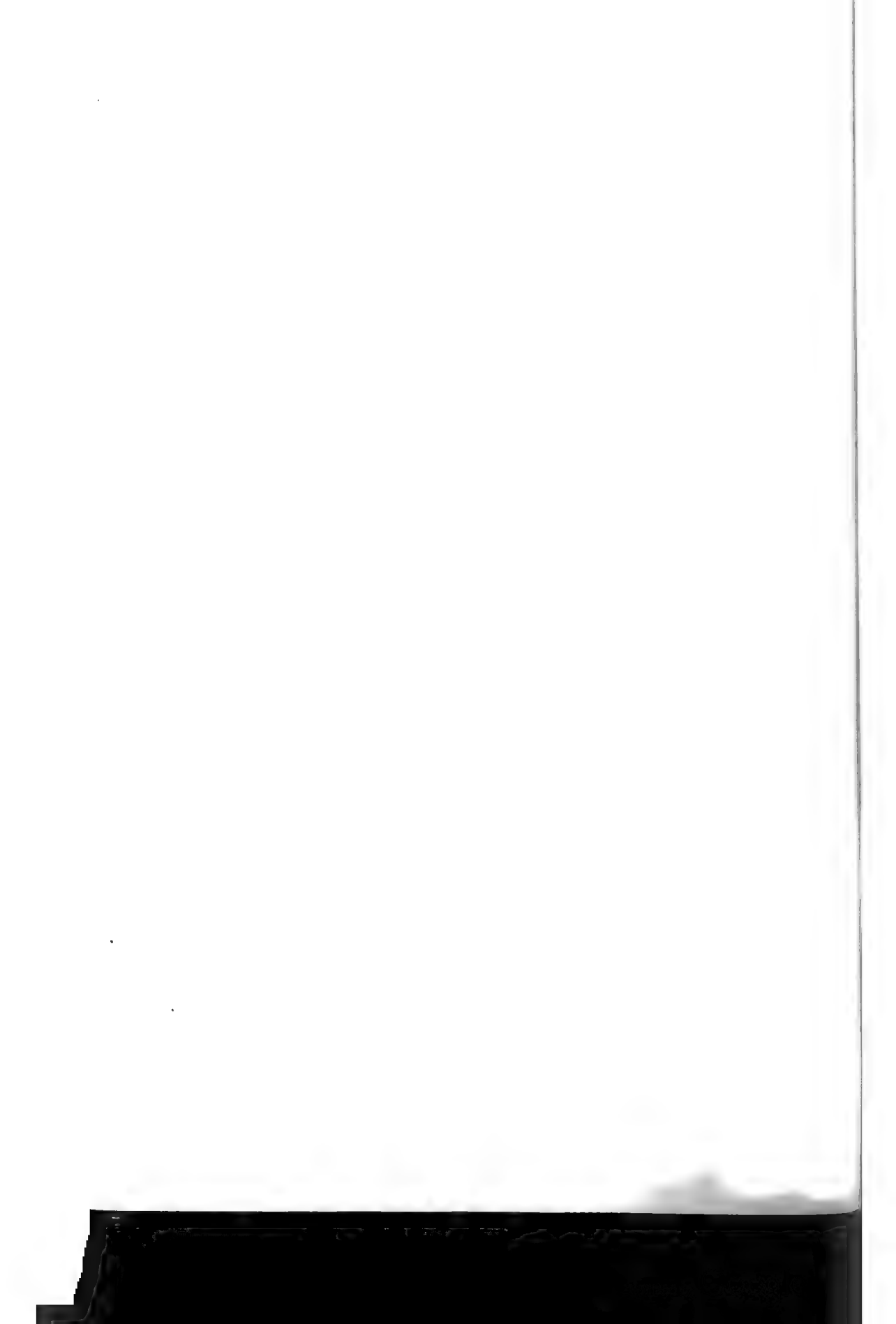
.....	397	County
.....	185	
.....	203	
.....	7	
.....	1	
.....	1Assembly District.
.....	397Election District.
Total	397	

NUMBER OF STRAIGHT VOTES	TALLY HERE VOTES ON SPLIT BALLOTS AS COUNTED	NUMBER OF SPLIT VOTES	TOTAL OF VOTES	NAMES OF CANDIDATES NOT ON THE BALLOT	TALLY HERE VOTES ON SPLIT BALLOTS AS COUNTED	TOTAL OF VOTES
203		3	206	[JOHN DOE]		1
203		6	209	[RICHARD ROE]		2
203			203			
Total of split votes for [Democratic] electors		9		Total of votes cast for candidates not on the ballot		3

TALLY OF SPLIT VOTES		PROOF OF THE TALLY OF SPLIT VOTES	
OF SPLIT VOTES,			NUMBER OF VOTES
Other:			
Each party.		The total of split votes for [Republican] Electors was....	10
Ballots not on the ballot.		The total of split votes for [Democratic] Electors was....	9
Ballots.		The total of votes for candidates not on the ballot was....	3
TOTAL		The total of blank votes on the split ballots was.....	251
of split ballots voted multiplied		Total.....	273
ed.			
Split ballots voted (7) multiplied by the number of electors to be elected (39) is.....			273

We Certify that the foregoing official tally sheet was correctly kept and filled out by the undersigned poll clerk as the ballots were severally canvassed and the vote thereon announced by the chairman of the board of inspectors in the above election district, in accordance with Sections 368 and 369 of the Election Law.

.....InspectorInspector.
.....InspectorInspector.Poll Clerk.





Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 84.

§ 338. Forms of return and tally of votes for officers other than presidential electors.—1. Return. The official return of votes for officers other than presidential electors shall be substantially in the following form with appropriate changes to indicate the vote for governor of each separate party or independent body by whom a candidate therefore was nominated:

OFFICIAL RETURN of Votes cast for [General Officers].

General Election. County of.....
Assembly District
 November.....19Election District

Return of votes cast for office of [Governor].

Total Number of Ballots Voted:
 Number to be elected to said office:

Total number of Votes to be canvassed:

For the office of.....the candidates named below received the number of votes set opposite their respective names.

[Print here the names of the candidates as they appear on the ballot, with six lines in addition for names to be written in and if a candidate for governor was nominated by more than one political organization, repeat the candidate's name as many times as he was nominated, inserting the vote of each party or independent body separately.]

Blank Votes
 Void Votes

Total.....

[Repeat the foregoing return for each office.]

The number of blank, void and protested ballots was:

The number of ballots which were taken from the ballot box by the chairman as excess ballots and placed with the spoiled and mutilated ballots, was:

STATE OF NEW YORK, } ss.:
 COUNTY OF.....

The undersigned, being duly sworn, do depose and say, each for himself, that the foregoing is a correct return of the ballots cast for the above offices at the election held on the day of 19 , at the Election District in the Assembly District of the County of

.....Inspector.
Inspector.
Inspector.
Inspector.
Poll Clerk.
Poll Clerk.
 Ballot Clerk.

N. B. To two out of the three returns tally sheets must be annexed.

2. Tally. The official tallies of votes cast for officers other than presi-

dential electors shall be in the following form with appropriate changes to indicate, where a candidate for governor was nominated by more than one political organization, the separate vote cast by each party or independent body for such candidate.* (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 84.

Consolidators' note.—Instead of including the form at length three separate times, to indicate that the return of the votes for all officers is to be made in the same way, the new section gives the form but once and adds below it the following instruction: ("Repeat the foregoing form for a return of the votes for each additional office.")

§ 339. Forms of return and tally of votes upon questions submitted.—1.

Return. The return sheet of votes upon constitutional amendments or other questions submitted, including town propositions and town appropriations, shall be in all respects like the form provided by this section for the return of votes for officers except in the following particulars:

(a) At the top of the sheet shall be printed the words "Official return of votes cast on (constitutional amendments, questions submitted, town propositions, or town appropriations, as the case may be.)"

(b) Below the heading, in place of the words, "Return of votes cast for office of," shall be printed the words, "Return of votes cast on question number (one) relating to (here give brief description)."

(c) The words "Number to be elected to said office," and "Total number of votes to be canvassed," shall be omitted.

(d) In place of the words "For the office of the candidates named below received the number of votes set opposite their respective names," shall be printed the words, "Upon question number (one) relating to (here give same description as above directed) votes were cast as follows:

Votes in favor

Votes against

(e) The verification shall be so modified as to state that the return is of ballots cast on constitutional amendments and questions submitted.

2. Tally. The tally sheet for constitutional amendments or other questions submitted shall be in all respects like the form provided by this section for the tally of votes for officers except in the following particulars:

(a) At the top of the sheet shall be printed the words: "Official tally of votes cast on question number one" (or other brief designation).

(b) The matter at the top of the tally sheet, except the title, the blanks to be filled in for the purpose of specifying the date and place of election, and the words, "Total number of votes to be canvassed," shall be omitted.

(c) In place of the candidates' names in the left hand column shall be printed the words "For (or against, as the case may be) question No. (or other brief designation)."

* The form of tally sheet as contained in law as enacted is omitted.

(d) The lines of tally squares left on the form herewith printed for names of candidates not on the ballot shall be omitted.

(e) The fourth instruction for tallying shall read as follows:

"4. Tally once for each vote, whether counted for or against the question, or blank, or void."

We certify that the foregoing statement is correct.

Dated this day of November,

.....
.....
.....
.....

Board of Inspectors.

(Amended by L. 1913, ch. 821.)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 84.

Consolidators' note.—The requirement of the printing of the blanks in the form prescribed is made to conform to §§ 337 and 338, the title to the form being supplied.

§ 340. **Number of official ballots.**—The number of official ballots of each kind to be provided for each polling place for each election to be held thereat, except a village election held at a different time from a general election, shall be one and one-fourth times as many ballots as near as may be as there were names of voters on the register of voters of such district for such election at the close of the final regular meeting for such registration. In cities of the first class the officer or board charged with the duty of furnishing official ballots shall furnish one and one-fourth times as many official ballots of each kind to be provided for such election as there are voters entitled to vote thereat, as nearly as can be estimated by such officer or board. The number of official ballots of each kind to be provided for each polling place for a town meeting held at any time or a village or city election held at a different time from a general election, shall be one and one-fourth times the number of persons who will be entitled to vote thereat, as nearly as can be estimated by the officer charged with the duty of providing such ballots. (Amended by L. 1913, ch. 820.)

Source.—Former Elec. L. (L. 1896, ch. 909) § 85, as amended by L. 1900, ch. 381.

Consolidators' note.—The provision for the number of ballots in districts where but two meetings are held can be and is omitted.

§ 341. **Officers providing ballots and stationery.**—The county clerk, in each of the counties of Oneida and Broome, the commissioner of elections in any county having one commissioner of elections, the board of elections in every other county except a county within the city of New York, and in any such county the board of elections of such city, shall provide the requisite number of official and sample ballots, cards of instruction, two poll books, distance markers, two tally sheets of each kind, three return blanks of each kind, pens, penholders, red and black ink, pencils having black lead, blotting paper, sealing wax and such other articles of stationery as may be necessary for the proper conduct of the

election and the canvass of the votes, for each election district in the county, for each election to be held thereat, except that when town meetings, city or village elections and elections for school officers are not held at the same time as a general election, the clerk of such town, city or village, respectively, shall provide such official and sample ballots and stationery for such election or town meeting. If the town meeting is held on general election day ballots and sample ballots for town propositions and official and sample general ballots on which town officers only are to be voted for shall be provided by the town clerk in like manner and in the same form as at a town meeting held at any other time, and such town clerk shall also furnish return blanks for making returns on town propositions or questions and for making returns of votes cast for candidates for town offices at such an election, and the expense of furnishing such ballots, sample ballots and return blanks shall be a town charge. And the board of elections of the city of New York shall provide such articles for each election to be held in said city. (*Amended by L. 1911, ch. 649, L. 1913, ch. 821, and L. 1916, ch. 454.*)

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 86, as amended by L. 1897, ch. 379, § 18; L. 1900, ch. 381, § 5; L. 1901, ch. 95, § 18, and ch. 615, § 1; L. 1902, ch. 176, § 1, and ch. 405, § 5; L. 1904, ch. 733, § 2; L. 1905, ch. 643, § 18.

Reference.—Destroying, concealing or suppressing official ballots, Penal Law, § 760. Failure to deliver after undertaking to do so, Penal Law, § 261.

Application.—Under the provision that boards of election shall provide ballots for all elections except those at town meetings held at times other than a general election, the exception has no application to a town meeting held at the same time as a general election, and ballots furnished for a local option election thereat are valid. *Matter of Town of Bath* (1916), 93 Misc. 575, 157 N. Y. Supp. 205.

Duty of county clerks in printing ballots.—See *matter of Hirsh* (1895), 14 Misc. 377, 36 N. Y. Supp. 19; *Matter of Madden* (1895), 148 N. Y. 136, 42 N. E. 534.

§ 342. **Public inspection of ballots.**—Each officer or board charged with the duty of providing official ballots for any polling place, shall have sample ballots and official ballots provided, and in the possession of such officer or board, and open to public inspection as follows: The sample ballots five days before the election, and the official ballots four days before the election for which they are prepared, unless prepared for a village election or town meeting held at a different time from a general election, in which case the official ballot shall be so printed and in possession at least one day, and the sample ballots at least two days, before such election or town meeting. During the times within which the same are open for inspection as aforesaid, it shall be the duty of the officer or board charged by law with the duty of preparing the same, to deliver a sample ballot of the kind to be voted in his district to each qualified elector who shall apply therefor, so that each elector who may desire the same may obtain a sample ballot similar, except as regards color and the number on the stub, to the official ballot to be voted at the polling place at which he is entitled to vote.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 86, as amended by L. 1897,

ch. 379, § 18; L. 1900, ch. 381, § 5; L. 1901, ch. 95, § 18, and ch. 615, § 1; L. 1902, ch. 176, § 1, and ch. 405, § 5; L. 1904, ch. 733; § 2; L. 1905, ch. 643, § 18.

§ 343. **Distribution of ballots and stationery.**—The board of elections of each county, except those counties which are wholly within the city of New York, shall deliver at its office to each town or city clerk in such county, except in New York city and in the city of Buffalo, on the Saturday before the election for which they are required, the official and sample ballots, cards of instruction and other stationery required to be provided for each polling place in such town or city for such election. It is hereby made the duty of each such town or city clerk to call at the office of such board of elections at such time and receive such ballots and stationery. In the cities of New York and Buffalo the board or officer required to provide such ballots and stationery shall cause them to be delivered to the board of inspectors of each election district at least one-half hour before the opening of the polls on each day of election. Each kind of official ballots shall be arranged in a package in the consecutive order of the numbers printed on the stubs thereof, beginning with number one. All official and sample ballots provided for such election shall be in separate sealed packages, clearly marked on the outside thereof with the number and kind of ballots contained therein and indorsed with the designation of the election district for which they were prepared. The instruction cards and other stationery provided for each election district shall also be inclosed in a sealed package or packages, with a label on the outside thereof showing the contents of each such package. Each such town and city clerk receiving such packages shall cause all such packages so received and marked for any election district to be delivered unopened and with the seals thereof unbroken to the inspectors of election of such election district one-half hour before the opening of the polls of such election therein. The inspectors of election receiving such packages shall give to such town or city clerk, or board, delivering such packages a receipt therefor specifying the number and kind of packages received by them, which receipt shall be filed in the office of such clerk or board. Town, city and village clerks required to provide the same for town meetings, city and village elections held at different times from a general election, shall in like manner, deliver to the inspectors or presiding officers of the election at each polling place at which such meetings and elections are held, respectively, the official ballots, sample ballots, instruction cards and other stationery, required for such election or town meeting, respectively, in like sealed packages marked on the outside in like manner, and shall take and file receipts therefor in like manner in their respective offices. (*Amended by L. 1916, ch. 537, § 39.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 87, as amended by L. 1897, ch. 379, § 19; L. 1905, ch. 643, § 19.

Consolidators' note.—In the last sentence "and the board of the city of New York, and in the city of Buffalo the commissioner of elections, required to pro-

L. 1909, ch. 22.

Ballots and stationery.

§§ 344, 345.

vide the same for elections held therein, respectively," is omitted. "Required to provide," etc., is doubly unnecessary, and the whole provision is mere repetition, as the previous provisions governing the distribution of ballots and stationery in New York City and Buffalo are broad enough to include special elections.

References.—Failure to deliver official ballots, Penal Law, § 761. Distribution where voting machine is used, § 404, post. Removal, mutilation or destruction of election supplies, Penal Law, § 758. Destroying, correcting or suppressing official ballots, Penal Law, § 760.

§ 344. Errors and omissions in ballots.—Upon affidavit, presented by any voter, that an error or omission has occurred in the publication of the names or description of the candidates, nominated for office, or in the printing of sample or official ballots, the supreme court, or a justice thereof, may make an order requiring the board of elections or other officer or board charged with the duty in respect to which such error or omission occurs to correct such error, or show cause why such error should not be corrected. The board of elections or such other officer or board shall, upon his own motion, correct without delay any patent error in the ballots which they may discover, or which shall be brought to their attention, and which can be corrected without interfering with the timely distribution of the ballots to the inspectors for use at such election. (*Amended by L. 1916, ch. 537, § 40.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 88.

Latent defect in official ballot. *People ex rel. Hirsh v. Wood* (1895), 148 N. Y. 142, 42 N. E. 536.

Effect of errors of election officers; defective ballots.—The purpose of the statute in describing with great detail the duties of election officers is that the choice of the voters may be made manifest and ascertained. When this has been clearly and fairly accomplished it will not do to thwart the public will because of the error or oversight of some election officer in the performance of his duty, when it is not claimed that his mistake in any wise affected the result. So a local option election will not be set aside for the reason that the town clerk erroneously printed the number upon both the ballot and stub, when he should have caused it to be placed on the stub only. Especially where no fraud or other irregularity is shown to have taken place and the contestants do not protest until after the ballots have been cast, the results of the election declared and the official certificate made and filed. *Matter of Town of Groton* (1909), 63 Misc. 370, 118 N. Y. Supp. 417, *affd.* (1909), 134 App. Div. 991, 119 N. Y. Supp. 1147.

§ 345. Unofficial ballots.—If the official ballots required to be furnished to any town or city clerk, or board, shall not be delivered at the time required, or if after delivery shall be lost, destroyed or stolen, the clerk of such town or city, or such board, shall cause other ballots to be prepared as nearly in the form of the official ballots as practicable, but without the indorsement, and upon the receipt of ballots so prepared from such clerk or board, accompanied by a statement under oath that the same have been so prepared and furnished by him or them, and that the official ballots have not been so delivered, or have been so lost, destroyed or stolen, the inspectors of election shall cause the ballots so substituted to be used at the elec-

tion in the same manner, as near as may be, as the official ballots. Such ballots so substituted shall be known as unofficial ballots.

Source.—Former Elec. L. (L. 1896, ch. 909) § 89.

References.—Unofficial ballots where voting machine is used, § 406, post. When unofficial ballots may be voted, § 360, post.

ARTICLE X.

(Former Art. 14, renumbered by L. 1913, ch. 800.)

CONDUCT OF ELECTIONS AND CANVASS OF VOTES.

Section 350. Opening the polls.

351. Persons within the guard-rail.
352. Watchers; challengers; electioneering.
353. General duties of inspectors.
354. General duties of ballot clerks.
355. General duties of poll clerk.
356. Delivery of ballots to voters.
357. Assistance to disabled or illiterate voters.
358. Preparation of ballots by voters; intent of voters.
359. Manner of voting.
360. When unofficial ballots may be voted.
361. Challenges.
362. Preliminary oath.
363. General oath and additional oaths.
364. Record of persons challenged.
365. Time allowed employees to vote.
366. Canvass of votes; preparation for canvass.
367. Comparing poll books and registers; verifying number of ballots.
368. Method of canvassing.
369. Objection to the counting; disposal of ballots.
370. Proving the tallies.
371. General provisions as to canvass.
372. Statement of canvass to be delivered to police.
373. Return of canvass.
374. Preservation of ballots.
375. Proclamation of result.
376. Sealing statements.
377. Delivery and filing of papers relating to the election; general provisions.
378. Delivery and filing of papers in the city of New York.
380. Delivery and filing of papers in the county of Erie.
381. Judicial investigation of ballots.
382. Destruction of books, records and papers relating to the elections.

§ 350. Opening the polls.—The inspectors of election, poll clerks and ballot clerks of each election district shall meet at the polling place therein at least one-half hour before the time set for opening the polls at each election for which official ballots are required to be provided, and shall proceed to arrange the space within the guard-rail and the furniture thereof, including the voting booths, for the orderly and legal conduct of the election.

The inspectors of election shall then and there have the ballot boxes required by law for the reception of ballots to be voted thereat; the box for the reception of ballots found to be defective in printing or mutilated before delivery to, and ballots spoiled and returned by, voters; the box for the stubs of voted and spoiled ballots; the sealed packages of official ballots, sample ballot and instruction cards and distance markers, poll books, tally sheets, return blanks and other stationery required to be delivered to them for such election; and if it be an election at which registered voters only can vote, the register of such voters required to be made and kept therefor.

The inspectors shall thereupon open the sealed packages of instruction cards and cause them to be posted conspicuously, at least one, and if printed in different languages, at least one of each language, in each of the voting booths of such polling place, and at least three of each language in which they are printed in or about the polling place; shall open the sealed packages of official ballots and sample ballots, and place them in charge of the ballot clerks, and shall place the poll books in charge of the poll clerks, and shall cause to be placed at a distance of one hundred feet from the polling place the visible markers designated herein as "distance markers," to prohibit "loitering or electioneering" within such distance. They shall also, before any ballots are cast, see that the voting booths are supplied with pencils having black lead only, unlock the ballot boxes, see that they are empty, allow the watchers present to examine them, and shall lock them up again while empty in such manner that the watchers present and persons just outside the guard-rail can see that such boxes are empty when they are relocked.

After such boxes are so relocked they shall not be unlocked or opened until the closing of the polls of such election, and, except as authorized by law, no ballots or other matter shall be placed in them after they are so relocked and before the announcement of the result of such canvass and the signing of the original statement of canvass and the two certified copies thereof. The instruction cards and distance markers posted as provided by law shall not be taken down, torn or defaced during such election. The ballot clerks with the official and sample ballots, the inspectors with such boxes and register of voters, and the poll clerks with their poll books, shall be stationed as near each other as practicable within such inclosed space. One of the inspectors shall then make proclamation that the polls of the election are open, and of the time in the afternoon when the polls will be closed.

Source.—Former Elec. L. (L. 1896, ch. 909) § 100.

References.—Additional oath of election officer before opening polls, § 357, post. Time of opening and closing polls, § 291, ante. Opening polls where voting machines are used, § 407, post. Removal or destruction of election supplies, poll-lists or instruction cards, Penal Law, § 758. Removal of official ballots before close of polls, Penal Law, § 764, subd. 5.

Distance markers should be placed one hundred feet from the nearest point of the polling place. Rept. of Atty. Genl., Feb. 1, 1911.

§ 351. **Persons within the guard-rail.**—From the time of the opening of the polls until the announcement of the result of the canvass of the votes cast thereat, and the signing of the official returns of such canvass and the copies thereof, the boxes and all official ballots shall be kept within the guard-rail. No person shall be admitted within the guard-rail during such period, except inspectors, poll clerks, ballot clerks, duly authorized watchers, persons admitted by the inspectors to preserve order or enforce the law, and persons duly admitted for the purpose of voting; provided, however, that candidates for public office voted for at such polling place may be present at the canvass of the votes.

Source.—Former Elec. L. (L. 1896, ch. 909) § 101.

References.—Unlawful presence within guard-rail, a misdemeanor, Penal Law, § 764, subd. 6.

§ 352. **Watchers; challengers; electioneering.**—Each political party or independent body duly filing certificates of nomination of candidates for offices to be filled at any such election, may, by a writing signed by the duly authorized county, city, town or village committee of such political party or independent body, or by the chairman or secretary thereof charged with that duty, and delivered to and filed with one of the inspectors of election, appoint not more than two watchers to attend each polling place thereof. Such committee, chairman or secretary thereof for a city, county, town or village shall not appoint watchers for any polling place outside of such city, county, town or village, respectively. Each watcher must be a qualified elector of the county in which the election district for which he is appointed a watcher shall be located, provided that women who are citizens and residents of the county, and of the age of twenty-one years, may act as watchers, with full rights and privileges of such office, at any election whenever held at which a woman suffrage constitutional amendment is submitted to the voters except that but one woman watcher for, and one woman watcher opposed to, the adoption of such amendment shall be permitted in each election district. Such watchers may be present at such polling place and within the guard-rail from at least fifteen minutes before the unlocking and examination of any ballot box at the opening of the polls of such election until after the announcement of the result of the canvass of the votes cast thereat and the signing of the returns of the canvass by the inspectors.

A reasonable number of challengers, at least one person of each such party or independent body, shall be permitted to remain just outside of the guard-rail of each such polling place, where they can plainly see what is done within such rail outside of the voting booths, from the opening to the close of the polls thereat. Each challenger must be a qualified elector of the county in which the election district for which he is appointed a challenger is located.

L. 1909, ch. 22. Conduct of elections and canvass of votes. §§ 353, 354.

No person shall, while the poles are open at any polling place, do any electioneering within such polling place or within one hundred feet therefrom in any public street or in any building or room, or in a public manner, and no political banner, poster or placard shall be allowed in or upon such polling place during any day of registration or of the election. (*Amended by L. 1910, ch. 428, L. 1911, ch. 649, L. 1913, ch. 821, and L. 1914, ch. 242.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 102.

References.—Misconduct of watchers, Penal Law, § 762. Unlawful electioneering, Penal Law, § 764, subd. 4.

Distance markers should clearly inform the electors of the prohibition against electioneering. Rept. of Atty. Genl. (1895) 245.

Woman watcher.—Suffragists and anti-suffragists having club or committee organizations in a county, city, town or village, may appoint and have present at the polling places one woman watcher for each faction at all elections at which a woman suffrage constitutional amendment is to be submitted, but a male elector may not be appointed to act for either of the factions. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 551.

The Secretary of State has no authority to appoint watchers for any political party or independent body. Atty. Genl. Opin. (1915), 4 State Dep. Rep. 551.

§ 353. **General duties of inspectors.**—One of the inspectors of election at each polling place shall be designated by the board of inspectors of election to receive the ballots from the voters voting; or if a majority of the inspectors shall not agree in such designation, they shall draw lots for such position. If it be an election for which voters are required to be registered, the other inspectors shall, before any ballots are delivered by the ballot clerks to a voter, ascertain whether he is duly registered. The ballot clerks shall not deliver any ballot to such voter until the inspectors announce that he is so registered. As each voter votes, the inspectors shall check his name upon such register and shall enter therein in the column provided therefor opposite the name of such voter, the consecutive number upon the stub of the ballot or set of ballots voted by him. The inspector shall forthwith upon detaching the stub from any official ballot deposit the same in the box provided for detached stubs.

Source.—Former Elec. L. (L. 1896, ch. 909) § 103, subd. 1, in part.

References.—Acting as inspector when not qualified, Penal Law, § 764, subd. 1. Misdemeanors in relation to elections, Penal Law, § 764. Revealing candidate for whom voter has voted, Penal Law, § 762. Marking ballot, Penal Law, § 762. Unfolding ballot before close of polls, Penal Law, § 762. Violation of Election Law by public officer, Penal Law, §§ 29, 763.

Ministerial officers.—Inspectors of election are merely ministerial officers. *People ex rel. Stapleton v. Bell* (1890), 119 N. Y. 175, 23 N. E. 533; *People ex rel. Sherwood v. State Board* (1891), 129 N. Y. 360, 29 N. E. 355.

§ 354. **General duties of ballot clerks.**—Ballot clerks shall fold and deliver the ballots to voters. Ballots shall be delivered in numerical order beginning with number one. When the ballots are in sets they shall only be delivered in sets. If a ballot is found to be defective or mutilated before

it is delivered to the voter, its stub and the stubs of all other ballots in the set shall immediately be detached and placed in the box for stubs, and all the ballots of that set shall immediately be marked "canceled" and placed in the box for spoiled and mutilated ballots. If a voter returns a ballot as defective, mutilated, defaced, or wrongly marked, he shall also return all the other ballots of the set, if any, and the ballot clerks shall likewise remove their stubs, placing all the stubs in the box for stubs and all the ballots of the set in the box for spoiled or mutilated ballots, first marking the ballots "canceled." In each case the voter shall receive another ballot, or set of ballots, unless not entitled thereto under section three hundred and fifty-eight.

Upon each delivery of official ballots, the ballot clerks shall announce the voter's name and the number on the stub, and they shall make a similar announcement when any ballot is returned to them.

The ballot clerks shall keep a record of all ballots deposited in the box for spoiled and mutilated ballots. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 103, subd. 2.

References.—See notes to § 353. Receiving official ballot from any person other than ballot clerk, Penal Law, § 764, subd. 13.

§ 355. General duties of poll clerk.—1. Poll clerks shall keep a record of the persons voting or offering to vote, and tally the votes during the canvass thereof.

2. Each poll clerk at each polling place for which official ballots are required to be provided shall have a poll-book for keeping the list of electors voting or offering to vote thereat at the election. Such book shall have eight columns headed respectively: "Number of electors," "Names of electors," "Residence of electors," "Signature or statement number of elector," "Signatures compared by inspector," "Number on ballots delivered to electors," "Number on ballots voted," and "Remarks;" provided, however, that the columns for "Signature or statement number of electors" and "Signatures compared by the inspector," when the poll-book is prepared for use in an election district wholly outside of a city or village having five thousand inhabitants or more, may in the discretion of the board or officer supplying such books be omitted therefrom. Previous to each delivery of an official ballot or set of official ballots by the ballot clerk to an elector, each poll clerk shall enter upon his poll-book in the appropriate column the number of the elector, in the successive order of the delivery of ballots to electors, the name of the elector in the alphabetical order of the first letter of his surname, his residence by street and number or if he has no street number, a brief description of the locality thereof. The column headed "Signature or statement number of elector," shall have printed above each horizontal line the words "the foregoing statements are true," and any elector whose registration was required to be personal shall, previous to the receipt of an official ballot, sign his name by his own hand and without assistance, using an indelible pencil

or ink, below the said words in the poll-book kept by the poll clerk who shall be designated by the chairman of the board of inspectors. No such signature shall be required of an elector whose registration was not required to be personal.

After an elector, whose registration was required to be personal, shall have so signed, and before an official ballot shall be given to him, one of the inspectors other than the inspector who receives the ballots from the electors shall compare the signature made in the poll-book with the signature theretofore made by the elector in the registration book on registration day, and if said signature is the same, or sufficiently similar to the signature written on registration day, as to identify it as being written by the same person who wrote the signature on registration day, said inspector shall thereupon certify that fact by writing his initials after such signature, in the column headed "Signatures compared by inspector." The inspector who shall so certify shall be chosen by lot by the board previous to the opening of the polls on election day, and if said inspector so chosen shall absent himself during the day, the board of inspectors shall fill his place by choosing by lot from the inspectors present another of the inspectors other than the inspector who receives the ballots from the electors.

If, on registration day, an elector whose registration was required to be personal had alleged his inability to so sign, then one of the poll clerks designated by the chairman of the board of inspectors shall read the same list of questions to the elector as were required to be read on registration days from a book to be provided for election day, and to be known as "identification statements for election day," and said poll clerk shall write the answers of the elector thereto. Each of these statements shall be numbered and a number corresponding to the number on the statement sheet shall be entered in the fourth column opposite the name of such elector answering the questions. The questions answered on registration day by the elector shall not be turned to or inspected until all the answers to said questions shall have been written down on election day by the poll clerk. Any person who shall prompt an elector in answering any questions provided in this subdivision shall be guilty of a felony.

At the bottom of each such list of questions shall be printed the following statement: "I certify that I have read to the above named elector each of the foregoing questions and that I have duly recorded his answers as above to each of said questions," and said poll clerk who has made the above record shall sign his name to said certificate and date the same, and note the time of day of making such record.

The comparison of the signature of an elector made on registration and election days, and a comparison of the answers made by an elector on registration and election days, shall be had in full view of the watchers, and the right to challenge electors shall exist until the ballot shall have been deposited in the ballot box. If the signature of the elector or the answers to the questions made by the elector do not correspond, then it shall be the

privilege of the watchers and challengers to challenge and the duty of each inspector to challenge, unless some other authorized person shall challenge.

Each poll clerk in every election district of the state shall enter upon his poll-book in the appropriate column the printed number upon the stub of the ballots delivered to each elector, and the number on the ballots voted by him. If the ballot or set of ballots delivered to any elector shall be returned by him to the ballot clerk, and he shall obtain a new ballot or set of ballots, the poll clerk shall write opposite his name on the poll-books, in the proper column, the printed number on the stub of such ballot or additional set of ballots. Each poll clerk shall make a memorandum upon his poll-book opposite the name of each person who shall have been challenged and taken either of the oaths prescribed upon such challenge, or who shall have received assistance in preparing his ballot and shall also enter upon the poll-book opposite the name of such person the names of the election officers or persons who render such assistance, and the cause or reason for such assistance by the elector assisted. As each elector offers his ballot or set of ballots which he intends to vote to the inspector, each poll clerk shall report to the inspector whether the number entered on the poll-book kept by him as the number on the ballot or set of ballots last delivered to such elector is the same as the number on the stub of the ballot or set of ballots so offered. As each elector votes, each poll clerk shall enter in the proper column on his poll-book the number on the detached stub of the ballots voted. (*Amended by L. 1911, ch. 649, L. 1913, ch. 821, and L. 1916, ch. 537, § 41.*)

Source.—Subd. 1 is Former Elec. L. (L. 1896, ch. 909) § 103, subd. 3, as amended by L. 1908, ch. 521, § 2. Subd. 2, is Elec. L. § 103, subd. 4, as added by L. 1908, ch. 521, § 3.

Reference.—See notes to § 353.

Constitutionality.—The fact that the signature law formerly applied only to the city of New York did not render the provision unconstitutional. *Matter of Ahern v. Elder* (1909), 195 N. Y. 493, 88 N. E. 1059.

Section cited.—*People ex rel. McLaughlin v. Aumenwerth* (sic.) (1909), 135 App. Div. 893, 120 N. Y. Supp. 295; *affd.* (1910), 197 N. Y. 340, 90 N. E. 973.

§ 356. Delivery of ballots to voters.—While the polls of the election are open, the voters entitled to vote and who have not previously voted thereat, may enter within the guard-rail at the polling place of such election for the purpose of voting, in such order that there shall not at any time be within such guard-rail more than twice as many voters as there are voting booths thereat, in addition to the persons lawfully within such guard-rail for other purposes than voting. The voter shall enter within the guard-rail through the entrance provided, and shall forthwith proceed to the inspectors and give his name, and, if in a city or village of five thousand inhabitants or over, his residence by street and number, or if it have no street number, a brief description of the locality thereof, and if required by the inspectors shall state whether he is over or under twenty-one years

of age. One of the inspectors shall thereupon announce the name and residence of the voter in a loud and distinct tone of voice. No person shall be allowed to vote in any election district at any election where voters are required to be registered unless his name shall be upon the registration books of such election district.

The right of any person to vote whose name is on such register shall be subject to challenge. If such voter is entitled to vote thereat and is not challenged, or if challenged and the challenge be decided in his favor, one of the ballot clerks shall then deliver to him one official ballot or a set of official ballots, folded by such ballot clerk in the proper manner for voting, which is: First, by bringing the bottom of the ballot up to the perforated line, and second, by folding both sides to the center, or towards the center, in such manner that when folded the face of each ballot shall be concealed, and the printed number on the stub and the indorsement on the back of the ballot shall be visible, so that the stub can be removed without removing any other part of the ballot, and without exposing any part of the face of the ballot below the stub, and so that when folded the ballot shall not be more than four inches wide.

No person other than an inspector or ballot clerk shall deliver to any voter within such guard-rail any ballot, and they shall deliver only such ballots as the voter is legally entitled to vote, and also the sample ballot when the same is asked for.

Source.—Former Elec. L. (L. 1896, ch. 909) § 104, subd. 1.

References.—Delivery of ballot by a person not a ballot clerk, a misdemeanor, Penal Law, § 764, subd. 14. Obstructing or delaying voters, Penal Law, § 764, subd. 13.

When delivery of ballots must cease.—An elector is not entitled to an official ballot after five o'clock. *Newcomb v. Leary* (1908), 128 App. Div. 329, 112 N. Y. Supp. 657.

§ 357. Assistance to disabled or illiterate voters.—Any voter who shall, at the time of registration, have made oath of physical disability or illiteracy, as prescribed by section one hundred and sixty-four of this chapter; or who, being duly registered in an election district where personal registration by all voters is required by law, shall state under oath to the inspectors of election on the day of election that, by reason of some accident, the time and place of which he must specify, or of disease, the nature of which he must also specify, he has, since the day upon which he registered, lost the use of both hands, or become totally blind, or afflicted by such degree of blindness as will prevent him, with the aid of glasses, from seeing the names printed upon the official ballot, or so crippled that he can not enter the voting booth and prepare his ballot without assistance; or any voter in an election district who is not required by law to personally register, who is unable to write by reason of illiteracy, or is physically disabled in one or more ways described in section one hundred and sixty-four of this chapter, and who shall make the statement under oath to the

inspectors in the form required in said section, may choose two of the election officers, both of whom shall not be of the same political faith, to enter the booth with him to assist him in preparing his ballots. At any town meeting or village election where the election officers are all of the same political faith, any voter entitled to assistance as herein provided may select one of such election officers and one voter of such town or village of opposite political faith from such election officer so elected, to render such assistance.

Such election officers or * persons assisting a voter shall not in any manner request or seek to persuade or induce any such voter to vote any particular ticket, or for any particular candidate, and shall not keep or make any memorandum or entry of anything occurring within such booth, and shall not, directly or indirectly, reveal to any other person the name of any candidate voted for by such voter, or which ticket he has voted, except they be called upon to testify in a judicial proceeding for a violation of this chapter, and each election officer, before the opening of the polls for the election, shall make oath that he "will not in any manner request, or seek to persuade, or induce any voter to vote any particular ticket or for any particular candidate, and that he will not keep or make any memorandum or entry of anything occurring within the booth, and that he will not, directly or indirectly, reveal to any person the name of any candidate voted for by any voter, or which ticket he has voted, or anything occurring within the voting booth, except he be called upon to testify in a judicial proceeding for a violation of the election law." The same oath shall be taken by every voter rendering such assistance, as provided for above, and any violation of this oath shall be a felony punishable upon conviction by imprisonment in a state prison for not less than two nor more than ten years.

No voter shall otherwise ask or receive the assistance of any person within the polling place in the preparation of his ballot, or divulge to any one within the polling place the name of any candidate for whom he intends to vote or has voted.

Source.—Former Elec. L. (L. 1896, ch. 909) § 104, subd. 2.

References.—Inducing voter or revealing vote, Penal Law, § 764, subd. 9. Assistance at registration, § 164, ante. Where voting machines are used, § 412, post.

Preparation of ballots by illiterate voters. Rept. of Atty. Genl. (1905), 541.

§ 358. Preparation of ballots by voters; intent of voters.—On receiving his ballot the voter shall forthwith and without leaving the inclosed space retire alone, unless he be one that is entitled to assistance in the preparation of his ballot, to one of the voting booths, and without undue delay unfold and mark his ballot as hereafter prescribed. No voter shall be allowed to occupy a booth already occupied by another, or to occupy a booth more than five minutes in case all the booths are in use and voters waiting to occupy the same.

* So in original.

It shall be unlawful to deface or tear an official ballot in any manner; or to erase any printed line, letter or word therefrom; or to erase any name or mark written thereon by a voter. If a voter wrongly mark, deface, or tear a ballot or one of a set of ballots, he may successively obtain others, one set at a time, not exceeding in all three sets, upon returning to the ballot clerks each set of ballots already received.

The voter shall mark his ballot with a pencil having black lead as follows and not otherwise:

1. To vote for any candidate on any ballot, except for an entire group of presidential electors by means of a single mark as hereinafter provided, he shall make a cross \times mark in the voting square at the left of the candidate's name.

2. To vote for any candidate not on the ballot, he shall write the candidate's name on a line left blank in the appropriate place.

3. To vote for an entire group of presidential electors, nominated by any party, he shall make a cross \times mark in the circle above the party column. If, on a ballot for presidential electors, the voter shall make such mark in the circle above a party column and also before the name of a candidate in such column, or in the voting squares before the names of two or more candidates in such column, without making a voting mark in any voting square of another column and without writing in any name, such individual voting marks shall be treated as surplusage and his vote shall be deemed to have been cast for all of the candidates whose names appear in the party column below such circle. If, however, a ballot for presidential electors shall be so marked in a party circle and in one or more voting squares in the column under such circle and also in any voting square or squares in another column or columns or a name or names be also written in, the vote on a ballot so marked shall only be counted for the candidate so specially indicated.

4. If, on a ballot for presidential electors, the voter shall make a cross \times mark in the circle above a party column, and no voting mark in any voting square of the same column, and shall also make a cross \times mark in the voting square before the name of a candidate in another party column, or in such squares before the names of two or more candidates in one or more of such other party columns, or writes in a name or names, he shall be deemed to have voted for the candidates whose names are thus specially indicated and also for all the candidates whose names appear in the column below the circle containing such mark, except those whose names are printed in the latter column on a horizontal line with the names so special indicated; provided, however, that if the voter shall make a cross \times mark in the circle above a party column and also cross \times marks in voting squares before any two or more names on the same horizontal line or write a name in a blank space on a horizontal line with one or more names so individually marked, his vote shall be counted only for candidates for the office of presidential elector which, by individual voting

marks or by writing, he shall have specially indicated, though there be no such marks in the column under such circle.

5. To vote on any constitutional amendment or question submitted, he shall make a cross X mark in the appropriate voting square at the left of the question as printed on the ballot.

A cross X mark shall consist of any straight line crossing any other straight line, at any angle, within a circle or voting square. Any mark other than a cross X mark or any erasure of any kind shall make the whole ballot void; but no ballot shall be declared void because a cross X mark thereon is irregular in form. Any ballot which is defaced or torn by the voter shall be void. If a voter shall do any act extrinsic to the ballot itself, such as inclosing any paper or other article in the folded ballot, such ballot shall be void. If the elector marks more names than there are persons to be elected to an office, or if for any other reason it is impossible to determine the elector's choice of a candidate for an office to be filled, his vote shall not be counted for such office but shall be returned as a blank vote for such office. Where, in the case of a candidate for governor or member of assembly, the candidate is nominated by two or more political organizations, and the voter makes a cross X mark in two or more voting spaces or squares, his vote for such candidate shall be counted, but he shall not be recorded in the tally sheet or returns as voting with any particular party or independent body for such candidate. (*Amended by L. 1911, ch. 296, L. 1913, ch. 821, and L. 1916, ch. 537, § 42.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 105, as amended by L. 1898, ch. 335, § 6.

Consolidators' note.—Election Law, § 105, as amended by L. 1898, ch. 335. The voting mark printed X not X; in "if a voter deface or tear a ballot * * * or wrongly marks the same," "marks" made "mark"; "voter" substituted and punctuation improved.

In its old form Rule 7 has given rise to some unnecessary confusion, for voters have sometimes thought that the requirement that the mark should be "within a circle" required them to mark a "circle" around their voting mark. The occasional printing of the cross in parentheses, thus (X), has added to the confusion. Accordingly "within a circle" has been changed to "within a party circle" to make it perfectly clear that the party circle printed on the ballot is the "circle" referred to.

References.—Misdemeanors by voters in preparing ballots, etc., Penal Law, § 764. Failure to return unvoted ballots to ballot clerks, Penal Law, § 764, subd. 16. See notes to § 86, ante, as to preparation of ballot at official primaries.

Question of law.—The question whether ballots before the court with certain marks and appearances on them, constituting undisputed evidence, are such as may or may not be counted under the statute, is a question of law. *People ex rel. Keeny v. Board of Canvassers* (1898), 156 N. Y. 36, 50 N. E. 425. The returns must present the ballots contested. *People ex rel. Krulish v. Fornes* (1903), 175 N. Y. 114, 67 N. E. 216; *Brown v. Board of Canvassers* (1915), 170 App. Div. 476, 155 N. Y. Supp. 979, modfd. (1906), 216 N. Y. 732, 110 N. E. 776.

Cross-marks.—Section 358 defines a cross-mark as "any straight line crossing any other straight line at an angle within a circle or voting square." Prior to the amendment of 1911 it was defined as "one straight line crossing another straight

line at any angle," etc. The section as amended also provides that "no ballot shall be declared void because a cross-mark thereon is irregular in form." The difference in the definition has resulted in a more liberal construction of the statute, and the decisions prior to 1911 must be considered in light of the change. The history of the law and a discussion of the many rulings on the subject of cross-marks and marks for identification are to be found in Saxe's Manual of Elections.

Marks not made by pencil with black lead vitiate the ballot. *People ex rel. Feeny v. Bd. of Canvassers* (1898), 156 N. Y. 36, 50 N. E. 425; *People ex rel. Obert v. Bourke* (1900), 30 Misc. 461, 63 N. Y. Supp. 906; *Matter of Houligan* (1907), 55 Misc. 5, 106 N. Y. Supp. 205.

Must be within voting space but need not be entirely therein. *Matter of Fallon* (1910), 197 N. Y. 336, 90 N. E. 942; *People ex rel. Pierce v. Parkhurst* (1898), 24 Misc. 442, 53 N. Y. Supp. 598; *People ex rel. Wells v. Collin* (1897), 19 App. Div. 457, 46 N. Y. Supp. 701, *affd.* (1897), 154 N. Y. 750, 49 N. E. 1102.

Construction of the word "straight."—Such construction should be adopted that a tremulous line drawn by an infirm elector or an irregular or curved line drawn by an elector with poor eyesight or with muscles untrained to the use of a pencil, should not be held void. *Matter of Fallon* (1910), 197 N. Y. 336, 90 N. E. 942, *mod.* (1909), 135 App. Div. 195, 119 N. Y. Supp. 1061.

A ballot is not necessarily invalid because the marks constituting the cross are not exactly straight, even or regular, unless there is a manifest intention to evade or violate the law. It is only where an attempt to make a distinguishing mark can be inferred that the ballot should be rejected. A ballot is not necessarily invalid because an elector in making a mark, retraced the stroke of his pencil thereby making an uneven or double line. *Matter of Hearst* (1905), 48 Misc. 453, 96 N. Y. Supp. 119; *People ex rel. Bantel v. Morgan* (1897), 20 App. Div. 48, 46 N. Y. Supp. 898.

General rules for marking of ballots.—Where slight pencil dots appear adjacent to the voting cross which were evidently made by the voter resting his pencil upon the paper before or after making the cross, the ballot is good and should be counted, and in any event all such ballots should be treated alike and some should not be declared void as to the respective candidates while others open to the same objection are allowed. Ballots bearing irregular cross marks should all be treated alike and are valid by virtue of the express wording of the statute. But ballots upon which the voter first wrote in the voting square the number printed upon the ballot opposite the name of the candidate for whom he intended to vote and then super-imposed a cross after discovering the mistake, are void, there being in such case a mark other than the cross which alone is permitted by the statute. Ballots having "half cross marks" in the voting space should be declared to be void, for they bear an unlawful mark. Ballots with excessive crosses in the voting space and bearing erasures are void. *Matter of Garvin* (1915), 168 App. Div. 218, 153 N. Y. Supp. 549.

Where there is a blur mark in the voting square of a ballot which is reasonably determined to be an erasure or an attempt to change the vote, such ballot comes within the language of the statute and must be rejected. Where upon the ballot some portions of all the cross-marks extend out of and beyond the voting squares; and one of said cross-marks has its lines intersecting upon the lower line of the voting square, so that there is no cross-mark whatever within the square, but simply two lines converging to an acute angle and forming a "V" within the square, there is not a cross-mark within the square as required by the statute. *People ex rel. Bell v. Board of Canvassers* (1909), 65 Misc. 223, 121 N. Y. Supp. 365.

Irregularities in marking.—A ballot which bears pencil marks, other than crosses placed in the voting spaces, is void and should not be counted. A cross placed

outside the circle or voting spaces on a ballot renders it void. In determining whether crosses made by a voter in the voting spaces of a ballot were given certain peculiarities for the purpose of identification, the statute should not be strictly construed. Thus, where there is no extraneous evidence showing that such peculiarities were made for the purpose of identification, a ballot should be counted although the lines of the cross were wavering and irregular or the pencil was passed back and forth several times so that the lines of the cross were double, etc. *Matter of Fallon* (1909), 135 App. Div. 195, 119 N. Y. Supp. 1061, mod. (1910), 197 N. Y. 336, 90 N. E. 942.

A vote for two candidates for the same office renders the ballot void only as to such office. Ballots not containing cross marks, but defective and incomplete marks that may serve for identification, are void. A ballot containing a second cross near the name of a candidate which was not made by the voter, but caused by the heavy ink and incidental to the folding of the ballot, is not invalid. A ballot on which the voter has written the name of his candidate for a certain office in the space underneath the printed name of a candidate instead of in the blank space provided for such purpose is void. A ballot on which the proper cross mark has not been placed before the name of a candidate is void. *People ex rel. Brown v. Supervisors of Nassau* (1915), 170 App. Div. 364, 156 N. Y. Supp. 205, mod. (1915), 216 N. Y. 732, 110 N. E. 776.

A ballot which has the name of a candidate written in the blank line, although it was printed as a candidate for the same office, is void. A ballot on which the voter has marked a cross in the proper space in front of each of the candidates for a certain office is blank as to such office. A ballot having a semi-circular mark over the cross, but not a part thereof, is void. A ballot having two crosses in the same voting space, or one cross with an attempted erasure of the other, is void. Flourishes at the upper end of both lines of the cross not constituting distinct lines, but made with the same impression of the pencil, constitute an irregular cross, and do not render the ballot void. *Brown v. Board of Canvassers* (1915), 170 App. Div. 476, 155 N. Y. Supp. 979, mod. (1915), 216 N. Y. 732, 110 N. E. 776.

Additional marks.—The courts have been liberal in sustaining the validity of ballots containing marks in addition to valid cross-marks. See records in *Matter of Fallon* (1910), 197 N. Y. 336, 90 N. E. 942, mod. (1909), 135 App. Div. 195, 119 N. Y. Supp. 1061; *People ex rel. De Frost v. McLaughlin* (1910), 197 N. Y. 589, 90 N. E. 973 (1914), 213 N. Y. 627, 107 N. E. 1084. See also *People ex rel. Pierce v. Parkhurst* (1898), 24 Misc. 442, 53 N. Y. Supp. 598; *Matter of Holmes* (1900), 30 Misc. 127, 61 N. Y. Supp. 775. But identification marks, however small, on either the face or reverse side of the ballot are fatal. *Matter of Hearst* (1905), 48 Misc. 453, 96 N. Y. Supp. 119.

A ballot which contains in a circle at the head of one of the columns a number of criss-cross pencil marks is void. Ballots having strips with the names of certain candidates torn therefrom evidently by the inadvertence of inspectors should be counted. *Matter of Thacher v. Lent* (1902), 71 App. Div. 483, 75 N. Y. Supp. 732.

A ballot marked at the head of two party columns should not be rejected as marked for identification because there are also crosses in front of the names of two Republican candidates and also a cross in front of the name of one Democrat, who was candidate for the same office. *People ex rel. Moran v. Sniffin* (1908), 123 App. Div. 730, 108 N. Y. Supp. 243.

Ballots marked on back are void. *Matter of Houligan* (1907), 55 Misc. 5, 106 N. Y. Supp. 205.

Ballots with number of different polling-place are void. *People ex rel. Nichols v. Board of Canvassers* (1891), 129 N. Y. 395, 408, 29 N. E. 327, 14 L. R. A. 624.

Spoiled and marked ballots.—When it is uncertain whether a ballot indorsed

"marked for identification" has been counted, such a ballot, although wholly void because cross marks have been placed before the emblems instead of in the voting spaces, should not be deducted from the count. A ballot containing crosses opposite the names of two candidates for the same office is ineffective only as to that office. Where a ballot has been indorsed "spoiled" at the original canvass, the inspectors cannot be compelled by a writ of mandamus to indorse it "wholly void." Under the evidence, *held*, that a ballot originally marked "spoiled" should not be added to the vote of a candidate, although valid as to him. *People ex rel. Brown v. Supervisors of Nassau* (1915), 170 App. Div. 364, 156 N. Y. Supp. 214, *modfd.* (1915), 216 N. Y. 732, 110 N. E. 776.

Ballots marked for identification are wholly void.—Ballots void because of improper marks in the voting space are wholly void and should not be counted for another candidate. *People ex rel. Brown v. Supervisors of Nassau* (1915), 170 App. Div. 364, 156 N. Y. Supp. 205, *affd.* (1915), 216 N. Y. 732, 110 N. E. 776.

Ballots to be preserved.—Inspectors should exercise great care in preserving them. *People ex rel. White v. Aldermen* (1898), 157 N. Y. 431, 52 N. E. 181.

Inspectors liable in damages for failure to perform duty as to marked ballots. *People ex rel. Hasbrouck v. Supervisors of Dutchess* (1892), 135 N. Y. 522, 32 N. E. 242.

Erasures or defacements.—Marks apparently made by voter in attempting to correct his own errors, as, after making a cross mark in the circle, endeavoring to erase it with a rubber or some sharp instrument, or by striking a pencil through the mark, constitute an erasure or defacement rendering the ballot void. *People ex rel. Feeny v. Bd. of Canvassers* (1898), 156 N. Y. 36, 50 N. E. 425; *People ex rel. Obert v. Bourke* (1900), 30 Misc. 461, 63 N. Y. Supp. 906; *Matter of Houligan* (1907), 55 Misc. 5, 106 N. Y. Supp. 205; *Matter of Garvin* (1915), 168 App. Div. 218, 153 N. Y. Supp. 549. See also *People ex rel. Brown v. Supervisors of Nassau* (1915), 170 App. Div. 364, 156 N. Y. Supp. 205, *modfd.* (1915), 216 N. Y. 732, 110 N. E. 776.

Placing ballot in envelope with enrollment blank.—The provision that "If a voter shall do any act extrinsic to the ballot itself, such as inclosing any paper or other article in the folded ballot, such ballot shall be void," means that the voter must not do any act extrinsic to the ballot which will have the effect to identify the same, as for instance the putting of the ballot in question in the sealed envelope with the enrollment blank. *People ex rel. Brown v. Keller* (1915), 170 App. Div. 324, 155 N. Y. Supp. 976, *affd.* (1915), 216 N. Y. 741, 111 N. E. 1095.

Failure to provide place for writing names.—The failure, neglect or omission of the election officials to provide a place on the official ballot for an office for which a vacancy existed does not deprive voters of their right to have the names of the candidates for whom they voted and whose names they wrote upon the official ballot canvassed and counted in favor of such persons. *Matter of Deltz* (1914), 87 Misc. 610, 150 N. Y. Supp. 43, *revd.* (1914), 165 App. Div. 298, 151 N. Y. Supp. 261.

Name of office as well as name of candidate may be written on ballot. *People ex rel. Goring v. Wappingers Falls* (1895), 144 N. Y. 616, 39 N. E. 641. This case seems to be superseded by later amendments.

Ballot not vitiated by writing thereon in good faith name of office to be filled and candidate therefor.—A voter who, with an honest belief that a vacancy in an office exists, writes upon his ballot the title of such office with the name of the person he desires to fill it will not be deemed to have so marked his ballot as to destroy its validity within the meaning of the provision of this section which provides that "any mark other than a × mark or any erasure of any kind shall make the whole ballot void." *Matter of Murphy* (1914), 165 App. Div. 308, 151 N. Y. Supp. 267, *affd.* (1915), 215 N. Y. 707, 109 N. E. 1085.

Written names of candidates.—Held under the column law, that the writing in of the name of a candidate whose name is printed on the ballot vitiates the ballot. *People ex rel. Feeny v. Bd. of Canvassers* (1898), 156 N. Y. 36, 50 N. E. 425.

A ballot upon which the voter wrote the name "Sulzer" under the title of Governor without adding first name, is valid. *Matter of Garvin* (1915), 168 App. Div. 218, 153 N. Y. Supp. 549.

Split tickets.—Cross must be in the space before candidate's name. *People ex rel. Wells v. Collin* (1897), 19 App. Div. 457, 46 N. Y. Supp. 701, *affd.* (1897), 154 N. Y. 750, 49 N. E. 1102; *People ex rel. Nichols v. County Canvassers* (1891), 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624; *People ex rel. Onondaga Savings Bank v. Butler* (1895), 147 N. Y. 164, 41 N. E. 416. A cross-mark in a space in the blank column, with no name to the right, cannot be accredited to the name in the column to the left. *People ex rel. Bantel v. Morgan* (1897), 20 App. Div. 48, 46 N. Y. Supp. 898. An excess of cross-marks in voting space opposite name was held not to invalidate in *People ex rel. Pierce v. Parkhurst* (1898), 24 Misc. 442, 53 N. Y. Supp. 598. Cross-marks before name of same candidate in two or more columns for same office, held surplusage. *People ex rel. Feeny v. Board of Canvassers* (1898), 156 N. Y. 36, 50 N. E. 425.

A ballot marked with a cross in the circle at the head of a party column and having a cross in front of the name of a candidate in another party column should be counted as a vote for the latter candidate. *People ex rel. Moran v. Sniffin* (1908), 123 App. Div. 730, 108 N. Y. Supp. 243.

A ballot having crosses in the circles at the head of two party columns, but having also a cross in front of the name of a candidate in one of those columns, should be counted as a vote for said candidate. *People ex rel. Moran v. Sniffin* (1908), 123 App. Div. 730, 108 N. Y. Supp. 243.

Ballot marked in two circles.—See *People ex rel. Feeny v. Bd. of Canvassers* (1898), 150 N. Y. 36, 50 N. E. 425; *Matter of Fallon* (1910), 197 N. Y. 336, 90 N. E. 942, *modifg.* 135 App. Div. 195, 119 N. Y. Supp. 1061; *People ex rel. Moran v. Sniffin* (1908), 123 App. Div. 730, 100 N. Y. Supp. 243; *Matter of Houligan* (1907), 55 Misc. 5, 106 N. Y. Supp. 205.

Cross-marks before names of opposing candidates for same single office vitiate ballot only as to such office. *People ex rel. Feeny v. Bd. of Canvassers* (1898), 156 N. Y. 36, 50 N. E. 425.

A ballot is not void, but should be counted, where the voter has marked the voting cross in more than one of the voting spaces before the name of a candidate for a given office who has been nominated by more than one party. *Opinion of Atty. Genl.* (1914) 370.

Ballot with cross-marks before words "No nomination" cannot be counted. *People ex rel. Feeny v. Bd. of Canvassers* (1898), 156 N. Y. 36, 50 N. E. 425.

Ballots containing more candidates than there are vacancies in office to be filled cannot be counted. *Montgomery v. O'Dell* (1893), 67 Hun 169, 22 N. Y. Supp. 412, *affd.* (1894), 142 N. Y. 665, 37 N. E. 570.

Intent of voter.—This section sets up as a general test, in all cases not specifically provided for in the preceding rules, the possibility of determining the elector's choice. If it is possible to determine such choice, his ballot is to be counted as he intended; if it is impossible to so determine, his ballot shall not be counted but shall be treated as a blank. Where the name of an individual is printed alone in a column, a mark in the circle at the head of that column is the same in effect as though the mark had been placed opposite the name. *In re Jerome Ballots* (1905), 48 Misc. 441, 96 N. Y. Supp. 122.

Since the statute provides clear and explicit rules regulating where and how a ballot shall be marked the question of the voter's intention is not involved. The only question is whether he has or has not in fact conformed to the requirements

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of the law. *Matter of Houhigan* (1908), 55 Misc. 5, 8, 106 N. Y. Supp. 205.

Reading rules 7 and 9 with rule 6, it is apparent that, if there is nothing irregular about the ballot but the manner of making a proper cross-mark in the circles or voting spaces the ballot is not void, but it cannot be counted as to any office or position as to which the voter's intent cannot be ascertained, but the ballot may be counted where the voter's choice can be determined. *Matter of Tamney v. Atkins* (1912), 151 App. Div. 309, 315, 136 N. Y. Supp. 865, revd. (1913), 209 N. Y. 202, 102 N. E. 567.

Marking ballots for constitutional delegates.—Subdivision 3 of this section controls in respect to the manner of marking the ballot for delegates to the constitutional convention, and if the ballot contains a cross (×) mark in the circle above a party column and also a cross (×) mark in one or more voting squares at the left of the names of one or more delegates to the constitutional convention, or the voter writes in a name or names, the ballot shall be counted for all the delegates in the party group except those whose names are opposite to the names so specially indicated. *Opinion of Atty. Genl.* (1914) 371.

Under the Election Law as it existed in March, 1916 (and as it now stands), there is no such thing as a ballot marked by the voter for identification. The ballot is valid or void, to be judged by a definite test prescribed by the statute. *People ex rel. Karns v. Porter* (1917), 176 App. Div. 330, 161 N. Y. Supp. 1140.

History of the use of ballots at elections in this State pursuant to constitutional and statutory authority outlined and discussed, per De Angelis, J. *People ex rel. Karns v. Porter* (1917), 176 App. Div. 330, 161 N. Y. Supp. 1140.

Various ballots examined by the court, and held:

That a cross made with double lines in the voting space did not invalidate the ballot; (The parties conceded that imperfections due to the penetration of the ballot by pencils used over a rough surface did not invalidate the ballot.)

That pencil marks which were clearly of accidental origin did not invalidate the ballot;

That a ballot with a single line instead of a cross in the voting space was void;

That marks in the voting space in addition to the cross mark rendered the ballot void;

That a figure made of many lines, but not constituting a cross, rendered the ballot void;

That where there were several lines in the voting space which were not cross marks, the ballot was void;

That a ballot with an irregular figure, not a cross, in the voting space, was void.

That a ballot with a detached line in the voting space was void. *People ex rel. Karns v. Porter* (1917), 176 App. Div. 330, 161 N. Y. Supp. 1140.

Although the intention of a voter does not control the validity of his ballot, for it may be void by reason of erasures or other defects irrespective of his intention, yet the court under the authority of the statute may consider within narrow limits the intention of the voter in respect of certain pencil marks on a ballot. Thus the court may say that slight pencil marks on a ballot were made by the voter unintentionally, as when handling the ballot, or by accidental contact with the pencil, and such marks are to be distinguished from marks made intentionally. *People ex rel. Karns v. Porter* (1917), 176 App. Div. 330, 161 N. Y. Supp. 1140.

§ 359. **Manner of voting.**—When the ballot or ballots which a voter has received shall be prepared as provided in the preceding section, he shall leave the voting booth with his ballot folded so as to conceal the face of the ballot, but show the indorsement and fac simile of the signature

of the official on the back thereof, and, keeping the same so folded, shall proceed at once to the inspector in charge of the ballot box, and shall offer the same to such inspector. Such inspector shall announce the name of the voter and the printed number on the stub of the official ballot so delivered to him in a loud and distinct tone of voice. If such voter be entitled then and there to vote, and be not challenged, or if challenged and the challenge be decided in his favor, and if his ballot or ballots are properly folded, and have no mark or tear visible on the outside thereof, except the printed number on the stub and the printed indorsement on the back, and if such printed number is the same as that entered on the poll books as the number on the stub or stubs of the official ballot or set of ballots last delivered to him by the ballot clerks, such inspector shall receive such ballot or ballots, and after removing the stub or stubs therefrom in plain view of the voter, and without removing any other part of the ballot, or in any way exposing any part of the face thereof below the stub, shall deposit each ballot in the proper ballot box for the reception of voted ballots, and the stubs in the box for detached ballot stubs. Upon voting, the voter shall forthwith pass outside the guard-rail unless he be one of the persons authorized to remain within the guard-rail for other purposes than voting.

No ballot without the official indorsement shall be allowed to be deposited in the ballot box except as provided by sections three hundred and forty-five and three hundred and sixty of this chapter, and none but ballots provided in accordance with the provisions of this chapter shall be counted. No official ballot folded shall be unfolded outside the voting booth. No person to whom any official ballot shall be delivered shall leave the space within the guard-rail until after he shall have delivered back all such ballots received by him either to the inspectors or to the ballot clerks, and a violation of this provision is a misdemeanor.

When a person shall have received an official ballot from the ballot clerks or inspectors, as hereinbefore provided, he shall be deemed to have commenced the act of voting, and if, after receiving such official ballot, he shall leave the space inclosed by the guard-rail before the deposit of his ballot in the ballot box, as hereinbefore provided, he shall not be entitled to pass again within the guard-rail for the purpose of voting, or to receive any further ballots.

Source.—Former Elec. L. (L. 1896, ch. 909) § 106.

References.—Showing ballot so as to reveal contents, a misdemeanor, Penal Law, § 764, subd. 10. Person other than inspector receiving ballot, Penal Law, § 764, subd. 15. Failure to return unvoted ballots, Penal Law, § 764, subd. 16. Illegal voting generally, Penal Law, §§ 764, 765. Duress or intimidation of voters, Penal Law, § 772. Giving or receiving consideration for franchise, Penal Law, §§ 768, 769. See notes to § 291, ante.

Voter may complete act of voting.—A voter who has received his ballots before the closing hour may complete the act of voting. Rept. of Atty. Genl. (1897), 221; Rept. of Atty. Genl. (1894), 313; Rept. of Atty. Genl. (1893) 144.

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An essential and vital part of the act of voting is the final delivery to the inspector by the voter of his ballot, with the stub visible as required by this section. Hence, where a duly qualified elector placed the three ballots which he had properly marked, with the stubs and an enrollment blank within the envelope for the latter, and sealed the same and delivered it to one of the inspectors, who deposited it in the enrollment box, the ballots are void upon the ground that they were never voted. *People ex rel. Brown v. Keller* (1915), 170 App. Div. 324, 155 N. Y. Supp. 976, *affd.* (1915), 216 N. Y. 741, 111 N. E. 1095.

§ 360. When unofficial ballots may be voted.—If, for any cause, the official ballots shall not be provided as required by law at any polling place, upon the opening of the polls of an election thereat, or if the supply of official ballots shall be exhausted before the polls are closed, unofficial ballots, printed or written, made as nearly as practicable in the form of the official ballot, may be used.

Source.—Former Elec. L. (L. 1896, ch. 909) § 107.

Reference.—How and when provided, § 345, *ante*.

Unofficial ballots at village election.—The inspectors of an election at a village election cannot issue a poll or count unofficial ballots. If they do so mandamus will issue to compel them to reconvene, return the unofficial ballots, correct the statement of the results of the canvass and make a proper certificate of the result. *People ex rel. March. v. Beam* (1907), 117 App. Div. 374, 103 N. Y. Supp. 813, *mod.* (1907), 188 N. Y. 266, 80 N. E. 921.

§ 361. Challenges.—A person may be challenged either when he applies to the ballot clerk for official ballots, or when he offers to an inspector the ballot he intends to vote, or previously by notice to that effect to an inspector by any elector. It shall be the duty of each inspector to challenge every person offering to vote whom he shall know or suspect not to be duly qualified as an elector, and every person whose right to register as an elector was challenged at the time of registration, provided such challenge has not previously been withdrawn. In addition to the foregoing any person may be challenged by any duly appointed watcher or challenger either when he applies to the ballot clerk for official ballots or when he offers to an inspector the ballot he intends to vote or previously by notice to that effect to an inspector.

Whenever a person shall apply to the board of inspectors on election day to vote upon the name of a person whose right to register as an elector was challenged, it shall be the duty of the chairman of the board of inspectors or some member of such board to administer to such applicant the preliminary oath prescribed in the next section, and to read to such applicant each question upon the copy of the challenge affidavit signed at the time of registration by the person upon whose name the applicant desires to vote, and the inspectors and watchers shall compare the answers given to such questions with the answers recorded thereto upon the copy of said challenge affidavit, and shall carefully compare the description of the person challenged at the time of registration recorded upon the copy of the challenge affidavit with that of the applicant. If there shall be any

material difference or conflict between the answers given by the applicant and the answers recorded upon the copy of the challenge affidavit to the questions printed thereon, or in the description of the person challenged and the applicant, or if the applicant shall refuse to answer any question put to him, or shall refuse to make such oath, his vote shall not be received and the facts thereof shall be recorded in each such case in the challenge record provided for in section three hundred and sixty-four. (*Amended by L. 1910, ch. 428, L. 1911, ch. 649, and L. 1916, ch. 537, § 43.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 108, pt. of subd. 1, as amended by L. 1901, ch. 544.

Inspectors are ministerial officers. They cannot refuse to accept the vote of an elector taking the required oaths, and mandamus will lie unless it appears indisputably upon the application that the applicant is not qualified. *People v. Pease* (1863), 27 N. Y. 45; *Götcheus v. Matthewson* (1901), 61 N. Y. 420; *People ex rel. Stapleton v. Bell* (1890), 119 N. Y. 175, 23 N. E. 533; *People ex rel. Sherwood v. Board of Canvassers* (1891), 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; *Matter of Hamilton* (1894), 80 Hun 511, 30 N. Y. Supp. 499.

Refusal to accept vote of qualified voter.—Inspectors of election have no right to refuse to allow a duly qualified and registered elector to vote, solely because some other person had previously voted on his name. Such refusal is a violation of the voter's constitutional right. *People ex rel. Borgia v. Doe* (1905), 109 App. Div. 670, 96 N. Y. Supp. 389.

§ 362. Preliminary oath.—If any person other than those persons heretofore provided for offering to vote at any election shall be challenged in relation to the right to vote thereat, one of the inspectors shall tender to him the following preliminary oath: "You do swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence and qualification as an elector."

The inspectors or one of them shall then question the person challenged in relation to his name; his place of residence before he came into that election district; his then place of residence; his citizenship; whether he be a native or naturalized citizen, and if the latter, when, where, and in what court, or before what officer he was naturalized; whether he came into the election district for the purpose of voting at that election; how long he contemplates residing in the election district; and all other matters which may tend to test his qualifications as a resident of the election district, his citizenship, or his right to vote at such election at such polling place and in addition to the foregoing provisions the inspectors or one of them shall ask the person challenged the same questions that were asked of him when he registered. A challenge made by any elector or by any duly appointed watcher or challenger must be acted upon by the board of inspectors as provided in this section. If any person shall refuse to take such preliminary oath when so tendered, or to answer fully any such question which may be put to him, his vote shall be rejected. After receiving the answers of the person so challenged, the board of inspectors shall point out to him the qualifications, if any, in respect to

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which he shall appear to them deficient. (*Amended by L. 1910, ch. 428 and L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 108, pt. of subd. 1, as amended by L. 1901, ch. 544.

§ 363. General oath and additional oaths.—If the person so offering to vote shall persist in his claim to vote, and the challenge be not withdrawn, one of the inspectors shall then administer to him the following general oath:

“You do swear (or affirm) that you are twenty-one years of age, that you have been a citizen of the United States for ninety days, and an inhabitant of this state for one year next preceding this election, and for the last four months a resident of this county, and for the last thirty days a resident of this election district, and that you have not voted at this election.”

If the person so offering to vote shall be challenged for causes stated in section two of article two of the constitution of this state, the following additional oath shall be administered by one of the inspectors:

“You do swear (or affirm) that you have not received or offered, do not expect to receive, have not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid, or used, any money or other valuable thing, as a compensation or reward for the giving or withholding of a vote at this election, and have not made any promise to influence the giving or withholding of any such vote, and that you have not made, or become directly or indirectly interested in any bet or wager depending upon the result of this election.”

If the person so offering to vote shall be challenged on the ground of having been convicted of bribery or any infamous crime, the following additional oath shall be administered to him by one of the inspectors:

“You do swear (or affirm) that you have not been convicted of bribery or any infamous crime, or if so convicted, that you have been pardoned and restored to all the rights of a citizen.”

If any person shall refuse to take either oath so tendered his vote shall be rejected, but if he shall take the oath or oaths tendered him, his vote shall be accepted.

Source.—Former Elec. L. (L. 1896, ch. 909) § 108, subd. 2.

Inspectors are ministerial officers.—See decisions under § 361.

§ 364. Record of persons challenged.—1. The inspectors of election shall keep a minute of their proceedings in respect to the challenging and administering oaths to persons offering to vote, in which shall be entered by one of them the name of every person who shall be challenged or take either of such oaths, specifying in each case whether the preliminary oath or the general oath, or both, were taken. At the close of the election, the inspectors shall add to such minutes a certificate to the effect that the same are all such minutes as to all persons challenged at such election in such district.

2. In cities and villages having a population of five thousand or more, in addition to the foregoing record, the chairman of each board of inspectors shall, immediately after any election or primary, return to every public officer who has filed with him or a member of his board a list of voters to be challenged, such challenge list with a written statement opposite each name, giving the reason, if the name was voted on, why the board permitted any person to vote thereon, or, if some person applied to vote thereon and was challenged and did not vote, the words "challenged and did not vote;" or if no person applied to vote on such name, the words "no application." Before making such return such chairman shall sign his name at the foot of each page of such challenge list. (*Amended by L. 1915, ch. 678, and L. 1916, ch. 537, § 44.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 108, subd. 3.

§ 365. Time allowed employees to vote.—Any person entitled to vote at a general election held within this state, shall on the day of such election be entitled to absent himself from any service or employment in which he is then engaged or employed, for a period of two hours, while the polls of such election are open. If such voter shall notify his employer before the day of such election of such intended absence, and if thereupon two successive hours for such absence shall be designated by the employer, and such absence shall be during such designated hours, or if the employer upon the day of such notice makes no designation, and such absence shall be during any two consecutive hours while such polls are open, no deduction shall be made from the usual salary or wages of such voter, and no other penalty shall be imposed upon him by his employer by reason of such absence. This section shall be deemed to include all employees of municipalities.

Source.—Former Elec. L. (L. 1896, ch. 909) § 109.

References.—Refusal to permit employees to attend, Penal Law, § 759. Intimidation of employees, Penal Law, § 772, subd. 3.

Application to town elections.—The provision allowing an employee two hours to vote does not apply to town elections, but an employee may have sufficient time given him to exercise the voting privilege. Rept. of Atty. Genl. (1911) 98.

§ 366. Canvass of votes; preparation for canvass.—1. Place and time of canvass. As soon as the polls of an election are closed, the inspectors of election thereat shall publicly canvass and ascertain the votes, and not adjourn or postpone the canvass until it shall be fully completed.

The room in which such canvass is made shall be clearly lighted, and such canvass shall be made in plain view of the public. It shall not be lawful for any person or persons, during the canvass, to close or cause to be closed the main entrance to the room in which such canvass is conducted in such manner as to prevent ingress or egress thereby.

2. Ballot clerks. At the close of the polls the ballot clerks shall make up in triplicate in ink a return which shall account for all the official ballots furnished to the election district in which they are serving; they

shall count and verify the number of each kind of unused ballots, and enter it upon their returns; they shall then open the box for ballots canceled before delivery and spoiled and returned by voters, separate them into their several kinds, count all ballots of each kind and enter the numbers upon their returns. They shall make the additions and subtractions called for by the returns and prove their figures. In making their returns as aforesaid, the ballot clerks shall use the printed forms supplied to them with the ballots, and they shall carefully insert in all the blank spaces thereon the appropriate names, words and figures according to the directions contained in article nine of this chapter and printed on the forms.

Each kind of ballot and each kind of stub shall immediately after they are counted as aforesaid be securely tied in a separate package, and shall be plainly labeled, sealed, and returned to the box from which it was taken, and the box securely locked and sealed. The ballot clerks shall also securely tie all unused ballots in a sealed package. They shall then sign and swear to their returns before one of the inspectors and shall deliver their returns, the boxes, packages, ballots and stubs, together with the keys of the boxes, to the chairman of the board of inspectors. The ballots so sealed and delivered shall be deposited and preserved as ballot boxes are hereinafter required to be deposited and preserved.

3. Poll clerks. Immediately upon the close of the polls the poll clerks shall assist the inspectors of election in comparing the poll-books with the registers as hereinafter provided, and shall make out in triplicate in ink and sign and swear to their returns before one of the inspectors of elections according to the forms provided, and deliver them to the chairman.

4. Order of canvassing. The ballot boxes shall then, and not before, be opened and the ballots shall be canvassed, in the following order:

First. The box, if any, containing presidential ballots.

Second. The box, if any, containing general ballots; and

Third. The boxes, if any, containing ballots upon constitutional amendments or other questions submitted, including town questions. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 110, pt. of subd. 1, as amended by L. 1898, ch. 335.

Consolidators' note.—The body of the subdivision is here divided into §§ 366 and 367, but the last sentence, providing that the chairman only shall unfold ballots, has been put into § 369 with other provisions governing the canvass of the ballots.

Written return inconsistent with indorsements on ballots themselves.—Where the written return of election officers giving the number of void ballots is inconsistent with the indorsements upon the ballots themselves, the particular indorsements should prevail over the written return. *People ex rel. Brown v. Board of Canvassers* (1915), 170 App. Div. 476, 155 N. Y. Supp. 979, modfd. (1915), 216 N. Y. 732, 110 N. E. 776.

Section cited.—*People ex rel. McLaughlin v. Aumenwerth* (1909), 135 App. Div. 893, 120 N. Y. Supp. 295, affd. (1910), 197 N. Y. 340, 90 N. E. 973.

§ 367. Comparing poll-books and registers; verifying number of ballots.—

The board of inspectors shall commence the canvass by comparing the two poll-books with the registers used on election day as to the number of voters voting at the election, correcting any mistakes therein, and, after the ballot clerks have delivered their returns to the chairman of the board, and not before, by counting the ballots found in the ballot boxes without unfolding them, except so far as to ascertain that each ballot is single, and by comparing the number of ballots found in each box with the number shown by the poll-books and the ballot clerks' returns to have been deposited therein.

If the ballots found in any box shall be more than the number of ballots so shown to have been deposited therein, such ballots shall all be replaced, without being unfolded, in the box from which they were taken, and shall be thoroughly mingled therein, and one of the inspectors designated by the board shall, without seeing the same and with his back to the box, publicly draw out as many ballots as shall be equal to such excess and, without unfolding them, forthwith inclose them in an envelope which he shall then and there seal and indorse "excess ballots from the box for ballots for (presidential electors, or general officers, et cetera, as the case may be)," signing his name thereto, and such envelope with the excess ballots therein shall be placed in the box for defective or spoiled ballots.

If two or more ballots shall be found in the ballot box so folded together as to present the appearance of a single ballot, and if the whole number of ballots in such ballot box exceeds the whole number of ballots shown by the poll books and ballot clerks' returns to have been deposited therein, and not otherwise, they, or enough of them to reduce the ballots to the proper number, selection to be made without examination of any voting mark thereon, shall similarly be inclosed, sealed, indorsed and placed with the spoiled ballots.

If, however, there lawfully be more than one ballot box for the reception of ballots voted at the polling place, no ballot found in the wrong ballot box shall for that reason be rejected, but shall be placed in its proper box by the inspectors upon the count of the ballots before the canvass, and counted in the same manner as if found in the proper ballot box, if such ballot shall not, together with the ballots found in the proper ballot box, make a total of more ballots than are shown by the poll-books and ballot clerks' returns to have been deposited in the proper box.

No ballot that has not the official indorsement shall be counted except such as are voted in accordance with the provisions of this chapter relating to unofficial ballots. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 110, pt. of subd. 1, as amended by L. 1898, ch. 335.

Disposition of surplus ballots and ballots folded together.—See *Matter of Village of Webster* (1905), 102 App. Div. 202, 92 N. Y. Supp. 658.

§ 368. Method of canvassing.—1. Method of canvassing ballots gener-

ally. Except as hereinafter specially provided, the method of canvassing ballots shall be as follows:

The chairman of the board of inspectors shall personally unfold each ballot of the kind then to be canvassed in such a manner that its face shall be down and all marks thereon shall be wholly concealed, and he shall place all the ballots, so unfolded and with their faces down, in one pile. He shall then take up each ballot in order, turn it face up, and announce in a loud and distinct voice, the vote registered on the first section or that the ballot is void or that the section is blank, as the case may be. He shall then turn the ballot face down and place it in a new pile. When he has announced the votes on the first sections of all the ballots of the kind then to be canvassed, and the poll clerk's tallies made as hereinafter provided are proved to be correct, the official return provided for in article thirteen shall be filled out and signed. Then, and not before, the chairman shall proceed to canvass in like manner the votes upon the sections remaining to be canvassed, completing the canvass of each ballot as he proceeds, and thus he shall proceed until all the ballots have been canvassed.

As each vote is announced each poll clerk shall immediately tally it in black ink, with a downward stroke from right to left upon the official tally sheet provided for the purpose, also carefully tallying one for each blank the name of the candidate for whom he tallies it, or that he tallies the vote blank or void as the case may be, or in case of a question submitted that he tallies the vote "Yes" or "No" as the case may be, and until such announcement by each poll clerk the chairman shall not announce another vote. When a candidate's name is not printed on the official tally sheet or return provided, it shall be written in full thereon in ink in its due order, that is, in the order in which it appears on the ballot. The tally marks shall be made in due numerical order in the tally spaces provided.

When all the sections relating to the same office or question shall have been canvassed, the number of ballots shall be compared with the tally thereof. If the result as shown on the tally sheets does not agree with the results as shown by the number of ballots, an error has been committed and a recanvass must be made. Upon the recanvass, the tally must be kept in red ink from left to right across the previous tally marks. When all the errors have been corrected and the tally sheets have been found to be correct, the poll clerks shall indicate the last tally opposite each name by forthwith canceling at least the next ten unused tally spaces, if there are so many, and if there are not so many, then as many as possible, by drawing through them in red ink one or more horizontal straight lines. The tally sheets having been thus prepared, verified, and closed, the inspectors and poll clerks shall sign the certificate at the foot of each sheet in the places indicated thereon. (*Subd. amended by L. 1914, ch. 244, § 16, in effect Apr. 8, 1914.*)

2. Canvassing ballots when more than one candidate is to be elected to the same office. When more than one candidate is to be elected to the

same office, the foregoing method of canvass shall be modified to meet the necessities of the case, as follows:

The chairman shall read the names of the candidates voted for in the order in which they appear in the section, and each poll clerk shall make an accurate tally of each vote as announced upon the official tally sheet provided for the purpose. The chairman shall also announce the void ballots, if any, and the number of blanks, if any, upon the section, and each poll clerk shall make as many tallies for each void ballot as there are candidates thereon to be elected to the office in question, and one tally for each blank.

3. Canvassing presidential ballots. The straight ballots, that is, all valid ballots on which all the candidates in any party group are voted for, shall be placed in piles, like with like, and the split ballots, that is, all valid ballots marked in one or more of the individual voting squares or with names written thereon, shall be placed in one pile, and all void ballots and wholly blank ballots shall be likewise placed in separate piles. Each of the piles shall then be counted and the result clearly announced, and the number of straight votes for each candidate shall be entered in gross opposite his name on a tally sheet by each poll clerk, and the number of split, void and wholly blank ballots shall be similarly entered in their appropriate places. The chairman shall then take the split ballots and they shall be canvassed, announced and tallied in the manner above provided for canvassing ballots when more than one candidate is to be elected to the same office. (*Amended by L. 1911, chs. 296 and 649, L. 1913, ch. 821, and L. 1914, ch. 244.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 110, subd. 2, as amended by L. 1898, ch. 335, § 7; L. 1901, ch. 654, § 5.

Canvass by election officers.—The underlying principle of so much of the Election Law as relates to the counting and canvassing of ballots is that this shall be done in the first instance, and so far as possible exclusively by the election officers, interposition by the courts being provided for only to compel the election officers to perform the duties imposed upon them by the statute. *People ex rel. Cantor v. County Board of Canvassers* (1914), 165 App. Div. 142, 150 N. Y. Supp. 480.

Recount not compelled by mandamus.—The court is not expressly or impliedly authorized to compel by mandamus the opening of the ballot boxes and a recount of the votes cast. The recount referred to in this section must be made by the inspectors before the declaration of the result. *Matter of Hearst v. Woelper* (1905), 183 N. Y. 274, 76 N. E. 28.

When a recount of ballots is required.—The recount provided for in the above section means a recount of the ballots which were canvassed and recorded on the tally sheets on the theory that the mistake is due to the fact that the tally sheets do not set forth, in the various columns, all of the ballots subject to canvass. *Matter of Stiles* (1902), 69 App. Div. 589, 75 N. Y. Supp. 278.

A tally sheet is an essential part of a canvass, and the inspectors may be compelled by mandamus to make their returns agree with the tally sheets. *Matter of Stewart* (1897), 24 App. Div. 201, 48 N. Y. Supp. 957, *affd.* (1898), 155 N. Y. 545, 50 N. E. 51.

§ 369. Objections to the counting; disposal of ballots.—If objection is

taken to the counting of any ballot or section, the board of inspectors shall forthwith and before canvassing any other ballot or section rule upon the objection. If the objection is continued after this ruling, the chairman, or if he refuse, one of the other inspectors, shall write in ink upon the back of the ballot a memorandum of the ruling and objection. The memorandum of the ruling shall be in the words "Counted void," or "Counted blank," or "Counted for (naming the candidate or candidates or the presidential ticket)," or, in the case of a question submitted "Counted for Question No. —," or "Counted against Question No. —," as the case may be. The memorandum of the objection shall be in the words "Objected to," followed by a brief statement of the nature of the objection and the signature of the chairman or other inspector.

Any ballot as to the counting of which objection is not taken but which is wholly blank or wholly void shall be indorsed in ink by the chairman of the board of inspectors, or if he refuse, by one of the other inspectors, with the words, "Wholly blank" or "Wholly void," as the case may be, and this memorandum of indorsement shall be followed by the signature of the chairman or other inspector.

In each case in which objection is taken or in which any ballot is canvassed as wholly blank or wholly void, each poll clerk shall tally once in the place provided at the foot of the tally sheet.

When all the ballots of any one kind shall have been canvassed, the chairman of the board of inspectors or, if he refuse, one of the other inspectors, shall carefully and securely place all the ballots of that kind as to the counting of which any objection was taken, all ballots which are wholly void, and ballots which are wholly blank, in a separate sealed package, which shall be indorsed on the outside thereof with the names of the inspectors, the designation of the election district, and the number and kind of ballots contained therein. The package so sealed shall be known as the package of protested, void and wholly blank ballots and shall be disposed of as hereinafter provided in sections three hundred and seventy-six, three hundred and seventy-seven, three hundred and seventy-eight and three hundred and eighty of this chapter. The other ballots shall be tied together, labeled, and returned to the ballot box from which they were taken before proceeding to canvass the next kind of ballots to be canvassed.

Any inspector who shall refuse to write in ink upon the back of any ballot a memorandum of a ruling or objection to the counting thereof; or shall refuse to place in the package of protested ballots any ballot as to the county of which any objection has been taken, shall be guilty of a felony. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 110, pt. of subd. 3, as amended by L. 1898, ch. 335, § 7.

Former section 369 is entirely changed by the amendment of 1913. It related to the "method of counting." The decisions which follow were rendered under former § 370 entitled "protecting ballots marked for identification."

Ballots objected to as marked for identification.—When a ballot is not void but is objected to because marked for identification great care should be observed to follow every provision of the statute designed to identify and preserve the ballots for future legal proceedings. *People ex rel. White v. Alderman* (1898), 157 N. Y. 431, 52 N. E. 181.

Duty of inspectors.—Inspectors of election have no right to reject a ballot because it bears marks which they think were placed thereon by the voter for the purpose of identifying it. They must count such ballots and indorse them "protested as marked for identification." *Matter of Houligan* (1907), 55 Misc. 5, 8, 106 N. Y. Supp. 205.

Inspectors must count all ballots, whether they deem them marked for identification or not. *People ex rel. Bradley v. Shaw* (1892), 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606.

Void ballots treated as marked for identification.—If ballots which should have been held void and not have been counted, have been treated by inspectors as ballots marked for the purpose of identification and counted, the court has the jurisdiction to pass upon them as void ballots and to direct the inspectors to make a statement of the result of the election on that basis. *People ex rel. White v. Aldermen* (1898), 157 N. Y. 431, 52 N. E. 181.

Section 370 cited.—*Matter of Fallon* (1909), 135 App. Div. 195, 119 N. Y. Supp. 1061, mod. (1910), 197 N. Y. 336, 90 N. E. 942.

§ 370. **Proving the tallies.**—1. Proving the tally of ballots other than those for presidential electors. Immediately upon counting the vote for any question, or for any office other than that of presidential elector, the poll clerks shall verify their figures by adding together all the votes tallied therefor, whether for a candidate, or for or against a question, or as void or blank. If, in a case where more than one candidate is to be elected to one office, the number of votes tallied (including void and blank votes) does not exactly equal the number of ballots cast (including void and blank ballots) multiplied by the number of candidates to be elected, or if, in the case of a question submitted or in a case where only one candidate is to be elected to an office, the total number of votes tallied (including void and blank votes) shall not exactly equal the number of ballots cast (including void and blank ballots), an error has been committed and a recanvass must be immediately made, as hereinbefore provided in section three hundred and sixty-eight of this chapter.

2. Proving the tally of ballots for presidential electors. In the case of ballots for presidential electors, the poll clerks shall verify their figures as follows:

First, they shall add together the votes counted for electors of each party;

Second, they shall add together the votes counted for candidates not on the ballot;

Third, they shall add together the void and wholly blank ballots and shall multiply the sum so obtained by the number of electors to be elected;

Fourth, they shall add together the votes on the split ballots tallied as blank;

Fifth, they shall then add together the four sums so obtained.

If the total of these four sums shall not exactly equal the number of bal-

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lots cast (including void and blank ballots) multiplied by the number of electors to be elected, an error has been committed, and a recanvass must be immediately made as hereinbefore provided in section three hundred and sixty-eight of this chapter. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 110, pt. of subd. 3, as amended by L. 1898, ch. 335, § 7.

§ 371. **General provisions as to canvass.**—The ballots shall at all times be kept on top of the table and in plain view of all parties entitled to examine them, until they have been tied into bundles as elsewhere provided. If requested by any person entitled to be present the inspectors shall, during the canvass of any ballot, exhibit to him the ballot then being canvassed, fully opened and in such a condition that he may fully and carefully read and examine it, but no inspector shall allow any ballot to be taken from his hand or to be removed from any pile by any person but the chairman. Any person other than a constituted election officer who shall handle any ballot voted or unvoted or the stub thereof shall be guilty of a misdemeanor. Any person who shall mark, tear or deface any ballot of another with the intent of defeating or altering a vote or ballot, shall be guilty of a felony, and shall be punished upon conviction thereof by imprisonment in a state prison for a period of not less than five nor more than ten years. (*Amended by L. 1913, ch. 821, and L. 1917, ch. 703, § 21, in effect June 1, 1917.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 110, pt. of subd. 3, as amended by L. 1898, ch. 335, § 7.

§ 372. **Statement of canvass to be delivered to police.**—In all cities and villages of five thousand inhabitants or more the chairman of the board of inspectors shall, forthwith upon the completion of the count of votes and the announcement thereof, deliver to the police officer on duty at such place of canvass a statement subscribed by the board of inspectors, stating the number of votes received by each candidate for office. Such statement shall forthwith be conveyed by the said officer to the station house of the police precinct in which such place of canvass is located, and he shall deliver the same inviolate to the officer in command thereof, who shall immediately transmit by telegraph, telephone or messenger, the contents of such statement to the officer commanding the police department of such city or village. In a city of over one million inhabitants, such commanding officer shall cause all such returns to be immediately tabulated so that the final results may be known as early as possible, and within twenty-four hours of its receipt at the station-house such statement itself shall be filed with such commanding officer. Such statement shall be preserved for six months by the police, and shall be presumptive evidence of the result of such canvass for each such office. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 23.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 110, pt. of subd. 3, as amended by L. 1898, ch. 335, § 7.

§ 373. **Returns of canvass.**—Upon completing the canvass, the inspectors and poll clerks shall make and sign in ink their several returns in triplicate, and shall verify them before the respective officers authorized for that purpose, and shall sign and certify in ink each tally sheet to be certified by them. In making their returns as aforesaid, the inspectors and poll clerks shall use the printed forms supplied to them with the ballots, and they shall carefully insert in all the blank spaces thereon the appropriate names, words and figures according to the directions contained in article nine of this chapter and printed on the forms. In the absence of an officer authorized to take acknowledgments and proof of deeds, and for the purposes of this chapter, any election officer shall be authorized to administer the oath to any other election officer. Each of the two tally sheets shall be securely attached by the chairman to one of the returns relating to the same office or question and shall be treated as a part thereof.

Any election officer who shall sign any statement of the canvass at any place other than the polling place, or at any time other than immediately after the canvass is completed, except under direction of the court, and any election officer or person who shall take from the polling place any such statement before it shall have been signed as herein provided, is guilty of a felony, and shall be punished, upon conviction thereof, by imprisonment in a state prison for not less than two nor more than five years.

If changes be necessary in any of the forms for tallies and returns, as prescribed in this article, the secretary of state shall prescribe the same. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 111, in part.

Consolidators' note.—The direction to endorse ballots which have been protested as marked for identification is omitted, this direction having been already given fully in § 370. The expression here omitted, "protested as," is better than the expression used in § 370, "objected to as," and is accordingly transplanted to that section.

References.—Making false return, Penal Law, § 766. Correction of errors in statement, § 432, post. Destruction or delay of election returns, Penal Law, § 1429.

New statement of canvass by inspectors is void. People ex rel. Russell v. Board (1887), 46 Hun 390; People ex rel. Fiske v. Devermann (1894), 83 Hun 181, 31 N. Y. Supp. 593.

Erasure or alteration on statement does not create presumption of fraud. People ex rel. Stone v. Minck (1860), 21 N. Y. 539.

Signing of statement by two inspectors.—People ex rel. Woods v. Crissey (1883), 91 N. Y. 616.

Signing a statement in blank is irregular, but does not necessarily render it void, when filled up. People ex rel. Fiske v. Devermann (1894), 83 Hun 181, 31 N. Y. Supp. 593.

Inspectors cannot affix ballots to statement after having signed it. Matter of Kline (1896), 17 Misc. 672, 40 N. Y. Supp. 600; People ex rel. Bush v. County Canvassers of Ulster (1892), 66 Hun 265, 21 N. Y. Supp. 279.

Mandamus to inspectors to perform duty. Gleason v. Blanc (1895), 14 Misc. 620, 36 N. Y. Supp. 938.

Failure to file original statement of canvass upon application for re-submission

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of local option questions.—Where due opportunity has been given to electors to vote for or against local option and the votes have been cast and canvassed, the result declared and the return made by the ballot clerks, the failure of the inspectors to make and file a return and to seal and deliver the ballot box to the proper custodian does not invalidate the election. *Matter of Morton* (1912), 152 App. Div. 628, 137 N. Y. Supp. 376, revg. (1912), 75 Misc. 180, 134 N. Y. Supp. 1030.

Section cited.—*Matter of Fallon* (1909), 135 App. Div. 195, 119 N. Y. Supp. 1061, mod. (1910), 197 N. Y. 336, 90 N. E. 942.

§ 374. Preservation of ballots.—After the last tally sheets and returns are completed, and all the stubs and ballots, except the protested, void and wholly blank ballots, are replaced in the boxes from which they were taken, each box shall be securely locked and sealed, and deposited, by an inspector designated for that purpose, with the officer or board furnishing it, together with the separate sealed package of unused official ballots. The boxes and packages so deposited shall be preserved inviolate for six months after the election, except that they may be opened and their contents examined upon the order of any court of competent jurisdiction or may be opened by direction of a committee of the senate or assembly to investigate and report upon contested elections of members of the legislature voted for at such election and their contents examined by such committee in the presence of the officer having the custody of such boxes. Unless ordered to be preserved by such a court, or unless an examination by such a committee be pending, they shall be opened and their contents destroyed after six months, except, that in a year in which a president of the United States is to be elected, in counties in which no contest has been noted, such boxes may be opened and their contents destroyed after four months and the boxes prepared for use at the primary election as provided in section seventy-nine of this chapter. The protested, void and wholly blank ballots shall be preserved as provided in section four hundred and thirty-seven of this chapter. Any candidate shall be entitled as of right to an examination in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate; but the court shall prescribe such conditions as of notice to other candidates or otherwise as it shall deem necessary and proper. (*Amended by L. 1913, ch. 821, L. 1916, chs. 31 and 537, § 45.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 111, in part.

Preserved ballots may be used in *quo warranto*.—Ballots preserved by a board of elections in the ballot boxes in their discretion as provided by this section, may be used as evidence in an action of *quo warranto*, provided that preliminary evidence be submitted showing that the ballots have been preserved in the boxes inviolate. *People v. McClellan* (1908), 191 N. Y. 341, 84 N. E. 68, revg. (1908), 124 App. Div. 215, 108 N. Y. Supp. 765.

Destruction of ballots after expiration of period.—Where a controversy is tending as to legality of an election an order requiring the preservation of the ballots after the expiration of the six months will not be vacated when it does not appear that there is any public interest therefor. *Matter of Hearst* (1907), 117 App. Div. 240, 102 N. Y. Supp. 47.

Custody of ballot boxes by custodians designated under this section will not be

interfered with by the court unless facts are shown affording reasonable grounds for the fear that they will be tampered with or they are exposed to danger of loss. *People v. McClellan* (1907), 52 Misc. 614, 103 N. Y. Supp. 827.

Opening ballot boxes.—Where no judicial proceedings are pending and it does not appear that any will be brought, the court is without power to grant an order to open ballot boxes containing ballots not void or protested, upon the application of parties who allowed the time within which to apply for mandamus under § 381 to expire. *Matter of Ulrich* (1910), 67 Misc. 196, 122 N. Y. Supp. 601.

Ballot box may be opened to determine the result of an election on the license question. *People ex rel. Henness v. Douglass* (1911), 143 App. Div. 760, 128 N. Y. Supp. 547.

Order for examination of voting machines cannot be made under provision for examination of ballot boxes.—The provision that "any candidate shall be entitled as of right to an examination in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate," has no application to voting machines and is not made applicable by section 417 of the Election Law (Cons. Laws, ch. 17) which merely declares that other articles of the Election Law, not applicable to voting machines generally, shall apply to voting by such machines. This provision is not broad enough to warrant the granting of an order for the examination of voting machines analogous to an order for the examination of ballot boxes under section 374. *Matter of Thomas* (1915), 216 N. Y. 426, 110 N. E. 762, revg. (1915), 171 App. Div. 977, 160 N. Y. Supp. 1148.

This section is broad enough in its terms to entitle any candidate voted for at the time of a general election to an examination as of right in a proper case of any ballots upon which his name lawfully appears as that of a candidate, whether the validity of the election is in controversy or not. *Matter of Quinn* (1917), 220 N. Y. (mem.) affg. (1916), 175 App. Div. 681, 160 N. Y. Supp. 867.

A candidate for the office of town clerk who was defeated at the biennial town election is entitled to an examination of the ballots under section 374 of the Election Law, which gives to any candidate the right to an examination in person, or by authorized agents, of any ballots upon which his name lawfully appeared as a candidate, if his moving affidavits disclose facts which entitle him to such examination. A proceeding instituted under said section involves a controversy over the validity of the election of a town officer at a general election. Where the time set for such inspection has expired during a contest as to the right of such inspection, the opposing candidate should be given another sufficient notice of the proposed inspection. *Matter of Quinn* (1916), 175 App. Div. 681, 160 N. Y. Supp. 867.

§ 375. Proclamation of result.—Upon the completion of such canvass and of the statements of the result thereof, the chairman of the board of inspectors shall make public oral proclamation of the whole number of votes cast at such election at such polling place for all candidates for each office; upon each proposed constitutional amendment or other question or proposition, if any, voted upon at such election; the whole number of votes given for each person, with the title of the office for which he was named on the ballot; and the whole number of votes given respectively for and against each proposed constitutional amendment or other question or proposition, if any, so submitted. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 112, in part.

§ 376. Sealing statements.—Each statement of canvass shall then be

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securely sealed with sealing wax in separate envelopes properly indorsed on the outside thereof by the inspectors, and shall be kept inviolate by the officers or board with whom they are filed until delivered, together with the packages of protested, void and wholly blank ballots, to the county or city board of canvassers. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 112, in part.

Failure to seal with sealing wax as required by the above section does not invalidate the submission of a question as to the location of county buildings, where it appears that the omission was unintentional and did not result in the perpetration of a fraud. *People ex rel. Williams v. Board of Canvassers* (1905), 105 App. Div. 197, 94 N. Y. Supp. 996, *affd.* (1905), 183 N. Y. 538, 76 N. E. 1116.

§ 377. **Delivery and filing of papers relating to the election; general provisions.**—If the election be other than an election of town, city, village or school officers, held at a different time from a general election, the chairman of the board of inspectors of each election district, except in the city of New York, shall forthwith upon the completion of the triplicate statement of the result, deliver one set of returns to the supervisor of the town in which the election district, if outside of a city, is situated, and if in a city to one of the supervisors of said city. If there be no supervisor, or he be absent or unable to attend the meeting of the county board of canvassers, it shall be forthwith delivered to an assessor of such town or city. One set of returns with tally sheets annexed, together with the poll books of the election, shall be forthwith filed by such inspectors, or by one of them deputed for that purpose, with the town clerk of such town, or the city clerk of such city, as the case may be. The package of protested, void and wholly blank ballots and the third set of returns with tally sheets annexed shall, within twenty-four hours after the completion of such canvass, be filed by the chairman of the board of inspectors, with the board of elections of the county in which the election district is situated. The register of electors and public copy thereof shall be filed as prescribed in section one hundred and eighty of this chapter. Each poll book containing signatures of electors required by this chapter to sign the poll book and all "identification statements for election day" received thereat shall within forty-eight hours after the close of the canvass be filed in person or by mail by the poll clerk of each election district having charge of such book, with the state superintendent of elections in such one of his offices as he may in writing designate. (*Amended by L. 1911, ch. 649, L. 1913, ch. 821, and L. 1916, ch. 537, § 46.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 113, subd. 1, as amended by L. 1897, ch. 379, § 20; L. 1905, ch. 165, § 1, ch. 643, § 20; and L. 1908, ch. 464, § 1.

References.—Destruction or delay of election returns, Penal Law, § 1429.

§ 378. **Delivery and filing of papers in the city of New York.**—In the city of New York the package of protested, void and wholly blank ballots and one set of returns with tally sheets annexed, together with one of the poll books, shall be filed by the chairman of the board of inspectors within

twenty-four hours after the completion of the canvass with the county clerk of the county within which the election district is located. One set of returns with tally sheets annexed and the other poll book shall be filed within such time with the board of elections or with the chief clerk of the branch office of the board of elections, as the case may be, in the borough within which the election district is located, by an inspector designated by the board of inspectors for that duty, and the third set of returns with the city clerk, by an inspector designated by the board of inspectors for that duty.

In election districts in the city of New York, the boards of inspectors of election must, at the same time that they make and sign the aforesaid returns, make a certified copy of so much thereof as relates to any candidate for member of assembly, senator, or representative in congress, voted for both in said election district and in any part of any county not within the city of New York, and such certified copy must, within twenty-four hours after the completion of the canvass by the inspectors, be filed by the chairman of the board of inspectors with the clerk of the county outside of the city of New York in which such officers or any of them are voted for at such election. (*Amended by L. 1911, chs. 274 and 649, and L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 113, subd. 2, as amended by L. 1897, ch. 379, § 20; L. 1901, ch. 95, § 19.

Consolidators' note.—The requirement that the police shall return the package of stubs, etc., in New York City to the "bureau of elections of the borough" is changed to "board of elections or to the chief clerk of the branch office of the board of elections, as the case may be, in the borough," the former superintendent and bureau of elections, with branch bureaus, in the police department, having been succeeded in 1901 by the board of elections and its branches.

§ 379. Additional requirements in the metropolitan elections district.—*Repealed by L. 1911, ch. 649.*

§ 380. Delivery and filing of papers in the county of Erie.—In the county of Erie one return with tally sheets annexed shall be filed forthwith by one inspector deputed for that purpose, with the clerk of the town, or the clerk of the city of Buffalo, or the clerk of the city of Tonawanda, as the case may be, and one return with the clerk of the county of Erie. The package of protested, void and wholly blank ballots and the third return with tally sheet annexed shall, within twenty-four hours after the completion of such canvass, be filed by the chairman of each board of inspectors with the commissioner of elections. All poll lists for the various election districts in the city of Buffalo shall be filed with the commissioner of elections, and those for the city of Tonawanda with the clerk of such city, and those for the towns in Erie county with the town clerks thereof. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 113, subd. 4, as added by L. 1905, ch. 643, § 21.

§ 381. **Judicial investigation of ballots.**—If any statement of the result of the canvass in an election district shall show that any of the ballots counted at an election therein were protested or were canvassed as wholly blank or void, a writ of mandamus may, upon the application of any candidate voted for at such election in such district, within twenty days thereafter, issue out of the supreme court to the board or body of canvassers, if any, of the return of the inspectors of such election district, and otherwise to the inspectors of election making such statement, requiring a recanvass of such ballots. If the court shall, in the proceedings upon such writ, determine that any such ballot was improperly canvassed, it shall order the error to be corrected. Boards of inspectors of election districts, and boards of canvassers, shall continue in office for the purpose of such proceedings. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 114.

When section inapplicable.—If the result of an election has been improperly declared by a town board of canvassers, relator has a remedy by quo warranto proceedings but not by mandamus under the provisions of this section. *Matter of Baldwin* (1913), 80 Misc. 263, 141 N. Y. Supp. 51.

A writ of mandamus directing the inspectors of election of a town meeting where local option questions under the Liquor Tax Law were voted upon to count certain ballots which were by them returned as void is a proceeding that may not be entertained by virtue of any inherent powers of the court, but must find authorization and support in the express provisions of some statute or statutes. *Matter of Tamney v. Atkins* (1913), 209 N. Y. 202, 102 N. E. 567.

County court cannot order recount. *Matter of Tompkins* (1897), 23 App. Div. 224, 48 N. Y. Supp. 737.

Proceeding can be instituted only by candidate.—*Matter of Tamney v. Atkins* (1913), 209 N. Y. 202, 102 N. E. 567, revg. (1912), 151 App. Div. 309, 136 N. Y. Supp. 865.

Time for beginning proceeding.—A proceeding for the judicial review of the acts of inspectors in counting void and protested ballots must be begun within twenty days after the election. *People ex rel. May v. Strang* (1910), 137 App. Div. 848, 122 N. Y. Supp. 617.

The words "within twenty days thereafter," as used in this section of the Election Law, refer to the application for relief and not to the actual obtaining and issuing of a writ of mandamus within that time. *Matter of Tamney v. Atkins* (1912), 151 App. Div. 309, 136 N. Y. Supp. 865, rev'd on other grounds (1913), 209 N. Y. 202, 102 N. E. 567.

Application for mandamus must show that violation of inspector was prejudicial. *People ex rel. Larkin v. Palmer* (1899), 27 Misc. 569, 59 N. Y. Supp. 62, revd. (1899), 46 App. Div. 366, 61 N. Y. Supp. 597, revd. (1900), 163 N. Y. 201, 57 N. E. 404.

It must state the number of election districts in which the ballots were improperly counted. *Matter of Ordway* (1907), 118 App. Div. 386, 103 N. Y. Supp. 360.

Source of information must be stated.—Mandamus will not be granted on affidavits on information and belief, which do not state source of information or grounds of belief. *People ex rel. Watkins v. Bd. of Canvassers of Oneida* (1898), 25 Misc. 444, 55 N. Y. Supp. 712.

Alternative writ should be first procured. *People ex rel. Hasbrouck v. Supervisors of Dutchess* (1892), 135 N. Y. 522, 32 N. E. 242.

What court must determine before issuing peremptory writ. *Id.*

Effect of alternative writ.—*People ex rel. Phillips v. Sutherland* (1896), 9 App. Div. 313, 41 N. Y. Supp. 181.

Scope of investigation by Supreme Court.—The authority conferred upon the Supreme Court by this section, as amended (L. 1913, ch. 821, § 31), is confined to a review of the protested, void and blank ballots returned by the election officers in the sealed package. It is distinct and separate from any provision of the law relating to the ballots replaced in the ballot box which has been sealed and locked. *People ex rel. Brown v. Freisch* (1915), 215 N. Y. 359, 110 N. E. 763, revg. (1915), 163 App. Div. 370, 153 N. Y. Supp. 277; *People ex rel. Brink v. Way* (1904), 179 N. Y. 174, 71 N. E. 756, revg. (1904), 92 App. Div. 82, 86 N. Y. Supp. 892.

Order directing opening ballot box.—The statute is not susceptible of a construction which will justify an order of the court directing election officers to open a box of voted ballots months after the close of an election, examine the ballots contained therein, and without any marks of identification appearing on said ballots, aided only by a recollection of the situation as it existed on the night of election day, endeavor to select the identical ballots declared void at the time of the canvass. *Id.*

Mandamus as to void ballots.—Under this section a writ of mandamus may be issued to determine whether any ballot and the votes thereon, which has been rejected by the inspectors as void, shall be counted. *Matter of Larkin* (1899), 46 App. Div. 366, 61 N. Y. Supp. 597, revd. on another ground (1900), 163 N. Y. 201, 57 N. E. 404.

Endorsement of rejected ballots.—A writ of mandamus will be issued against the canvassers of ballots cast at a town meeting requiring them to endorse upon each rejected ballot the reason for such rejection and to place such ballots in a separate sealed package, and to endorse the package with their names and the number of ballots contained therein. *People ex rel. Maxim v. Ward* (1901), 62 App. Div. 531, 71 N. Y. Supp. 76.

Clerical error in return.—The supreme court has no authority under this section or under its general power, authority and jurisdiction to determine the validity of ballots contained in the boxes deposited with the city clerk where there has been a clerical error in the returns by the election inspectors, nor to order a recount of such ballots. *People ex rel. White v. Supervisors of Albany* (1908), 192 N. Y. 539, 84 N. E. 1118, affg. (1908), 125 App. Div. 914, 109 N. Y. Supp. 142.

Right to compel count of ballots protested as marked for identification.—Although the court cannot command a recount of ballots already counted by the inspectors, mandamus will lie to compel them to meet and count ballots which have been protested as marked for identification, and which they have not counted for any candidate, and to make a true return thereof and correct their statement of the votes cast, and to count the ballots for the candidates whose names appear thereon. The Election Law continues the inspectors in office for the purpose of proceedings to review action upon ballots, which have been protested, or rejected by them as void. *People ex rel. McLaughlin v. Aumenwerth* (1910), 197 N. Y. 340, 90 N. E. 973, affg. (1909), 135 App. Div. 893, 120 N. Y. Supp. 295; *People ex rel. Degroot v. Bd. of County Canvassers* (1909), 134 App. Div. 981, 119 N. Y. Supp. 1140.

A peremptory writ of mandamus can be granted to compel a recount of ballots cast at a general election, rejected as void, and protested as marked for identification, where the opposing affidavits allege that the packages containing such ballots were found in the county clerk's office in a place to which all persons had an easy access; that none of such packages were endorsed, that some of them were sealed and others unsealed; that many ballots were not endorsed as required by the election law, and that many of them had actually been counted for the peti-

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tioner. *People ex rel. Perry v. Board of Canvassers* (1903), 88 App. Div. 185, 84 N. Y. Supp. 406.

Void ballots treated as marked for identification, and thus counted. Court has power to pass upon them as void, and direct inspectors to make a statement on that basis. *People ex rel. White v. Aldermen* (1898), 157 N. Y. 431, 52 N. E. 181.

Further return.—Inspectors may be compelled by mandamus to make a further return of the results of an election, where it appears that the return made contains clerical errors and that the canvass of the votes cast was in some respects conducted in violation of the Election Law. *People ex rel. Ranton v. Syracuse* (1895), 88 Hun 203, 34 N. Y. Supp. 661.

Ballots improperly placed in ballot box.—If, upon an inspection of the ballot boxes under an order granted pursuant to section 374 of the Election Law, it appears that ballots marked "protested," "wholly void" or "wholly blank" have, by inadvertence or otherwise been deposited in the ballot box instead of being placed in a separate package as required by statute, the court may, under this section, determine that such ballots were improperly canvassed by the board of inspectors and order the error corrected. *People ex rel. Cantor v. County Board of Canvassers* (1914), 165 App. Div. 142, 150 N. Y. Supp. 480.

Election of member of Congress.—Although Congress is the final judge of the qualifications of its own members, until a certificate of election has been transmitted and acted upon, the courts of this state are open to a candidate who complains that the certificate is about to issue in violation of the law. *People ex rel. Brown v. Supervisors of Suffolk* (1916), 216 N. Y. 732, 110 N. E. 776, modfg. (1915), 170 App. Div. 364, 156 N. Y. Supp. 205, 170 App. Div. 358, 156 N. Y. Supp. 214, 170 App. Div. 476, 155 N. Y. Supp. 979.

Proceeding under this section to secure a recanvass of the "void and protested" ballots contained in the sealed envelopes and cast at the general election of a representative in Congress. Evidence examined, and held, that the order of the Special Term should be modified. *Brown v. Board of Canvassers* (1915), 170 App. Div. 476, 155 N. Y. Supp. 979, modfd. (1916), 216 N. Y. 732, 110 N. E. 776.

Village election.—Where inspectors at a village election receive unofficial ballots which were objected to upon this ground and upon the further ground that they were marked for identification, and counted them and caused them to be locked up with the valid ballots, their action is a violation of this section and the supreme court may, by mandamus, compel the opening of the box and the removal of the unofficial and protested ballots. It is improper to direct by mandamus a recanvass of the vote and the proclamation of the result. A remedy is by proceedings authorized by § 114 (now § 381). *People ex rel. March v. Beam* (1907), 188 N. Y. 266, 80 N. E. 921, mod. (1907), 117 App. Div. 374, 103 N. Y. Supp. 818.

Order of appellate division appealable to court of appeals.—*People ex rel. Feeny v. Bd. of Canvassers of Richmond* (1898), 156 N. Y. 36, 50 N. E. 425.

Section cited.—*People ex rel. McLaughlin v. Aumenwerth* (sic.) (1909), 135 App. Div. 893, 120 N. Y. Supp. 295, affd. (1910), 197 N. Y. 340, 90 N. E. 973. *Matter of Fallon* (1909), 135 App. Div. 195, 119 N. Y. Supp. 1061, mod. (1910), 197 N. Y. 336, 90 N. E. 942.

§ 382. Destruction of books, records and papers relating to the elections.—The officer or board with whom the statement of the result, the returns with tally sheets annexed together with the poll books of the election, the "identification statements for election day," the register of electors and the public copy thereof are filed after an election shall preserve the same for at least two years after the receipt thereof and until all suits or proceedings before any court or judge touching the same shall have been determined.

At the expiration of such time such books, records and papers, except a poll book containing signatures of electors, may be destroyed by such officer. This section shall not apply to a city of over one million inhabitants. (*Added by L. 1916, ch. 537, § 47.*)

ARTICLE XI.

(Former Art. XV, renumbered by L. 1913, ch. 800.)

VOTING MACHINES.

- Section 390. State voting machine commissioners.
391. Examination of voting machine.
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418. When ballot clerks not to be elected.
419. Number of voters in election districts.
420. Definitions.
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§ 390. State voting machine commissioners.—There shall be a state board of voting machine commissioners which shall consist of three commissioners to be appointed by the governor every five years, one of whom shall be an expert in patent law and two of whom shall be mechanical experts. Their successive terms of office shall begin on the first day of January of every fifth year dating from nineteen hundred and three and end on the thirty-first day of December. Any commissioner now in office or hereafter

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appointed may be removed at the pleasure of the governor, and vacancies shall be filled by the governor for any unexpired term.

No voting machine commissioner shall have any pecuniary interest in any voting machine.

Source.—Former Elec. L. (L. 1896, ch. 909) § 160, as added by L. 1899, ch. 466, § 1.

Consolidators' note.—Rewritten, but substance unchanged. The original section continued the voting machine commissioners appointed under L. 1897, ch. 450, until December 31, 1902, and provided for their successors. The new section provides for a series of five year terms dating from January 1, 1903 (the beginning of the existing tenures), each term ending December 31.

§ 391. **Examination of voting machine.**—Any person or corporation owning or being interested in any voting machine may apply to the state board of voting machine commissioners to examine such machine and report on its accuracy, efficiency and capacity to register the will of voters. The commissioners shall examine the machine and report accordingly. Their report shall be filed in the office of the secretary of state and shall state whether in their opinion the kind of machine so examined can be safely used by such voters at elections, under the conditions prescribed in this article. If the report states that the machine can be so used, it shall be deemed approved by the commissioners and machines of its kind may be adopted for use at elections as herein provided. When the machine has been so approved, any improvement or change that does not impair its accuracy, efficiency or capacity shall not render necessary a re-examination or re-approval thereof. Any form of voting machine not so approved, or which has not been heretofore examined by said commissioners and reported on pursuant to law and its use specifically authorized by law, can not be used at any election. Each commissioner is entitled to one hundred and fifty dollars for his compensation and expenses in making such examination and report, to be paid by the person or corporation applying for such examination.

Source.—Former Elec. L. (L. 1896, ch. 909) § 161, as added by L. 1899, ch. 466, and amended by L. 1901, ch. 530.

§ 392. **Requirements of voting machine.**—A voting machine approved by the state board of voting machine commissioners must be so constructed as to provide facilities for voting for such candidates as may be nominated. It must also permit an elector to vote for any person for any office, whether or not nominated as a candidate by any party or organization, and must permit voting in absolute secrecy. Such machine shall also be so constructed that an elector cannot vote for a candidate or on a proposition for whom or on which he is not lawfully entitled to vote. It must also be so constructed as to prevent voting for more than one person for the same office, except where an elector is lawfully entitled to vote for more than one person for that office, and it must afford him an opportunity to vote for as many persons for that office as he is by law entitled to vote for and

no more, at the same time preventing his voting for the same person twice. It must be provided with a lock or locks, by the use of which immediately after the polls are closed or the operation of such machine for such election is completed, any movement of the voting or registering mechanism is absolutely prevented. It may also be provided with a separate ballot in each party column or row containing only the words "presidential electors" preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors, and shall be counted as such. (*Amended by L. 1911, ch. 649 and L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 162, as added by L. 1899, ch. 466, and amended by L. 1901, ch. 530.

Consolidators' note.—The provision that a machine "may" be so constructed as to provide facilities for seven different parties is made "must," like the rest of the specifications.

A voting machine does not comply with the requirements of the law which fails to provide upon the face thereof a proper space and place for the name of each candidate lawfully nominated for the office or position to be voted for at an election, except candidates for presidential electors, and which does not enable the voter to indicate and vote for, with equal effect, each candidate of his choice for whom he may desire to vote and for whom he has a right to vote. Where voting machines are in use and provided with a separate ballot in which the party columns or rows contain only the words "Presidential Electors," without naming the individual candidates for that position, a voter cannot legally vote for the list of candidates of any party by means of a printed slip pasted in a space provided in the machine for that purpose. He may, however, in that manner vote for candidates for that position where he chooses not to vote for the candidates nominated by any one political party. Rept. of Atty. Genl. (1912) Vol. 2, p. 375.

Use of ballot machines in voting for presidential electors.—Rept. of Atty. Genl. (1904) 398.

The space for voting for presidential electors upon voting machines need not necessarily be at the top or the beginning of the party columns or rows. Voting machines cannot be used for State and county tickets and paper ballots for presidential electors at the same voting place. Rept. of Atty. Genl. (1912) Vol. 2, p. 409.

Presidential electors may be voted for on a voting machine without placing the names of such electors in separate spaces thereon. Voting machines cannot be legally used for the general ticket and a regular paper ballot for presidential electors at the same polling place. Where a candidate is nominated by more than one party, his name must appear but once on the voting machine ballot. Opinion of Atty. Genl. (1916), § State Dept. Rep. 431.

§ 393. Adoption of voting machine.—The board of elections of the city of New York, the common council of any other city, the town board of any town, or the board of trustees of any village may adopt for use at elections any kind of voting machine approved by the state board of voting machine commissioners, or the use of which has been specifically authorized by law; and thereupon such voting machine may be used at any or all elections held in such city, town or village, or in any part thereof, for voting, registering and counting votes cast at such elections. Voting machines of dif-

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ferent kinds may be adopted for different districts in the same city, town or village.

Source.—Former Elec. L. (L. 1896, ch. 909) § 163, as added by L. 1899, ch. 466, and amended by L. 1901, ch. 530.

A purchase of voting machines by a city involves an appropriation of money and must be accomplished in the same manner as other purchases in behalf of the city. The statute expressly authorizes the local authorities of a city to determine whether or not an expenditure for voting machines shall be made and the taxpayers have no voice in the matter. *People ex rel. Voting Machine Co. v. City of Geneva* (1904), 98 App. Div. 383, 90 N. Y. Supp. 275.

Provision where machines break during the progress of the election. Rept. of Atty. Genl. (1903) 466.

Use of voting machines for voting upon propositions submitted by the Constitutional Convention of 1915. Atty. Genl. Opin. (1915), 5 State Dep. Rep. 503.

§ 394. **Experimental use of voting machine.**—The authorities of a city, town or village authorized by the last section to adopt a voting machine may provide for the experimental use, at an election in one or more districts, of a machine which it might lawfully adopt, without a formal adoption thereof; and its use at such election shall be as valid for all purposes as if it had been lawfully adopted.

Source.—Former Elec. L. (L. 1896, ch. 909) § 164, as added by L. 1899, ch. 466.

§ 395. **Providing machines.**—The local authorities adopting a voting machine shall, as soon as practicable thereafter, provide for each polling place one or more voting machines in complete working order, and shall thereafter preserve and keep them in repair, and shall have the custody thereof and of the furniture and equipment of the polling place when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within the city, town or village as the officers adopting the same may direct.

Source.—Former Elec. L. (L. 1896, ch. 909) § 165, as added by L. 1899, ch. 466.

Reference.—Defacing, injuring, destroying or secreting voting machine, Penal Law, § 764, subd. 17.

§ 396. **Payment for machines.**—The local authorities, on the adoption and purchase of a voting machine, may provide for the payment therefor in such manner as they may deem for the best interest of the locality and may for that purpose issue bonds, certificates of indebtedness or other obligations which shall be a charge on the city, town or village. Such bonds, certificates or other obligations may be issued with or without interest, payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par.

Source.—Former Elec. L. (L. 1896, ch. 909) § 166, as added by L. 1899, ch. 466.

§ 397. **Form of ballots.**—All ballots shall be printed in black ink on

clear, white material, of such size as will fit the ballot frame, and in as plain, clear type as the space will reasonably permit. The party emblem for each political party represented on the machine, which has been duly adopted by such party in accordance with this chapter, and the party name or other designation shall be affixed to the names, or, in case of presidential electors, to the list of candidates of such party. Each party may be further distinguished by a stripe of color below the party emblem, which shall be adopted in the same manner as the party emblem. The order of the lists or names of candidates of the several parties or organizations shall be arranged as provided by this chapter for blanket ballots, except that they may be arranged either vertically or horizontally. When the same person has been nominated for the same office to be filled at the election by more than one party or independent body, all the provisions relating to the official ballot in this chapter shall apply and the voting machine shall be so adjusted that his name shall appear but once on the ballot. But in the case of a person so nominated, the name and emblem of the party casting the highest number of votes for governor at the last preceding election of a governor shall be at the left of or above the names and emblems of other parties and independent bodies uniting in the same nomination, and the names and emblems of the latter parties shall follow in the order of priority based on the relative party vote for governor at such election, counting from left to right if the column be horizontal and downward if the column be vertical. (*Amended by L. 1911, ch. 649, L. 1913, ch. 821, and L. 1916, ch. 537, § 48.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 167, as added by L. 1899, ch. 466 and amended by L. 1907, ch. 654.

Where a candidate is nominated by more than one party, his name must appear but once on the voting machine ballot. Opinion of Atty. Genl. (1916), 9 State Dept. Rep. 431.

§ 398. **Sample ballots.**—The officers or board charged with the duty of providing ballots for any polling place shall provide therefor two sample ballots which shall be arranged in the form of a diagram showing the entire front of the voting machine as it will appear after the official ballots are arranged for voting on election day. Such sample ballots shall be open to public inspection at such polling place during the election day. In all general elections where voting machines are used there may be furnished a sufficient number of sample ballots of a reduced size, showing the key board of the voting machine as it will appear after the official ballots are arranged for voting on election day, with illustrations and brief instructions how to vote; one of which sample ballots may be mailed by the county clerk to each registered voter at least three days before the election or in lieu thereof, a copy of such sample ballot may be published for one week preceding the election in newspapers representing at least two political parties.

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Source.—Former Elec. L. (L. 1896, ch. 909) § 168, as added by L. 1899, ch. 466, § 1, and amended by L. 1901, ch. 530, § 4, and L. 1908, ch. 491, § 1.

Printing of ballots by county clerk where machines are used. Rept. of Atty. Genl. (1903) 372.

§ 399. Number of official ballots.—Four sets of ballots shall be provided for each polling place for each election for use in the voting machine.

Source.—Former Elec. L. (L. 1896, ch. 909) § 169, as added by L. 1899, ch. 466.

§ 400. Preparation of voting machine for election.—The board of elections for each county and the city of New York in which voting machines are to be used, shall cause the proper ballot labels to be placed on the machines corresponding with the sample ballots herein provided for, and the machine in every way put in order, set, and arranged, ready for use in voting at such election; and, for the purpose of so labeling, putting in order, setting and arranging the machine, shall employ one or more competent persons who shall be known as the voting machine custodian, or custodians, who shall be sworn to perform their duties honestly and faithfully, and for such purpose shall be considered as officers of election, and shall be paid for the time spent in the discharge of their duties, in the same manner as election officers are paid. In cities where there are more than twenty voting machines, more than one custodian shall be appointed. They shall be selected from the two political parties entitled to representation on a board of election officers. Said custodian, or custodians, shall, under the direction of said board or officer having charge and control of the election, cause the machine to be so labeled, put in order, set, arranged, and delivered to the polling place of the election district in which the election is to be held, together with all furniture and appliances necessary for the proper conducting of the election, at least one hour before the time set for opening the polls on election day. In preparing a voting machine for an election, the custodian shall, according to the printed directions furnished, arrange the machine and the ballots therefor so that it will in every particular meet the requirements for voting and counting at such election, and thoroughly test the same. Before preparing the voting machine for any election written notice shall be mailed to the chairman of the city, or town committee of at least three of the principal political parties, stating the time and place where machines will be prepared, at which time one representative of each of such political parties shall be afforded an opportunity to see that the machines are in proper condition for use in the election; such representatives shall be sworn to faithfully perform their duties and shall be regarded as election officials but shall not interfere with the custodians or assume any of their duties. When a machine has been so examined by such representatives it shall be sealed with a numbered metal seal. Such representatives shall certify: to the number of the machine; if all of the counters are set at 000; and the number registered on the protective counter, if

one is provided, and on the seal. After the preparation of the machines, an officer or officers or someone duly authorized, other than the person who has prepared them for the election, shall inspect each machine, and report in writing if all of the registering counters are set at zero (000), and the machine is arranged in all respects in good order for the election and locked, with the number registered on the protective counter, if one is provided; and with the number on the seal. When a voting machine has been properly prepared for election, it shall be locked against voting, and sealed; and the keys thereof shall be delivered to the board or official having charge and control of elections, together with a written report made by the custodian of the machine on blanks furnished to him, stating that it is in every way properly prepared for the election. All voting machines shall be transferred to the polling places in charge of an authorized official, who shall certify to their delivery in good order. After the machine has been delivered and set up ready for use in the election at the polling place, it shall be the duty of the local authorities to provide ample protection against molestation or injury to the machine. Every voting machine shall be furnished with a lantern, or a proper substitute for one, which shall give sufficient light to enable electors while in the booth to read the ballot labels, and suitable for use by the election officers in examining the counters. The lantern shall be prepared in good order for use before the opening of the polls. All voting machines used in any election shall be provided with a screen, hood, or curtain which shall be so made and adjusted as to completely conceal the elector and his action while voting. (*Amended by L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 169-a, as added by L. 1908, ch. 491.

Appointing of voting machine custodians.—Rept. of Atty. Genl. (1908) 541. The duties of a custodian and of an inspector of election are conflicting and cannot be performed by the same person. Rept. of Atty. Genl. (1908) 545.

§ 401. *Instruction of election officers.*—Not later than the first day of October in each year, the custodian, or custodians, of the machine shall instruct each board of inspectors that is to serve in an election district in the use of the machine, and in the duties of inspectors of election in connection therewith; and he shall give to each inspector of election that has received such instruction and is fully qualified to properly conduct the election with the machine, a certificate to that effect. For the purpose of giving such instruction, the custodian shall call such meeting, or meetings, of the inspectors of election as shall be necessary; but such meetings shall not be called earlier than seven o'clock in the afternoon. Such custodian shall without delay file a report with the board or official in charge of elections, stating that he has instructed the election officers, giving the names of such officers, and the time and place where such instruction was given. The inspectors of election of each election district in which a voting machine is to be used, shall attend such meeting, or meetings, as shall be called, for the purpose of receiving such instructions,

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concerning their duties as shall be necessary for the proper conduct of the election with the machine. Each inspector of election that shall qualify for and serve in the election, shall be paid one dollar for the time spent in receiving such instruction, in the same manner and at the same time as he is paid for his services on election day. No inspector of election shall serve in any election at which a voting machine is used, unless he shall have received such instruction and is fully qualified to perform his duties in connection with the machine, and has received a certificate to that effect from the custodian of the machines; provided, however, that this shall not prevent the appointment of an inspector of election to fill a vacancy in an emergency. (*Amended by L. 1911, ch. 649.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 169-b, as added by L. 1908, ch. 491.

§ 402. **Instruction of voters before election.**—In all places where voting machines are to be used one or more of such machines which shall contain the ballot labels, showing the party emblems and title of offices to be voted for, and which shall so far as practicable contain the names of the candidates to be voted for, shall be placed on public exhibition in some suitable place, in charge of a competent instructor, for three days during the thirty days next preceding the election; but no voting machine which is to be assigned for use in an election shall be used for such public instruction within five days before the election. During public exhibition of any voting machine for the instruction of voters previous to an election, the counting mechanism thereof shall be concealed from view and the doors may be temporarily opened only when authorized by the board or official having charge and control of the elections. Printed instructions how to vote circulated to voters must conform to the instructions approved by the officials providing ballots, and adapted to the machine used.

Source.—Former Elec. L. (L. 1896, ch. 909) § 169-c, as added by L. 1908, ch. 491.

Use of voting machine for instruction within hall or room where official machine is being used would furnish opportunity for violation of the law and should not be permitted. Rept. of Atty. Genl. (1911) 211.

§ 403. **Voting machines, independent nominations.**—(*Repealed by L. 1913, ch. 821.*)

§ 404. **Distribution of ballots and stationery.**—The ballots and stationery shall be delivered to the board of inspectors of each election district before ten o'clock in the forenoon of the day next preceding the election.

Source.—Former Elec. L. (L. 1896, ch. 909) § 170, as added by L. 1899, ch. 466.

§ 405. **Tally sheets.**—In each election district where voting machines are used, tally sheets shall be printed to conform with the type of voting machine used, of a form approved by the secretary of state. The designating number and letter on the counter of each candidate shall be printed next to the candidate's name on the tally sheets.

Source.—Former Elec. L. (L. 1896, ch. 909) § 171, as added by L. 1899, ch. 466, and amended by L. 1908, ch. 491.

§ 406. **Unofficial ballots.**—If the official ballots for an election district at which a voting machine is to be used, required to be furnished by or to any town, or city clerk, or board, shall not be delivered at the time required, or if after delivery shall be lost, destroyed, or stolen, the clerk of such town or city, or such board, or the election inspectors of such district, shall cause other ballots to be prepared, printed or written, as nearly in the form of the official ballots as practicable, and the inspectors shall cause the ballots so substituted to be used at the election in the same manner, as near as may be, as the official ballots. Such ballots so substituted shall be known as unofficial ballots.

Source.—Former Elec. L. (L. 1896, ch. 909) § 172, as added by L. 1899, ch. 466.

§ 407. **Opening the polls.**—The inspectors of election and poll clerks of each district shall meet at the polling place therein, at least three-quarters of an hour before the time set for the opening of the polls at each election, and shall proceed to arrange within the guard-rail the furniture, stationery and voting machine for the conduct of the election. The inspectors of election shall then and there have the voting machine, ballots and stationery required to be delivered to them for such election; and if it be an election at which registered voters only can vote, the registry of such voters required to be made and kept therefor. The inspectors shall thereupon cause at least two instruction cards, and if printed in different languages, at least two of each language, to be posted conspicuously within the polling place. If not previously done, they shall insert in their proper place on the voting machine, the ballots containing the names of offices to be filled at such election, and the names of candidates nominated therefor. The keys to the voting machine shall be delivered to the election officers three-quarters of an hour before the time set for opening the polls, in a sealed envelope, on which shall be written or printed the number and location of the voting machine; the number on the seal; and, if provided with a protective counter, the number registered on such counter, as reported by the custodian. The envelope containing the keys shall not be opened until at least one inspector from each of two political parties shall be present at the polling place and shall have examined the envelope to see that it has not been opened. Before opening the envelope all election officers present shall examine the number on the machine, also the number registered on the protective counter, if one is provided, and shall see if they are the same as the numbers written on the envelope containing the keys. If found not to agree, the envelope must not be opened until the custodian, or other authorized person, shall have been notified and shall have presented himself at the polling place for the purpose of re-examining such machine and shall certify that it is properly arranged. If the numbers on the seal and protective counter, if one is provided, are found to agree with the numbers on the envelope the inspectors shall proceed to open the doors concealing the counters. Before the polls are open for election, each inspector shall carefully

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examine every counter and see that it registers zero, and the same shall be subject to the inspection of the official watchers. The machine shall remain locked against voting until the polls are formally opened and shall not be operated except by voters in voting. If any counter for a candidate is found not to register zero (000), the inspectors of election shall immediately notify the custodian, who shall adjust the counter at zero.

Source.—Former Elec. L. (L. 1896, ch. 909) pt. of § 173, as added by L. 1899, ch. 466, § 1, and amended by L. 1901, ch. 530, § 5, and L. 1908, ch. 491, § 4.

Reference.—See notes to § 350, ante.

§ 408. **Independent ballots.**—Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office, are herein referred to as irregular ballots. Where two or more persons are to be elected to the same office, and each candidate's name is placed upon or adjacent to a separate key or device, and the machine requires that all irregular ballots voted for that office be deposited, written or affixed in or upon a single receptacle or device, a voter may vote in or by such receptacle or device for one or more persons whose names do not appear upon the machine with or without the names of one or more persons whose names do so appear.

In voting for presidential electors, a voter may vote an irregular ticket made up of the names of persons in nomination by different parties, or partially of names of persons so in nomination and partially of names of persons not in nomination, or wholly of names of persons not in nomination by any party. Such irregular ballot shall be deposited, written or affixed in or upon the receptacle or device provided on the machine for that purpose.

With these exceptions, no irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted.

Source.—Former Elec. L. L. 1896, ch. 909) pt. of § 173, as added by L. 1899, ch. 466, § 1, and amended by L. 1901, ch. 530, § 5, and L. 1908, ch. 491, § 4.

§ 409. **Location of machines; guard-rail.**—The exterior of the voting machine and every part of the polling place shall be in plain view of the election officers and watchers. The voting machines shall be placed at least four feet from the poll clerk's table. A guard-rail shall be constructed at least three feet from the machine, with openings to admit voters to and from the machine. The voting machine shall be so located in the polling place that, unless its construction requires otherwise, the ballot labels on the face of the machine can be plainly seen by the election officers and the party watchers when not in use by voters. The election officers shall not themselves be, or permit any other person to be, in any position or near any position, that will permit one to see or ascertain how a voter votes, or how

he has voted. The election officer attending the machine shall inspect the face of the machine after each voter has cast his vote, to see that the ballot labels are in their proper places and that the machine has not been injured. During elections the door or other covering of the counter compartment of the machine shall not be unlocked or opened or the counters exposed except for good and sufficient reasons, a statement of which shall be made and signed by the election officers and shall be sent with the returns.

Source.—Former Elec. L. (L. 1896, ch. 909) § 174, as added by L. 1899, ch. 466, § 1, and amended by L. 1908, ch. 491, § 5.

§ 410. **Manner of voting.**—After the opening of the polls, the inspectors shall not allow any voter to pass within the guard-rail until they have ascertained that he is duly entitled to vote. Only one voter at a time shall be permitted to pass within the guard-rail to vote. The operating of the voting machine by the voter while voting shall be secret and obscured from all other persons except as provided by this chapter in cases of voting by assisted voters. No voter shall remain within the voting machine booth longer than three minutes, and if he shall refuse to leave it after the lapse of three minutes, he shall be removed by the inspectors. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 175, as added by L. 1899, ch. 466.

§ 411. **Instructing voters.**—In case any voter after entering the voting machine booth, and before the closing of such booth, shall ask for further instructions concerning the manner of voting, two inspectors of opposite political parties shall give such instructions to him; but no inspector or other election officer or person assisting a voter shall in any manner request, suggest or seek to persuade or induce any such voter to vote any particular ticket, or for any particular candidate, or for or against any particular amendment, question or proposition. After giving such instructions, the inspectors shall retire and such voter shall then close the booth and vote as in the case of an unassisted voter. (*Amended by L. 1916, ch. 537, § 49.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 176, as added by L. 1899, ch. 466.

§ 412. **Illiterate or disabled voters.**—The provisions of sections one hundred and sixty-four and three hundred and fifty-seven of this chapter, shall apply also when ballot machines are used, and the word "booth" when used in such elections, shall be interpreted to include the ballot machine inclosure or curtain.

Source.—Former Elec. L. (L. 1896, ch. 909) § 177, as added by L. 1899, ch. 466.

§ 413. **Canvass of vote and proclamation of result.**—There shall be printed directions in the statement of canvass to the election officers for their guidance before the polls are opened and when the poles are closed; a certificate of which shall be signed by the election officers before the polls

are opened, showing the delivery of the keys in a sealed envelope; the number on the seal; the number registered on the protective counter, if one is provided; if all of the counters are set at zero (000); if the public counter is set at zero (000); if the ballot labels are properly placed in the machine. Also a certificate which shall be filled out after the polls have been closed, that the machine has been locked against voting and sealed; the number of electors as shown on the public counters; the number on the seal; the number registered on the protective counter, if one is provided; and that the voting machine is closed and locked. The inspectors' return and statement of canvass shall show the total number of votes cast for each office, the number of votes cast for each candidate, as shown on his counter, and the number of votes for persons not nominated, which shall be certified by the board of inspectors. As soon as the polls of the election are closed, the inspectors of election thereat shall immediately lock the voting machine against voting, and open the counting compartments in the presence of the watchers and all other persons who may be lawfully within the polling place, giving full view of all the counter numbers. The chairman of the board of inspectors shall, under the scrutiny of an inspector of a different political party, in the order of the offices as their titles are arranged on the machine, read and announce in distinct tones the designating number and letter on each counter for each candidate's name, the result as shown by the counter numbers, and shall then read the votes recorded for each office on the irregular ballots. He shall also in the same manner announce the vote on each constitutional amendment, proposition or other question. The counter shall not in the case of presidential electors be read consecutively along the party row or column, but shall always be read along the office columns or rows, completing the canvass for each office. The vote as registered shall be entered by the clerks on the tally sheets in ink, in the same order on the space which has the same designating number and letter. After copying the vote from the tally sheets on the returns, the figures shall be verified by being called off in the same manner from the counters of the machine by an inspector of a different political party. The counter compartment of the voting machine shall remain open until the official returns and all other reports have been fully completed and verified by the election board. During such time any candidate, watcher, or challenger of any party or independent body duly accredited as provided by section three hundred and fifty-two of the election law who may desire to be present shall be admitted to the polling place. The proclamation of the result of the votes cast shall be deliberately announced in a distinct voice by the chairman of the board of inspectors who shall read the name of each candidate, with the designating number and letter of his counter, and the vote registered on such counter; also the vote cast for and against each question submitted. During such proclamation ample opportunity shall be given to any person lawfully present to compare the results so announced with the counter dials of the machine and any neces-

sary corrections shall then and there be made by the election board, after which the doors of the voting machine shall be closed and locked.

Before adjourning the board shall, with the seal provided therefor, so seal the operating lever of the machine that the voting and counting mechanism will be prevented from operation. (*Amended by L. 1911, ch. 649 and L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 178, as added by L. 1899, ch. 466, § 1, and amended by L. 1907, ch. 654, § 2, and L. 1908, ch. 491, § 6.

Defective machine.—See *People ex rel. Deister v. Wintermute* (1909), 194 N. Y. 99, 86 N. E. 818.

§ 414. **Disposition of irregular ballots; and preserving the record of the machine.**—The inspectors of election shall, as soon as the count is completed and fully ascertained as in this chapter required, lock the machine against voting, and it shall remain so for the period of three months, except as provided by section four hundred and sixteen of this chapter and except that it may be opened and all the data and figures therein examined upon the order of any court of competent jurisdiction or may be opened by direction of a committee of the senate or assembly to investigate and report upon contested elections of members of the legislature voted for by the use of such machine and such data and figures examined by such committee in the presence of the officer having the custody of such machine. Any candidate shall be entitled on application to the supreme court and on reasonable grounds shown to have any machine in or upon which he was named as a candidate opened and all the data and figures therein examined by him or his authorized agents, but the court shall prescribe such conditions as of notice to other candidates or otherwise as it shall deem necessary and proper. Whenever irregular ballots have been voted, the inspectors shall return all of such ballots in a properly secured sealed package indorsed "irregular ballots," and file such package with the original statement of canvass. It shall be preserved for six months after such election, and may be opened and its contents examined only upon order of the supreme court or a justice thereof, or a county judge of such county, or by direction of such a committee of the senate and assembly if the ballots relate to the election under investigation by such committee, and at the expiration of such time, such ballots may be disposed of in the discretion of the officer or board having charge of them. (*Amended by L. 1916, ch. 537, § 50.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 179, as added by L. 1899, ch. 466, § 1, and amended by L. 1901, ch. 530, § 6, and L. 1908, ch. 491, § 7.

§ 415. **Disposition of keys; opening counter compartment.**—The keys of the machine shall be enclosed in an envelope which shall be supplied by the officials, on which shall be written the number of the machine and the district and ward where it has been used, which shall be securely sealed and indorsed by the election officers, and shall be so returned to the officer from whom they were received. The number on the seal and the number

registered on the protective counter, if so provided, shall be written on the envelope containing the keys. All keys for voting machines shall be kept securely locked by the officials having them in charge. A public officer who, by any provision of law, is entitled to the custody of a machine for any period of time, shall be entitled to the keys therefor while such machine is in his charge. It shall be unlawful for any unauthorized person to have in his possession any key or keys of any voting machine; and all election officers, or persons entrusted with such keys for election purposes, or in the preparation of the machine therefor, shall not retain them longer than necessary to use them for such legal purpose. All machines shall be boxed and collected as soon after the close of the election as possible, and the machines, and the boxes for the machines, shall at all times be stored in a suitable place. (*Amended by L. 1909, ch. 465, and L. 1916, ch. 537, § 51.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 179-a, as added by L. 1908, ch. 491, § 8.

§ 416. Provision for re-canvass of vote.—Whenever it shall appear that there is a discrepancy in the returns of any election district, the county board of canvassers shall summon the inspectors of election thereof and said inspectors shall, in the presence of said board of canvassers, or a bi-partisan committee thereof, make a record of the number on the seal and the number on the protective counter, if one is provided, open the counter compartment of said machine, and without unlocking said machine against voting, shall re-canvass the vote cast thereon. Before making, such re-canvass the county board of canvassers shall give notice in writing to the custodian and to the county chairman of each political party or nominating body that shall have nominated candidates for the election, of the time and place where said re-canvass is to be made; and each of such political parties or nominating bodies may send two representatives to be present at such re-canvass. If, upon such re-canvass, it shall be found that the original canvass of the returns has been correctly made from the machine, and that the discrepancy still remains unaccounted for, the county board of canvassers, of said committee thereof, with the assistance of the custodian of said machine, shall, in the presence of the inspectors of election and the authorized representatives of the several said political parties or nominating bodies, unlock the voting and counting mechanism of said machine and shall proceed to thoroughly examine and test the machine to determine and reveal the true cause or causes, if any, of the discrepancy in the returns from said machine. Before testing the counters they shall be reset at zero (000) after which each counter shall be operated at least one hundred times. After the completion of said examination and test, the custodian shall then and there prepare a statement in writing giving in detail the result thereof, and said statement shall be witnessed by the persons present and shall be filed with the secretary of the county board of canvassers. But nothing contained in this section shall authorize

any change in the returns filed by inspectors of election in any election district nor authorize any board of canvassers in any wise to consider or act upon any re-canvass of votes made pursuant thereto. (*Amended by L. 1916, ch. 537, § 52.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 179-b, as added by L. 1908, ch. 491, § 8.

Discrepancy in returns of election district.—Where an alleged return does not conform to the statute there is a discrepancy in the return. The word "discrepancy" is not to be construed in a narrow sense but in such a sense as to justify as much relief in cases of error in voting machine districts as has been afforded for nearly seventy-five years in cases of error in districts where there has been voting by ballot. *Smith v. Board of Canvassers* (1915), 92 Misc. 607, 156 N. Y. Supp. 837, *affd.* (1915), 171 App. Div. 123, 157 N. Y. Supp. 85, *affd.* (1915), 216 N. Y. 421, 110 N. E. 768.

Correct return may be required by mandamus.—Mistake in reading vote shown by voting machines. *Matter of Smith v. Wenzel* (1915), 216 N. Y. 421, 110 N. E. 768, *affg.* (1915) 171 App. Div. 123.

§ 417. Application of other articles and penal law.—The provisions of the other articles of this chapter apply as far as practicable to voting by voting machines, except as herein provided. The provisions of the penal law and of this chapter relating to misconduct at elections shall apply to elections with voting machines. Any person who shall before or during an election tamper with any voting machine; or who shall interfere or attempt to interfere with the correct operation of the voting machine, or the secrecy of voting; or shall wilfully injure a voting machine to prevent its use; or, any election or police officer or anyone employed to assist in the care or arrangement of the voting machine, who shall permit any person to violate the secrecy of the voting, or to interfere in any way with the correct operation of the voting machine; or any unauthorized person who shall make or have in his possession a key to a voting machine that has been adopted and will be used in elections in this state shall be guilty of a felony, punishable by imprisonment in a state prison for not less than one year nor more than five years.

Source.—Former Elec. L. (L. 1896, ch. 909) § 180, as added by L. 1899, ch. 466, § 1, and amended by L. 1908, ch. 491, § 9.

Section 374 inapplicable.—Section 374, providing for an examination of ballot boxes, is not made applicable to voting machines by this section. *Matter of Thomas* (1915), 216 N. Y. 426, 110 N. E. 762, *revg.* (1916), 171 App. Div. 977, 160 N. Y. Supp. 1148.

§ 418. When ballot clerks not to be elected.—Ballot clerks shall not be elected or appointed for any district for which a voting machine shall have been adopted, and which will be supplied and ready for use at the next election to be held therein.

Source.—Former Elec. L. (L. 1896, ch. 909) § 181, as added by L. 1899, ch. 466.

Employment of ballot clerks in election districts where voting machines are used is required. *Atty. Genl. Opin.* (1915), 5 State Dep. Rep. 550.

§ 419. Number of voters in election districts.—For any election in any

city, town or village in which voting machines are to be used, the election districts in which such machines are to be used may be created by the officers charged with the duty of creating election districts, so as to contain as near as may be four hundred and fifty voters each. Such redistricting or redivision may be made at any time after any November election and on or before August fifteenth following, to take effect on the sixth Wednesday before the next general election. Where such redistricting or redivision shall be made in any town, the board making the same shall, on or before September first following, appoint from the inspectors of election then in office (if sufficient therefor are then in office, and, if not, from persons not in office, sufficient to make up the requisite number), to take effect on or before the first day of registration thereafter and not earlier than the second Wednesday following the next fall primary, four inspectors of election for each election district thus created, who shall be equally divided between the two parties entitled to representation on said boards of inspectors. Thereafter no redivision of such election district shall be made for elections by such machines until at some general election the number of votes cast in one or more of such districts shall exceed five hundred. But the town board of a town in which such machines are used may alter the boundaries of the election districts at any time after a general election and on or before August fifteenth following, to take effect on the sixth Wednesday before the next general election, provided that the number of such election districts in such town shall not be increased or reduced, and the number of votes to be cast in any district whose boundaries are so altered shall not exceed five hundred.

If the creation, division or alteration of an election district is rendered necessary by the creation, division or alteration of a town, ward or city or rendered necessary or occasioned by the division of a county into assembly districts after a reapportionment by the legislature or members of assembly, such creation, division or alteration of an election district shall be made and shall take effect immediately; and inspectors of election for the new election districts, as so created, divided or altered, shall be appointed, in the manner provided by law, a reasonable time before the next official primary or meeting for registration and such appointments shall take effect immediately. (*Amended by L. 1911, ch. 542, L. 1914, ch. 244, and L. 1916, ch. 537, § 53.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 182, as added by L. 1899, ch. 466, § 1, and amended by L. 1901, ch. 530, § 7, and L. 1903, ch. 122, § 1.

Consolidators' note.—The provision that after a redistricting of election districts in a town two of the inspectors of election "shall belong to and be of the same political faith and opinion on state and national issues as one of the two political parties which at the last preceding general election for state officers shall have cast the greatest number of votes in said town, and the other two" inspectors "shall belong to and be of the same political faith and opinion on state and national issues as the other of said two political parties," is omitted as unconstitutional.

The constitutional requirement (art. 2, § 6) is that "all laws creating, regulating

or affecting boards of officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes." The provision in question seems to violate this constitutional requirement in that it adopts the vote in the *town* rather than in the *state*, as the test. The Constitution, it should be noted, lays down no rule for determining how the highest and next highest number of votes are to be determined,—whether the vote upon a single office shall be taken as the basis of comparison between all parties, and if so, what office, or whether the vote for the candidate who polls the greatest vote shall be deemed the vote of the party, or whether only straight ballots shall be included in estimating the number, or whether some split ballots shall be included and some excluded, or how it is to be determined whether any given vote is cast by the "political party." It is obvious that the vote for any given candidate cannot be an *exact* measure of a party vote, nor can the vote on any particular office be an *exact* measure, though in default of any better measure it is conceivable that either might, for practical purposes, be adopted as such. But whatever the measure, and however the number of votes cast by any given "political party" is to be determined, the Constitution would seem to require, *ex vi terminorum*, that every vote cast by the party anywhere throughout the *state* be counted, in deciding whether its vote was either the highest or the next highest. Suppose in any election the vote in the whole state was in this order, parties A, B, and C, but in any given town using voting machines and redistricted under the section under review the party vote stood A, C, B; the Constitution would seem to divide the inspectorships between A and B; this section says they must go to A and C.

In place of this provision, accordingly, the expression used in the earlier section (Election Law, § 13, new § 312) is resorted to, and it is here provided that the inspectors "shall be equally divided between the two parties entitled to representation on said boards of inspectors."

It may be added that the statute as it stands is inconsistent with the provision relating to the qualification of election inspectors generally (Election Law, § 11, subd. 1, new § 302), which provides for election officers "in every election district of this state" and substantially follows the language of the constitutional provision already quoted, omitting, like it, any provision as to how the "highest and next highest number of votes" are to be determined, but making, like it, the vote in the *state* the test. It is also inconsistent with the general provision relating to inspectors in towns (Election Law, § 13, new § 312), which provides that appointments are to be made from the nominees of "the two political parties entitled to representation on a board of election officers," and which thus refers by inference to the general requirements of the Constitution and of § 11, subd. 1, and adopts the same test, i.e., the vote in the *state*. Why the legislature adopted a basis of selection for towns which use voting machines different from that adopted for other towns, or adopted a different basis in the same town before and after redistricting (which is what the old section does) does not appear.

The statutory provisions referred to may be read in connection with the definition of a party as found in Election Law, § 32 (Primary Election Law, § 3, subdivision 4) and Election Law, § 120 (Election Law, old § 56), and with new §§ 48, 49, 52, 66, 72 and 73 (Primary Election Law, § 4, subdivisions 3 and 4, § 5, subdivision 1, §§ 10, 13 and 14, respectively), and new §§ 130, 194, 196, 295, 301, 303 (Election Law, §§ 61, 11, subdivision 2, paragraphs d and e, §§ 7, 10, 12, respectively), and new § 473 (Metropolitan Elections District Law, § 4), and new § 509 (Soldiers' and Sailors' Election Law, § 10). In the definition of a party and in several of the other sections just cited, the vote for *governor* is adopted as the

test, but, with one exception, the provisions based thereon do not relate to officers in charge of registration, the polls and the canvass (the extent of the constitutional requirement). The exception referred to is Primary Election Law, § 5, subdivision 1 (new § 52), as to which it is to be said that if it is to be construed not as containing a misdescription of the election officers, but as adding something to the Election Law and as requiring the *election* officers to represent the two parties who cast the largest and next largest votes for *governor* in the last preceding *gubernatorial* election, it would seem to be inconsistent with the constitutional requirement that the vote at the last preceding *general* election shall be taken.

§ 420. **Definitions.**—The list of candidates used or to be used on the front of the voting machine shall be deemed official ballots under this chapter for an election district in which a voting machine is used pursuant to law. The word “ballot” as used in this article, (except when reference is made to irregular ballots) means that portion of the cardboard or paper or other material within the ballot frames containing the name of the candidate and the emblem of the party organization by which he was nominated, or a statement of a proposed constitutional amendment, or other question or proposition with the word “Yes” for voting for any question or the word “No” for voting against any question. The term “question” shall mean any constitutional amendment, proposition, or other question submitted to the voters at any election. The term “ballot label” shall mean the printed strips of cardboard containing the names of the candidates nominated and the questions submitted. The term “irregular ballot” shall mean a vote cast, by or on a special device, for a person whose name does not appear on the ballot labels. The term “voting machine custodian” shall mean the person who shall have charge of preparing and arranging the voting machine for elections. The term “protective counter” shall mean a separate counter built into the voting machine which cannot be reset, which records the total number of movements of the operating lever. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 183, as added by L. 1899, ch. 466, § 1, and amended by L. 1908, ch. 491, § 9.

Consolidators' note.—The old section contained two sentences, the first providing that “*the list of candidates used or to be used on the front of the voting machine shall be deemed official ballots,*” etc., and the second being the following—which purports to be itself a complete definition: “The word ‘ballot’ as used in this article (except when reference is made to independent ballots) means that portion of the cardboard or paper or other material within the ballot frames containing the name of the candidate for office, or a statement of a proposed constitutional amendment, or other question or proposition with the word ‘for’ or the word ‘against.’” Long as this definition is, it is defective in omitting the party names, emblems and color-stripes and the list of offices, besides being in part a mere repetition of the first sentence. Accordingly there is here inserted after “list of candidates” in the first sentence, “and all other matter printed upon the cardboard, paper or other material,” and the entire second sentence is omitted.

Questions submitted.—The fact that voting machines used at an election held to determine the question as to the location of certain county buildings, had upon them the words, “Yes” and “No,” instead of the words, “For” and “Against,” as prescribed by this section, does not render invalid the votes registered by such

voting machines where there is no pretense that any elector was thereby deceived. *People ex rel. Williams v. Board of Canvassers* (1905), 105 App. Div. 197, 94 N. Y. Supp. 996, *affd.* (1905), 183 N. Y. 538, 76 N. E. 1116.

Abbreviated form of propositions, use of. *Rept. of Atty. Genl.* (1906) 633.

§ 421. **Saving clause.**—Nothing herein shall be deemed to prohibit the adoption or use of any voting machine at any election within any town, city or village that has adapted the same prior to the tenth day of December, nineteen hundred and thirteen, if the mechanism is or may be made adjustable to conform to the grouping of candidates under the title of the office, but the method of conducting an election therewith shall be in the manner prescribed by this chapter. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 184, part, as added by L. 1899, ch. 466.

ARTICLE XII.

(Former Art. XVI, as renumbered by L. 1913, ch. 800.)

BOARDS OF CANVASSERS.

- Section 430. Organization of county board of canvassers.
- 431. Production of returns and tally sheets.
- 432. Correction of clerical errors in election district statements.
- 433. Mandamus to county or state boards of canvassers to correct errors.
- 434. Proceedings of state board of canvassers upon corrected statements of county boards.
- 435. Mandamus to state board to canvass corrected statements of county boards.
- 436. Proceedings upon corrected statements.
- 437. Statements of canvass by county boards; preservation of protested, void and wholly blank ballots.
- 438. Decisions of county boards as to persons elected.
- 439. Transmission of statements of county boards to secretary of state and board of elections.
- 440. Organization and duties of board of canvassers of the city of New York.
- 441. Organization of state board of canvassers.
- 442. Canvass by state board.
- 443. Certificates of election.
- 444. Record in office of secretary of state of county officers elected.

§ 430. **Organization of county board of canvassers.**—The board of supervisors of each county shall be the county board of canvassers of such county. The county board of canvassers of each county within the city of New York shall consist of the members of the board of aldermen of the city of New York elected as such within the county. The said county boards of canvassers shall also within their respective counties be the city board of canvassers of such city. The county board of canvassers of a county containing a city or cities shall be the city board of canvassers of such city or cities, except that the board of aldermen of the city of Buffalo shall be the city board of canvassers for such city. The county board of canvassers

of the respective counties shall meet on the Tuesday next after each election of public officers held in such county other than an election of town, city, village or district school officers held at a different time from a general election. The board of county canvassers shall meet at the usual place of meeting of the board of supervisors, except that in a county wholly included in the city of New York such board of county canvassers shall meet at the office of the county clerk. Upon such meeting they shall choose one of their number chairman of such board. In a county having a single commissioner of elections, instead of a board of elections, such commissioner * shall be the secretary of the board of county canvassers. In a county wholly included within the limits of the city of New York and in a county, if any, in which the general powers and duties of a county board of elections is devolved upon the county clerk by this chapter, the county clerk, or if he be absent or unable to act, a deputy county clerk designated by the clerk, shall be secretary of the board of county canvassers. In every other county of the state the president of the board of elections shall be the secretary of the board of county canvassers, or if he be absent or unable to act, the secretary of such board shall be the secretary of the board of county canvassers. When a chairman of the board of county canvassers shall have been chosen, as above provided, the secretary of such board shall thereupon administer the constitutional oath of office to the chairman, who shall then administer such oath to each member, and to the secretary of the board. A majority of the members of any board of canvassers shall constitute a quorum thereof. If, on the day fixed for such meeting, a majority of any such board shall not attend, the members of the board then present shall elect the chairman of the board and adjourn to some convenient hour of the next day. If such board, or a majority thereof, shall fail or neglect to meet within two days after the time fixed for organizing such board, the supreme court, or any justice thereof, or county judge within such county, may compel the members thereof by writ of mandamus to meet and organize forthwith. (*Amended by L. 1910, ch. 432, and L. 1916, ch. 537, § 54.*)

Source.—Former Elec. L. (L. 1896, ch. 909), § 130, as amended by L. 1897, ch. 379, § 21; L. 1901, ch. 208, § 1; L. 1905, ch. 643, § 22; L. 1908, ch. 105, § 1.

Consolidators' note.—In the Election Law of 1896, this section constituted the board of supervisors of each county the county board of canvassers for the county, exception, however, being made of the counties of New York and Kings, where the boards of aldermen of the cities of New York and Brooklyn were made the county canvassers, these counties having under the Constitution (art. 3, § 26) no supervisors whatever, as their boundaries coincided with those of the cities. When in 1897 both cities were merged in the "greater New York," the coincidence of city and county lines ceased, and the two counties thereby lost their constitutional immunity from supervisors; and at the same time by L. 1897, ch. 380, the constitutional requirement was complied with by providing that members of the municipal assembly should be elected "as such and also as supervisors" from the several counties within the city; but their powers "as supervisors" were restricted to (1)

* So in original.

acting as county canvassers; and (2) subdividing their counties into assembly districts (a constitutional function). At the same time L. 1897, ch. 379, amended this section by eliminating the exceptional provisions for New York and Kings counties, and made the supervisors the county canvassers in every county.

In 1899, art. 3, § 26 of the Constitution was amended so as to abolish the office of supervisor in counties within, and less than, a city, and to permit the functions of the office to be devolved upon the local municipal legislature; and later, L. 1901, ch. 466, amended § 1586 of the New York City charter by vesting the powers and duties of the several boards of supervisors of the counties within the city in "the board of aldermen," which board, by virtue of legislation concurrent with the foregoing, succeeded to the former "municipal assembly." It should be noted that from 1897 until 1900, when the constitutional amendment went into effect, the aldermen and members of the common council of the city of New York were actually also elected as *supervisors*, the ballots reading "for Alderman (or Councilman) and Supervisor," but that since 1900 they have been elected only as aldermen (or councilmen).

This situation has given rise to two claims: (1) that the duties of the county canvassers were devolved upon "the board of aldermen," i. e., the *whole* board; and (2) that they were devolved upon *only those members of the board who were elected within the county*, in spite of the language of the statute that they "are vested in the board of aldermen." In another aspect the question is whether L. 1897, ch. 380, was in effect repealed or not by the constitutional amendment of 1899, with or without the subsequent act of 1901. For the complete argument on both sides of the question reference is made to the briefs of counsel in *Matter of Scofield v. Board of Aldermen*, reported in 102 App. Div. 358, also to the conflicting opinions of successive corporation counsels and to the communications addressed to the corporation counsel, forming a part of the record of that case. The supreme court at special term, in an unconvincing opinion by Marean, J., held that the county canvassers were only the aldermen elected from the county. The appellate division of the second department did not pass on the question, disposing of the case on the ground that the party initiating the proceedings had not the right to maintain them. The question may therefore fairly be said to be an open one. At all events the case exhibits a serious omission by the legislature.

That omission is here supplied by changing the sentence reading "The county board of canvassers of counties wholly or partly within the city of New York shall be the city board of canvassers of the city of New York within their respective counties," to "The county board of canvassers of each county within the city of New York shall consist of the members of the board of aldermen of the city of New York elected as such within the county. The said county boards of canvassers shall also within their respective counties be the city board of canvassers of such city."

The effect of this change is, briefly, to give express warrant for what is now the actual practice and to supply the legislative sanction, presumably omitted by mistake, for a continuance of the former method of canvass, in line with Mr. Justice Marean's opinion; also to settle the dispute in the *Scofield* case, but not passed upon by the appellate division, whether the presidents of the boroughs are members of the canvassing boards, since they are, for some purposes at least, members of the board of aldermen.

Application.—The provisions of the Election Law making the county board of canvassers also the city board of canvassers of a city within the county, apply to Cortland county regardless of the provisions of the Cortland city charter. Rept. of Atty. Genl. (1912) Vol. 2, p. 517.

§ 431. Production of returns and tally sheets.—As soon as such board

of county canvassers shall have been organized, the officer with whom they were filed shall deliver to such board of canvassers all the returns with tally sheets annexed containing the original statements of canvass received from inspectors of election for districts within the county for which said board are county or city canvassers. The original statements which have been delivered to members of the board of canvassers shall then be delivered to the board. If any member of the county board of canvassers shall be unable to attend the first meeting of such board, he shall, at or before such meeting, cause to be delivered to the secretary of such board any original statement that may have come into his possession. If, at the first meeting of a county board of canvassers of any county, all returns with tally sheets annexed so required to be produced shall not be produced before the board, it shall adjourn to some convenient hour of the same or the next day, and the secretary of such board shall, by special messenger or otherwise, obtain such missing returns, if possible, otherwise he shall procure the other set of returns with tally sheets annexed, or, failing that, the third set of returns without tally sheets, in time to be produced before such board at its next meeting. At such first meeting, or as soon as an original statement of the result of the canvass of the votes cast at such election in every election district of the county shall be produced before such board, the board shall proceed to canvass the votes cast in such county at such election. (*Amended by L. 1913, ch. 821, and L. 1916, ch. 537, § 55.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 131, as amended by L. 1897, ch. 379, § 22.

References.—Destruction of election returns, Penal Law, § 1429. Fake return or false statement of canvass, Penal Law, § 766.

Ministerial duties.—Board of county canvassers cannot act judicially. *People ex rel. Blodgett v. Board* (1892), 44 N. Y. St. Rep. 738, 19 N. Y. Supp. 206; *Matter of Woods* (1893), 5 Misc. 575, 26 N. Y. Supp. 169; *People ex rel. Derby v. Rice* (1891), 129 N. Y. 461, 29 N. E. 358. See *Matter of Hart* (1900), 161 N. Y. 507, 55 N. E. 1058.

Basis of canvass is the official statements before the board. *People ex rel. Noyes v. Canvassers* (1891), 126 N. Y. 392, 27 N. E. 792. But see *Matter of Stewart* (1898), 155 N. Y. 545, 50 N. E. 51. It is not the duty of a board of county canvassers to ascertain which of the candidates for an office was in fact elected, but simply to determine from the documentary evidence before them, furnished by inspectors of election, upon which alone they may act, the number of votes given for each candidate. *People ex rel. Noyes v. Board of Canvassers*, *supra*.

Tally-sheet and not the "original" statement is the best evidence of the election. It is the original record. *Matter of Stewart* (1898), 155 N. Y. 545, 50 N. E. 51.

Statements of all votes cast at an election, required to be made by county boards of canvassers, may show the number of votes cast by election districts. *Rept. of Atty. Genl.* (1912) Vol. 2, p. 423.

§ 432. Correction of clerical errors in election district statements.—If, upon proceeding to canvass such votes, it shall clearly appear to any county board of canvassers that certain matters are omitted from any such statement which should have been inserted, or that any merely clerical mistakes exist therein, they shall have power, and such power is hereby

given, to summon the election officers whose names are subscribed thereto before such board, and such election officers shall forthwith meet and make such correction as the facts of the case require; but such election officers shall not change or alter any decision before made by them, but shall only cause their canvass to be correctly stated. The board of county canvassers may adjourn from day to day not exceeding three days in all, for the purpose of obtaining and receiving such corrected statements. (*Amended by L. 1913, ch. 821.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 132.

Statement may be sent back for clerical corrections, but not for a recanvass. *People ex rel. Noyes v. Canvassers* (1891), 126 N. Y. 392, 27 N. E. 792; *People ex rel. Fiske v. Devermann* (1894), 83 Hun 181, 31 N. Y. Supp. 593; *In re Alderman of First Ward* (1897), 49 N. Y. Supp. 241.

Mandamus to compel return to be sent back.—*People ex rel. Munro v. Board* (1891), 129 N. Y. 469, 29 N. E. 361; *People ex rel. Ranton v. City of Syracuse* (1895), 88 Hun 203, 34 N. Y. Supp. 661.

Mandamus to compel correction of inspectors return by tally sheet.—When the statement or return states a less number of votes for certain candidates than that shown by the unquestioned tally sheet the board of county canvassers may be required by mandamus, on the petition of the candidates prejudiced, to exercise the powers conferred by this section to summon inspectors to correct their returns. *Matter of Stewart* (1898), 155 N. Y. 545, 50 N. E. 51, affg. (1897), 24 App. Div. 201, 48 N. Y. Supp. 957.

Canvass by part of inspectors.—Where canvass was made by only part of inspectors, the canvass is erroneous, not incomplete. *People ex rel. Way v. Strang* (1910), 137 App. Div. 848, 122 N. Y. Supp. 617.

§ 433. Mandamus to county or state boards of canvassers to correct errors.—The supreme court may, upon affidavit presented by any voter, showing that errors have occurred in any statement or determination made by the state board of canvassers, or by any board of county canvassers, or that any such board has failed to act in conformity to law, make an order requiring such board to correct such errors, or perform its duty in the manner prescribed by law, or show cause why such correction should not be made or such duty performed. If such board shall fail or neglect to make such correction, or perform such duty, or show cause as aforesaid, the court may compel such board, by writ of mandamus, to correct such errors or perform such duty; and if it shall have made its determination and dissolved, to reconvene for the purpose of making such corrections or performing such duty. Such meeting of the board of state or county canvassers shall be deemed a continuation of its regular session, for the purpose of making such corrections, or otherwise acting as the court may order, and the statements and certificates shall be made and filed as the court shall direct, and shall stand in lieu of the original certificates and statements so far as they shall vary therefrom, and shall in all places be treated with the same effect as if such corrected statements had been a part of the originals required by law.

A special proceeding authorized by this section must be commenced

within four months after the statement or determination in which it is claimed errors have occurred was made, or within four months after it was the duty of the board to act in the particular or particulars as to which it is claimed to have failed to perform its duty.

Source.—Former Election L. (L. 1896, ch. 909) § 133.

Mandamus of board. See *People ex rel. Derby v. Rice* (1891), 129 N. Y. 461, 29 N. E. 358; *People ex rel. Noyes v. Canvassers* (1891), 126 N. Y. 392, 27 N. E. 792; *People ex rel. Daley v. Rice* (1891), 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643; *People ex rel. Munro v. Board* (1891), 129 N. Y. 469, 29 N. E. 361; *People ex rel. Russell v. Board* (1887), 46 Hun 390; *People ex rel. Gregg v. Board* (1889), 54 Hun 595, 8 N. Y. Supp. 259; *People ex rel. Fiske v. Devermann* (1894), 83 Hun 81, 31 N. Y. Supp. 593.

When refusing of mandamus proper.—When a relator seeks a determination by mandamus of a canvassing board that he has been elected to an office in the possession of another, claiming title thereto, who is not a party to the proceeding, the court may refuse the writ as a matter of discretion leaving him to his remedy in the action provided by law for the determination of a title to an office. *Matter of Hart* (1899), 159 N. Y. 278, 54 N. E. 44.

Power of court.—Upon a writ of mandamus to require the board of canvassers to reconvene and correct alleged errors in its canvass of the votes cast upon a question relating to the location of county buildings, the court cannot decide whether the question, as printed on the ballot, was in the form prescribed by law. *People ex rel. Williams v. Board of Canvassers* (1905), 105 App. Div. 197, 94 N. Y. Supp. 996, *affd.* (1905), 183 N. Y. 538, 76 N. E. 1116.

§ 434. **Proceedings of state board of canvassers upon corrected statements of county boards.**—When a new or corrected statement or certificate, made by a board of county canvassers under the provisions of the preceding section, shall vary from the original statement or certificate with reference to votes for the offices of governor, lieutenant-governor, judge of the court of appeals, justice of the supreme court, secretary of state, comptroller, state treasurer, attorney-general, state engineer and surveyor, senator or representative in congress, or any of them, the county clerk, or other officer with whom the same is filed, shall forthwith prepare and transmit certified copies thereof to the officials mentioned in section four hundred and thirty-nine of this article, in the manner therein prescribed. The secretary of state shall thereupon file in his office the certified copy received by him, and obtain from the governor and comptroller the certified copies received by them, or either of them, and file the same in his office. He shall then, and within five days after any such certified copy has been received by him, appoint a meeting of the state canvassers to be held at his office, or the office of the state treasurer or comptroller, and the said board of state canvassers shall, from such certified copies, proceed to make a new statement of the whole number of votes given at the election referred to in such statement for the various offices above mentioned, or any of them, so far as the number of votes for any particular office or candidate has been changed by such new or corrected statement in the manner provided by section four hundred and forty-two of this article. Upon the new or corrected statement thus made, the said board of state canvassers

shall then proceed to determine and declare what person or persons whose votes are affected by such new or corrected statement have been, by the greatest number of votes, duly elected to the various offices, or any of them, and the statement, certificate and declaration thereupon made shall stand in lieu of the original statement, declaration and certificate so far as the latter are changed by the former.

Source.—Former Elec. L. (L. 1896, ch. 909) § 134, in part.

§ 435. **Mandamus to state board to canvass corrected statements of county boards.**—The supreme court shall, upon application of a candidate interested in the result of such new or corrected statement, or of any voter in the county from which such statement came, and upon proof by affidavit that the same has been made and filed as herein provided, and that the state board of canvassers has neglected or refused to act thereon within the time above prescribed, require said board to act upon such new or corrected statement, and canvass the same as above provided, or show cause why it should not do so; and in the event of the failure of such board to act upon such new or corrected statement and canvass the same, or show cause as aforesaid, the court may compel such board by writ of mandamus to act upon and canvass such new or corrected statement, and make a statement, certificate and declaration in accordance therewith; and if the state board of canvassers shall have made a determination, and adjourned or dissolved before receiving such new or corrected statement, the court may compel such board to reconvene for the purpose of carrying out its order and direction; and for that purpose the meeting of said board shall be deemed a continuance of its regular session.

Source.—Former Elec. L. (L. 1896, ch. 909) § 134, in part.

§ 436. **Proceedings upon corrected statements.**—The state board of canvassers and the secretary of state shall respectively have the same powers and discharge the same duties with reference to new or corrected statements, that they have and are charged with with reference to original statements.

Source.—Former Elec. L. (L. 1896, ch. 909) § 134, in part.

Consolidators' note.—The old section charged the officers in question with the same powers and duties "with reference to statements made under *this section* that they have and are charged with under the provisions of section one hundred and thirty-nine and one hundred and forty of this act." The section having been split up, this is now made to charge them with the same powers and duties "with reference to new or corrected statements that they have and are charged with with reference to original statements."

§ 437. **Statements of canvass by county boards; preservation of protested, void and wholly blank ballots.**—Upon the completion by a county board of canvassers of the canvass of votes of which original statements of canvass are by law required to be delivered to them, by the boards or officers with whom the same may have been filed by the inspectors of election, they shall make separate statements thereof as follows:

1. One statement of all such votes cast for each office of elector of president and vice-president of the United States.

2. One statement of all such votes cast for each state office, to include, in the case of a candidate for governor who was nominated by two or more parties or independent bodies, a separate statement of the number of votes cast for him as the candidate of each party or independent body by which he was nominated.

3. One statement of all such votes cast for each office of representative in congress, except that the board of canvassers in the county of New York shall not make a statement of the votes cast in any election district in said county, for any candidate for the office of assemblyman, senator or representative in congress, the candidates for which were also voted for by voters in election districts in any county not within the city of New York.

4. One statement as to all such votes cast upon every proposed constitutional amendment or other proposition or question duly submitted to all the voters of the state.

5. One statement as to all the votes cast for all and each of the candidates for each office of member of assembly for which the voters of such county or any portion thereof, except as provided in paragraph numbered three in this section, were entitled to vote at such election.

6. One statement as to all the votes cast for each county office, and office of school commissioner, for which the voters of such county, or any portion thereof, were entitled to vote at such election, and to be canvassed by them.

7. One statement as to all the votes, if any, upon any proposition or question upon which only the voters of such county were entitled to vote at such election.

8. In the counties wholly or partly within the city of New York, the respective county boards shall make a separate statement as to the votes, if any, so cast upon any proposition or question upon which only the voters of such city were entitled to vote at such election in such county or portion thereof.

Each such statement shall set forth, in words written out at length, all votes cast for all the candidates for each such office; and if any such office was to be filled at such election by the voters of a portion only of a county, all the votes cast for all the candidates for each office in any such portion of a county, designating it by its proper district number or other appropriate designation; the name of each such candidate; the number of votes so cast for each, and, in the case of a candidate for governor who was nominated by two or more parties or independent bodies, the number separately stated of votes cast for him as the candidate of each party or independent body by which he was nominated; and the whole number of votes so cast upon any proposed constitutional amendment or other proposition or question, and all the votes so cast in favor of and against the same respectively. In the counties wholly or partly within the city of New York, the respective

county boards shall make a separate statement of the votes cast for all the city offices voted for by the voters of such city or any portion thereof, within such counties.

The statements required by this section shall each be certified as correct over the signatures of the members of the board, or a majority of them, and shall be filed and recorded in the office of the board of elections of each county, except in the counties wholly within the city of New York, and in such counties they shall be filed in the office of the county clerk. When the whole canvass shall be completed, all original statements of canvass used thereat shall be filed in the office of the secretary of the board, who shall file a report of such canvass with the board of supervisors, except in counties wholly within a city of the first class. The original statement of canvass not used at the canvass and the packages of protested, void and wholly blank ballots shall be retained in the office in which or by the officer with whom they were filed, except as otherwise expressly provided by law. The packages of protested, void and wholly blank ballots shall be retained inviolate in the office in which they are filed subject to the order and examination of a court of competent jurisdiction, or to examination by a committee of the senate or assembly to investigate and report on a contested election of member of the legislature where such ballots were cast at such election, and may be destroyed at the end of six months from the time of the completion of such canvass, unless otherwise ordered by a court of competent jurisdiction or unless such committee examination be pending. (*Amended by L. 1913, ch. 821, L. 1914, ch. 244, and L. 1916, ch. 537, § 56.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 135, as amended by L. 1897, ch. 379, § 23.

Contents of statements of county board.—*People ex rel. Derby v. Rice* (1891), 129 N. Y. 461, 29 N. E. 538.

Separate return of votes cast for candidates of political party.—The court cannot compel a county board of canvassers to make its return so as to show separately the number of votes cast for the office of governor in the column and under the emblem of a political party whose candidate for the office of governor was the same as that of another political party, in order that it may appear from the returns filed in the office of the secretary of state whether or not such political party polled the required number of votes for state officers to entitle it to make its nominations by conventions during the next year. There is no provision in the statute authorizing such a separate return. *People ex rel. Boies v. Board of Canvassers* (1903), 79 App. Div. 514, 80 N. Y. Supp. 25.

Candidates having similar names.—Where it appears that a candidate for an office was voted for upon a ballot under different names, the votes must be separately canvassed as cast for the several names appearing upon the ballots. The board of canvassers is not authorized to assume that the votes cast for the several names were intended by the electors to be cast for a certain single person. Nor can the court in a proceeding to review the determination of the county board of canvassers consider affidavits from which it appears that the voters intended to vote for only one man, and that he was known by the different names for which the ballot was cast. *People ex rel. Kathan v. County Board of Canvassers* (1902), 75 App. Div. 110, 77 N. Y. Supp. 620.

§ 438. Decisions of county boards as to persons elected.—Upon the com-

pletion of the statements required by the preceding section the board of canvassers for each county shall determine what person has by the greatest number of votes been so elected to each office of member of assembly to be filled by the voters of each county for which they are county canvassers if constituting one assembly district, or in each assembly district therein, if there be more than one, and each person elected by the greatest number of votes to each county office of such county to be filled at such election, and if there be more than one school commissioner district in such county, each person elected by the greatest number of votes to the office of school commissioner to be filled at such election in each district. The board of elections of the county of Hamilton shall forthwith transmit to the board of elections of the county of Fulton a certified copy of the statement so filed and recorded in its office of the county board of canvassers of Hamilton county as to all the votes so cast in Hamilton county for all the candidates and for each of the candidates for the office of member of assembly of the assembly district composed of Fulton and Hamilton counties; and the board of elections of Fulton county shall forthwith deliver the same to the Fulton county board of canvassers, who shall from such certified copy, and from their own statement as to the votes so cast for such office in Fulton county, determine what person was at such election elected by the greatest number of votes to such office. Such board of each county shall determine whether any proposition or question submitted to the voters of such county only has by the greatest number of votes been adopted or rejected.

All such determinations shall be reduced to writing and signed by the members of such board, or a majority of them, and filed and recorded in the office of the board of elections of such county, except in the counties wholly within the city of New York, and in such counties the county clerk, who or which shall each cause a copy thereof, and of the statement filed and recorded in his or its office, upon which such determination was based, to be published in accordance with the provisions of the laws of eighteen hundred and ninety-two, chapter six hundred and eighty-six, sections twenty-one and twenty-two.

The board of elections of each county, except in the counties wholly within the city of New York, and in such counties the county clerk, shall prepare as many certified copies of each certificate of the determination of the county * board of canvassers of such county as there are persons declared elected in such certificate, and shall, without delay, transmit such copies to the persons therein declared to be elected, respectively. (*Amended by L. 1916, ch. 537, § 57.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 136, as amended by L. 1897, ch. 379, § 24; L. 1905, ch. 643, § 23.

Publication of determination.—All determinations of the county board of canvassers and the statements upon which they are based, are required to be published in one issue of two newspapers designated by the board of supervisors. The de-

* So in original.

termination may be combined as to all officers elected in the county. Opinion of State Comptroller (1916), 10 State Dept. Rep. 547.

§ 439. **Transmission of statements of county boards to secretary of state and board of elections.**—Upon the filing in the office of the county clerk or board of elections of a statement of the county board of canvassers as to the votes cast for candidates for the offices of electors of president and vice-president, or as to the votes cast for candidates for state officers, except members of assembly, and for representatives in congress, or as to the votes cast on any proposed constitutional amendment or other proposition or question submitted to all the voters of the state, such county clerk or board of elections shall forthwith make two certified copies of each such statement, and, within five days after the filing thereof in his or its office, transmit by mail one of such copies to the secretary of state, and one to the comptroller of the state. The comptroller shall forthwith upon the receipt thereof deliver such certified copy to the secretary of state. If any certified copy shall not be received by the secretary of state on or before the last day of November next after a general election, or within twenty days after a special election, he shall dispatch a special messenger to obtain such certified copy from the county clerk or board of elections required to transmit the same, and such county clerk or board of elections shall immediately upon demand of such messenger at his or its office make and deliver a certified copy to such messenger who shall, as soon as practicable, deliver it to the secretary of state.

The board of elections of each county, except a county wholly within the city of New York, and in any such county the county clerk, shall transmit to the secretary of state within twenty days after a general election, and within ten days after a special election, a list of the names and residences of all persons determined by the board of county canvassers of such county to be elected member of assembly, or to any county office; and on or before the fifteenth day of December in each year a certified tabulated statement of the official canvass of the votes cast in each such county by election districts for candidates for governor, lieutenant-governor, secretary of state, comptroller, treasurer, attorney-general, state engineer and surveyor and United States senator, or any proposed constitutional amendment or other proposition, at the last preceding general election, to include, in the case of a candidate for governor who was nominated by two or more parties or independent bodies, a separate statement of the number of votes cast for him as the candidate of each party or independent body by which he was nominated.

Upon the filing in the office of the county clerk of a county wholly or partly within the city of New York of a statement of the county board of canvassers as to the votes cast for candidates for a city office within such city, such county clerk shall forthwith make a certified copy of each such statement and, within five days after the filing thereof in his office, deliver in a sealed envelope such certified copy to the board of elections of the city

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of New York; on or before the fifteenth day of December in any year in which there shall have been an election for a city office for which votes were cast in a county within the city of New York the county clerk thereof shall file with the city clerk of such city a certified copy of the official canvass of the votes cast in such county or portion thereof by election districts for such city office, and such canvass by election districts shall, as soon as possible thereafter, be published in the City Record. (*Amended by L. 1914, ch. 244, and L. 1916, ch. 537, § 58.*)

Source.—Former Elec. L. (L. 1896, ch. 909) § 137, as amended by L. 1897, ch. 379, § 25; L. 1900, ch. 732, § 1; L. 1901, ch. 95, § 20; L. 1905, ch. 643, § 24.

References.—Delay or destruction of election returns, Penal Law, § 1429.

The term "official canvass" should be defined as a tabulated statement of all the votes cast by election districts. Opinion of Atty. Genl. (1917), 10 State Dept. Rep. 506.

§ 440. Organization and duties of board of canvassers of the city of New York.—The board of elections of the city of New York shall be the board of canvassers of the city of New York of the statements of the county boards of canvassers of the counties within such city of the votes cast in such city or any portion thereof for a city office or upon any proposition or question upon which only voters of such city were entitled to vote. The members of the board of elections shall meet at the usual place for holding their regular meeting on the first Monday in December succeeding a general election for a city office within such city and within thirty days after a special election, and shall organize by selecting one of the members as chairman. The secretary of the board of elections of the city of New York shall be the secretary of the board so organized, or if he be unable to serve the board may appoint a chief clerk to be such secretary. The secretary shall thereupon administer to the chairman the constitutional oath of office and the chairman shall administer such oath to the members of such board and the secretary thereof.

As soon as such board shall have organized the secretary shall deliver to such board the certified copies of the statements of the county board of canvassers of each county wholly or partly within such city of the votes cast for candidates for city office within such city and upon any proposition or question, if any, submitted to the voters of such city only, and the said board shall proceed to canvass such statements. If a certified copy of any statement of any county board required to be delivered to said board shall not be delivered prior to the meeting and organization of said board, it may * adjourn such meeting from day to day not exceeding a term of five days, and it shall be the duty of the secretary to procure from the county clerk of such county the required certified copy of such statement.

Upon the completion of such canvass said board shall make separate tabulated statements signed by the members of such board or a majority

* So in original.

thereof, and attested by the secretary, of the whole number of votes cast for all the candidates for each office shown by such certified copies to have been voted for, the whole number of votes cast for each of such candidates, the number of votes cast in each county for them, and if the voters of only a part of a county were entitled to vote for such candidates, the part of such county, and the determination of the board as to the persons thereby elected to such office by the greatest number of votes. The said board shall also make a separate similar tabulated statement of the votes cast upon any proposition or question submitted at the election to the voters of such city only and shall include a determination as to whether such proposition or question by the greatest number of votes has been adopted or rejected.

Each such statement and determination shall be filed and recorded in the office of the board of elections, and the said board shall cause the publication of the same in at least two newspapers within each borough of such city and in the City Record. Upon the filing in the office of the board of elections of such statements and determination the president of the board of elections shall issue and transmit by mail or otherwise a certificate of election to each person shown thereby to be elected, such certificate to be countersigned by the members of the board of elections of the city of New York under the seal of the city of New York.

Source.—Former Elec. L. (L. 1896, ch. 909) § 138, as added by L. 1897, ch. 379, § 26, and amended by L. 1901, ch. 95, § 21.

§ 441. **Organization of state board of canvassers.**—The secretary of state, attorney-general, comptroller, state engineer and surveyor, and treasurer, shall constitute the state board of canvassers, three of whom shall be a quorum. If three of such officers shall not attend on a day duly appointed for a meeting of the board, the secretary of state shall forthwith notify the mayor and recorder of the city of Albany to attend such meeting, and they shall forthwith attend accordingly, and shall, with the other such officers attending constitute such board. The secretary of state shall appoint a meeting of such board at his office, or at the office of the treasurer or comptroller on or before the fifteenth day of December next after each general election, and within forty days after each special election, to canvass the statements of boards of county canvassers of such election. He shall notify each member of the board of such meeting. The board may adjourn such meeting from day to day, not exceeding a term of five days.

Source.—Former Elec. L. (L. 1896, ch. 909) § 139, as renumbered by L. 1897, ch. 379, § 27.

§ 442. **Canvass by state board.**—Such board shall at such meeting proceed to canvass the certified copies of the statements of the county board of canvassers of each county in which such election was held. If any member of such board shall dissent from a decision of the board, or shall deem any of the acts or proceedings of the board to be irregular, and

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shall protest against the same, he shall state such dissent or protest in writing signed by him, setting forth his reasons therefor, and deliver it to the secretary of state, who shall file it in his office.

Upon the completion of such canvass said board shall make separate tabulated statements signed by the members of such board or a majority thereof, of the whole number of votes cast for all the candidates for each office shown by such certified copies to have been voted for, the whole number of votes cast for each of such candidates, the number of votes cast in each county for them, and if the voters of only a district of the state were entitled to vote for any such candidate, the name and number of such district; the determination of the board as to the persons thereby elected to such office; the whole number of votes shown by such certified copies to have been cast upon each proposed constitutional amendment or other proposition or question shown by such copies to have been voted upon; the whole number of votes cast in favor of and against each, respectively; and the determination of the board as to whether it was adopted or rejected. Each such statement, dissent and protest shall be delivered to the secretary of state and recorded in his office.

Source.—Former Elec. L. (L. 1896, ch. 909) § 140, as renumbered by L. 1897, ch. 379, § 27.

Powers of state board.—See *People ex rel. Daley v. Rice* (1891), 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643; *People ex rel. Derby v. Rice* (1891), 129 N. Y. 461, 29 N. E. 358; *People ex rel. Sherwood v. Rice* (1891), 129 N. Y. 391; *People ex rel. Sherwood v. Board* (1891), 129 N. Y. 360, 29 N. E. 355.

Duties of state board of canvassers are purely ministerial.—*Matter of Hart* (1900), 161 N. Y. 507, 55 N. E. 1058. It cannot determine title to an office or that a vacancy exists in an office, and canvass votes cast therefor, when the office was not included in the election notice of the secretary of state. *Id.*

§ 443. **Certificates of election.**—The secretary of state shall thereupon forthwith transmit a copy, certified by his signature and official seal, of each such statement as to votes cast for candidates for any office, to the person shown thereby to have been elected to such office. He shall prepare a general certificate, under the seal of this state, and attested by him as secretary thereof, addressed to the house of representatives of the United States, in that congress for which any person shall have been chosen, of the due election of all persons so chosen at that election as representatives of this state in congress; and shall transmit the same to the house of representatives at its first meeting. If any person so chosen at such election shall have been elected to supply a vacancy in the office of representative in congress, it shall be mentioned by the secretary of state in the statements to be prepared by him.

Source.—Former Elec. L. (L. 1896, ch. 909) § 141, as renumbered by L. 1897, ch. 379, § 27.

§ 444. **Record in office of secretary of state of county officers elected.**—The secretary of state shall enter in a book to be kept in his office the names of the respective county officers elected in this state, including school

commissioners, specifying the counties and districts for which they were severally elected, and their places of residence, the offices to which they were respectively elected, and their terms of office.

Source.—Former Elec. L. (L. 1896, ch. 909) § 142, as renumbered by L. 1897, ch. 379, § 27.

ARTICLE XIII.

(Former Art. XVII, renumbered by L. 1913, ch. 800.)

UNITED STATES SENATORS, REPRESENTATIVES IN CONGRESS AND PRESIDENTIAL ELECTORS.

(Title amended by L. 1913, ch. 820, § 67.)

Section 449. United States senators.

- 450. Representatives in congress.
- 451. Electors of president and vice-president.
- 452. Meeting and organization of electoral college.
- 453. Secretary of state to furnish lists of electors.
- 454. Vote of the electors.
- 455. Appointment of messenger.
- 456. Other lists to be furnished.
- 457. Compensation of electors.

§ 449. United States senators.—At the general election next preceding the expiration of the term of office of a United States senator from this state, a successor to such office shall be elected by the people for a full term of six years. If a vacancy occur in the office of United States senator from this state in any calendar year less than thirty days prior to a general election, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the succeeding calendar year. If such a vacancy occur in any calendar year more than thirty days prior to a general election the governor shall make a temporary appointment to fill such vacancy until the first day of December in such calendar year. Such an appointment to fill a vacancy shall be evidenced by a certificate of the governor which shall be filed in the office of the secretary of state. At the time of filing of such certificate the governor shall also issue, and file in the office of the secretary of state, a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration of the term of such appointment. The provisions of this chapter relating to the canvass of votes and of election results shall apply to such an election to fill a vacancy, except that the canvass of votes and results affecting the office of United States senator shall be completed by the county board of canvassers, and statements thereof certified to the secretary of state within ten days after the election and the canvass of such results completed by the state board of canvassers and statements thereof certified to the secretary of state before the first day of December following the elec-

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tion. Each county board of canvassers shall meet and organize for such purpose on the third day after the election and the state board of canvassers on the second Monday after election. (*Inserted by L. 1913, ch. 822.*)

§ 450. **Representatives in congress.**—Representatives in the house of representatives of the congress of the United States shall be chosen in the several congressional districts at the general election held therein in every even numbered year. If any such representative shall resign, he shall forthwith transmit a notice of his resignation to the secretary of state, and if a vacancy shall occur in any such office, the clerk of the county in which such representative shall have resided at the time of his election, shall, without delay, transmit a notice thereof to the secretary of state.

Source.—Former Elec. L. (L. 1896, ch. 909) § 190, as renumbered by L. 1899, ch. 466.

§ 451. **Electors of president and vice-president.**—At the general election in November preceding the time fixed by the law of the United States for the choice of president and vice-president of the United States, there shall be elected by general ticket as many electors of president and vice-president as this state shall be entitled to, and each voter in this state shall have a right to vote for the whole number, and the several persons, to the number required to be chosen, having the highest number of votes shall be declared and be duly appointed electors.

Source.—Former Elec. L. (L. 1896, ch. 909) § 191, as renumbered by L. 1899, ch. 466.

§ 452. **Meeting and organization of electoral college.**—The electors of president and vice-president shall convene at the capitol on the second Monday in January next following their election, and those of them who shall be assembled at twelve o'clock, noon, of that day, shall immediately at that hour fill, by ballot and by plurality of votes, all vacancies in the electoral college occasioned by the death, refusal to serve, or neglect to attend at that hour, of any elector, or occasioned by an equal number of votes having been given for two or more candidates. The electoral college being thus completed, they shall then choose a president, and one or more secretaries from their own body.

Source.—Former Elec. L. (L. 1896, ch. 909) § 192, as renumbered by L. 1899, ch. 466.

§ 453. **Secretary of state to furnish lists of electors.**—The secretary of state shall prepare three lists, setting forth the names of such electors, and the canvass under the laws of this state of the votes given for each person for whose election any and all votes were given, together with the certificate of determination thereon, by the state canvassers; procure to the same the signature of the governor; affix thereto the seal of the state; and deliver the same thus signed and sealed to the president of the college of electors on the second Monday in January.

Source.—Former Elec. L. (L. 1896, ch. 909) § 193, as renumbered by L. 1899, ch. 466.

§ 454. **Vote of the electors.**—Immediately after the organization of the electoral college, the electors shall then and there vote by ballot for president and vice-president, one of whom at least shall not be an inhabitant of this state. They shall name in their ballots the person voted for as president, and in distinct ballots, the person voted for as vice-president. They shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and after annexing thereto one of the lists received from the secretary of state, they shall seal up the same, certifying thereon, that lists of the votes of this state for president and vice-president are contained therein.

Source.—Former Elec. L. (L. 1896, ch. 909) § 194, as renumbered by L. 1899, ch. 466.

§ 455. **Appointment of messenger.**—The electors shall then, by a writing under their hands, or under the hands of a majority of them, appoint a person to take charge of the lists so sealed up, and deliver the same to the president of the senate at the seat of government of the United States before the third Monday in the said month of January. In case there shall be no president of the senate at the seat of government on the arrival of the person intrusted with the lists of the votes of the electors, then such person shall deliver the lists of votes in his custody into the office of the secretary of state of the United States.

Source.—Former Elec. L. (L. 1896, ch. 909) § 195, as renumbered by L. 1899, ch. 466.

§ 456. **Other lists to be furnished.**—The electors shall also forward forthwith, by the post-office in the city of Albany, to the president of the senate of the United States at the seat of government, and deliver forthwith to the judge of the United States court for the northern district of the state of New York, similar lists signed, annexed, sealed up and certified in the manner aforesaid.

Source.—Former Elec. L. (L. 1896, ch. 909) § 196, as renumbered by L. 1899, ch. 466.

§ 457. **Compensation of electors.**—Every elector of the state for the election of a president and vice-president of the United States, who shall attend at any election of those officers and give his vote at the time and place appointed by law, shall be entitled to receive for his attendance at such election, the sum of fifteen dollars per day, together with ten cents per mile each way from his place of residence by the most usual traveled route, to the place of meeting of such electors, to be audited by the comptroller upon the certificate of the secretary of state, and paid by the treasurer.

L. 1909, ch. 22. State superintendent of elections. § 471.

Source.—Former Elec. L. (L. 1896, ch. 909) § 197, as renumbered by L. 1899, ch. 466.

ARTICLE XIV.

(Former Art. XIV, renumbered by L. 1913, ch. 800.)

STATE SUPERINTENDENT OF ELECTIONS.

(Title amended by L. 1911, ch. 649, and L. 1915, ch. 678.)

- Section 471. State superintendent of elections, chief deputy and assistants.
 472. Powers of superintendent, clerk and deputies.
 474. Additional deputies.
 475. Control and powers of deputies; refusal to furnish information.
 476. Aid by private persons and public officers.
 477. Subpoenas by state superintendent.
 478. Administration of oaths by superintendent and deputies.
 479. Attendance and duties at polling places.
 480. Reports by lodging-house and hotel keepers.
 481. Affidavits by hotel keepers holding liquor licenses.
 482. Filing such reports and affidavits.
 483. Reports by police and certain departments.
 484. List to be furnished if required by the superintendent of elections.
 485. Card lists of registered voters.
 486. Challenge lists.
 487. Salaries and expenses.
 488. Report to governor.
 489. Authority of state superintendent of elections.

§ 470. Metropolitan elections district.—*Repealed by L. 1911, ch. 649.*

§ 471. State superintendent of elections, chief deputy and assistants.—There shall be an officer to be known as "state superintendent of elections." The governor shall appoint such superintendent of elections by and with the advice and consent of the senate, who shall hold office for the full term of four years. Such term shall begin on the first day of January in every fourth year beginning with the year nineteen hundred and fifteen and shall expire on the thirty-first day of December. Vacancies shall be filled for the remainder of the unexpired term. Such superintendent may be removed from office in the same manner as a sheriff. He may appoint one chief deputy without nomination, a secretary and necessary clerks, stenographers and other employees, and remove them at pleasure. (*Amended by L. 1909, ch. 240, L. 1911, ch. 649, and L. 1915, ch. 678.*)

L. 1915, ch. 678, § 44.—The terms of office of the present state superintendents of elections shall expire upon the appointment and qualification of a single superintendent of elections under the provisions of section four hundred and seventy-one of the election law as amended by this act. Upon the appointment and qualification of such superintendent of elections, he shall succeed to the powers and duties of such superintendents of elections except as modified by this act and shall have the charge, custody and control of the offices, property, books, records, papers and

documents pertaining to the powers and duties of such superintendents. After this act takes effect and until the appointment and qualification of such superintendent of elections, the present superintendents of elections shall have the powers and duties of the superintendent of elections as prescribed by the election law as amended by this act. This act shall not affect any matter pending under the election law at the time it takes effect or at the time of the appointment of a single superintendent of elections under section four hundred and seventy-one of such law as amended by this act, which pertain to the powers and duties of the present superintendents of elections, nor affect the running of time with respect to any proceeding provided for in the election law. Any such pending matter pertaining to the functions of the state superintendents of elections shall be continued and disposed of by the state superintendent of elections.

Source.—L. 1905, ch. 689, § 2.

Consolidators' note.—The section has been recast, the expressions appropriate to the original enactment as such being omitted and new expressions of a more general nature substituted.

Appointment by governor, constitutionality.—The office of state superintendent of elections is new in name and functions, the legislature may therefor provide for the appointment of its incumbent by the governor instead of by some local authority and the law in that particular is a valid exercise of legislative power. *Matter of Morgan* (1906), 186 N. Y. 202, 78 N. E. 869, affg. (1906), 114 App. Div. 127, 99 N. Y. Supp. 783. See also *People v. Ellenbogen* (1906), 114 App. Div. 182, 99 N. Y. Supp. 897, affd. (1906), 186 N. Y. 603, 79 N. E. 1112. The amendment of 1905, ch. 689, held constitutional in *People v. Cahill* (1908), 193 N. Y. 232.

§ 472. Powers of superintendent, clerks and deputies.—Such state superintendent of elections and the deputies appointed by him, shall possess and exercise all the powers vested in a sheriff, as a conservator of the peace, either by statute or common law. The chief deputy shall be placed in charge of the branch office in the city of New York. Any clerks, appointed by the state superintendent of elections pursuant to the provisions of this article, shall have power, when directed by the state superintendent of elections, to administer oaths and affirmations required by law or by any order, rule or regulation of the state superintendent of elections, for or in connection with the appointment and qualification of deputy superintendents of elections appointed pursuant to the provisions of this article. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 26.*)

Source.—L. 1905, ch. 689, § 3.

§ 473. Deputies.—Section amended by L. 1911, ch. 649, and repealed by L. 1915, ch. 678, § 27.

§ 474. Additional deputies.—The superintendent, whenever he deems it necessary, may appoint, in addition to the chief deputy, without nomination, and at pleasure remove, not more than two hundred and thirty-three other deputies, to be employed by him in enforcing the provisions of this article. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 28.*)

Source.—L. 1905, ch. 689, § 5.

§ 475. Control and powers of deputies; refusal to furnish information.—All deputies appointed under this article shall be subject to the direction

and control of the state superintendent and he may, subject to the next provision, assign them to any election district. He must, however, assign to duty in the city of New York seventy of the deputies receiving annual salaries and eighty-seven deputies receiving per diem compensation. The state superintendent shall make such rules for the control and conduct of his deputies as he may deem advisable, not in conflict with law.

Such deputies, when directed by the state superintendent, shall, on their own motion, or on complaint of any citizen of the state, may:

1. Investigate all questions relating to registration of voters, and for that purpose shall have power to visit and inspect any house, dwelling, building, inn, lodging-house or hotel and interrogate any inmate, house-dweller, keeper, care-taker, owner, proprietor or landlord thereof or therein, as to any person or persons residing or claiming to reside therein or thereat.

2. Arrest any person without warrant who in his presence violates or attempts to violate any of the provisions of this chapter or the penal law relating to crimes against the elective franchise.

3. Execute warrants of arrest and take into custody the person or persons named in such process.

4. Inspect and copy any books, records, papers or documents relating to or affecting the election or the registration of voters.

5. Require every lodging-house keeper, landlord or proprietor to exhibit his register of lodgers therein at any time to such deputy.

Any person who neglects or refuses to furnish any information required or authorized by this article, or to exhibit records, papers, or documents herein authorized to be inspected, or which are required to be exhibited, shall be guilty of a misdemeanor. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 29.*)

Source.—L. 1905, ch. 689, § 6.

Consolidators' note.—The second sentence, "The state superintendent shall make such rules for the control and conduct of his deputies as he may deem advisable, not in conflict with law," is taken over from § 487.

Refusal to answer questions.—The power given to deputies appointed under the above act to investigate questions relating to the registration of voters, and for that purpose to interrogate any inmate or proprietor of any house, as to any person residing or claiming to reside therein, cannot be exercised until after registration; it is, therefore, not a misdemeanor for an inmate of a lodging house to refuse to answer questions before he has registered. *People ex rel. Maher v. Carleton* (1903), 41 Misc. 523, 85 N. Y. Supp. 22.

§ 476. Aid by private persons and public officers.—The state superintendent, or any deputy, may call on any person to assist them in the performance of their duty; and they may also call on any public officer who by himself or his assistants, deputies or subordinates shall render such assistance as may be required. Any such person, public officer, deputy or subordinate who shall fail, on demand of the superintendent or any deputy, to render such aid and assistance in the performance of his duty as

he shall demand, or who shall willfully hinder or delay, or attempt to hinder or delay such superintendent or deputy, in the performance of his duty, shall be guilty of a felony and shall upon conviction thereof be sentenced to imprisonment in a state prison for a period of not more than three years; and if a public officer, shall, in addition to such imprisonment, forfeit his office. A member of a uniformed police force and every sheriff, deputy sheriff and election officer shall, for the purpose of this article, be deemed a public officer. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 30.*)

Source.—L. 1905, ch. 689, § 7, in part.

May call on citizens to assist.—The state superintendent of elections may not appoint citizens to assist him on election day, the statute imposes such duties upon him and his four hundred deputies, but if an emergency arises the superintendent or his deputies may call upon any person to assist them. Rept. of Atty. Genl. (1909) 742.

Assisting in escape of elector.—A conviction under an indictment charging a person with assisting in the escape of a registered elector, who, when he attempted to vote, was arrested by a deputy superintendent of elections on the charge of having falsely registered, cannot be sustained in the absence of proof that the person whom the deputy superintendent had arrested was actually guilty of the crime of false registration. *People v. Hochstim* (1902), 76 App. Div. 25, 78 N. Y. Supp. 638, 986, revg. (1901), 36 Misc. 562, 73 N. Y. Supp. 626.

§ 477. Subpoenas by state superintendent.—The state superintendent shall have power to issue subpoenas for the purpose of investigating any matter within his jurisdiction and of aiding him in enforcing the provisions of this article, such subpoenas to be issued in the name of the state superintendent. He may in proper cases issue subpoenas duces tecum. A subpoena issued by the state superintendent of elections may be served by the superintendent or by any deputy appointed by him or by any police or peace officer.

Any person who shall omit, neglect or refuse to obey a subpoena attested in the name of the state superintendent and made returnable at one of the offices or branch offices of the superintendent, or who shall refuse to testify under oath before him or his chief deputy, or other deputy duly designated by the superintendent pursuant to the provisions of this article, is guilty of a misdemeanor. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 31.*)

Source.—L. 1905, ch. 689, § 7, in part.

Constitutional.—This section is not unconstitutional as compelling one to be a witness against himself in a criminal case; for although the defense is made criminal the right to refuse to answer if the evidence may incriminate the witness is not taken away. *People v. Cahill* (1908), 126 App. Div. 391, 393, 110 N. Y. Supp. 728, affd. (1908), 193 N. Y. 232, 86 N. E. 39, 20 L. R. A. (N. S.) 1084.

§ 478. Administration of oaths by superintendent and deputies.—The superintendent, his chief deputy and any of the deputies duly designated by the superintendent for that purpose, under his hand and seal of office, are hereby authorized and empowered to administer oaths and affirmations

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in the usual appropriate forms, to any person in any matter or proceedings authorized as aforesaid, and in all matters pertaining or relating to the elective franchise and to take and administer oaths and affirmations in the usual appropriate forms, in taking any affidavit or deposition which may be necessary or required by law or by any order, rule or regulations of the superintendent for or in connection with the official purposes, affairs, powers, duties or proceedings of said superintendent or deputies or any official purpose lawfully authorized by said superintendent.

Any person who shall make any false statement under oath before the state superintendent, his deputy, or other deputy authorized to take oaths, as herein provided, is guilty of a felony. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 32.*)

Source.—L. 1905, ch. 689, § 7, in part.

Power of deputy to administer oath.—A deputy whose designation as such by the superintendent of election is shown by a copy of the original designation, is *prima facie* legally designated and the burden of proof is on the defendant to show that such deputy did not qualify by taking his oath of office. *People v. Ellenbogen* (1906), 114 App. Div. 182, 99 N. Y. Supp. 897, *affd.* (1906), 186 N. Y. 603, 79 N. E. 1112.

§ 479. **Attendance and duties at polling places.**—The state superintendent may attend at any election, and each deputy shall, on election day, attend the election at the polling place to which he is assigned. The state superintendent and each deputy shall be admitted at any time within any polling place and within the guard-rails thereof. It shall be the duty of the superintendent and of each deputy during the election to preserve order and arrest any person violating or attempting to violate this chapter or any provision of the penal law relating to the elective franchise. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 33.*)

Source.—L. 1905, ch. 689, § 8.

§ 480. **Reports by lodging-house and hotel keepers.**—It shall be the duty of every landlord, proprietor, lessee or keeper of a lodging-house, inn or hotel, to keep a register in which shall be entered the name and residence, the date of arrival and departure of his guests and the room, rooms or bed occupied by them. This register shall be so arranged that there shall be a space on the same line in which each male guest or male lodger shall sign his name, and such landlord, proprietor, lessee or keeper shall make a sworn report upon a blank to be prepared and furnished by the state superintendent twenty-nine days before the election next ensuing to the said superintendent of elections, which report shall contain a detailed description of the premises so used and occupied as a lodging-house, inn or hotel, including the size and character of building, and in case only part of a building is so used, a statement as to what part of said building is so used, and also if there be more than one building on the premises, which particular building is so used, and the names of the lodgers therein and all employees and all other persons living therein including

the landlord, proprietor, lessee or keeper and members of his family, who claim a voting residence at or in such lodging-house, inn or hotel, together with the length of time they have been regularly lodging or living therein, the beginning of such residence, the color, age, height, weight, color of hair, marks on face or hands, the complexion and any distinguishing marks or features of face or body whereby such persons may be identified, the place of their nativity, the occupation and place of business of such persons and the room occupied by each such person, and whether such person is a guest, landlord, proprietor, lessee or keeper, and the signature of each such person. Above the space reserved for the signature of each such person shall be printed the following words "the foregoing statements are true." In the form of affidavit, which shall be sworn to by the landlord, proprietor, lessee or keeper of such lodging-house, inn or hotel, shall be included the statement that the signatures of the guests or lodgers certified to in said report, were written in the presence of such landlord, proprietor, lessee or keeper, and that he personally knows them to be the persons therein described.

To the end that the sworn report herein required shall truly set forth the facts therein stated, it shall be the duty of the said landlord, proprietor, lessee or keeper to question each male person lodging or living in such lodging-house, inn or hotel as to his intention of claiming such place as a voting residence, and such person shall thereupon declare his intention thereof, and if he shall claim such place as his voting residence he shall give to such landlord, proprietor, lessee or keeper such facts regarding himself as are required to be incorporated in the sworn report herein provided for.

Any such landlord, proprietor, lessee or keeper or any lodger who shall violate this provision shall be deemed guilty of a misdemeanor. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 34.*)

Source.—L. 1905, ch. 689, § 9, in part, as amended by L. 1908, ch. 488.

References.—Lodging house keepers in cities of first class to keep daily register between Sept. 1 and Nov. 15, General City Law, §§ 110–115.

Presumption arising from report is rebuttable. *Matter of Jacobs* (1904), 45 Misc. 113, 91 N. Y. Supp. 596.

§ 481. **Affidavits by hotel keepers holding liquor licenses.**—If any person, other than the keeper or members of his family, shall claim a voting residence in a building or part of the building used as a hotel, within three months of a general election, in which building or part of the building the business or trafficking in liquors is conducted under a liquor tax certificate issued under subdivision one of section eight of the liquor tax law, the holder of such certificate shall furnish to the state superintendent of elections, whenever the superintendent shall require him so to do, an affidavit properly acknowledged and signed before a notary public, in which the holder of such certificate shall state whether he and such building have conformed to and at the time of making the affidavit do conform

to all the requirements of the laws, ordinances, rules and regulations relating to hotels and hotel keepers, including all laws, ordinances, rules and regulations of the state or locality pertaining to the building, fire and health departments in relation to hotels and hotel keepers and that such building is or was within three months of the said election used as a hotel. If for any reason the said building or part of the building used as a hotel shall be devoted to other than hotel purposes within three months of said election the holder of such liquor tax certificate shall state in such affidavit for what purpose such building or part thereof formerly used for hotel purposes is then used, and, if the same has been sublet to any person, he shall so state, giving the terms of said lease, and the name of the lessee.

Any holder of a liquor tax certificate required to make such affidavit by the said superintendent who shall refuse, fail or neglect to make and file the same forthwith with the superintendent is guilty of a misdemeanor. Any holder of a liquor tax certificate who shall incorporate any false statement in any sworn report or affidavit to the superintendent of elections is guilty of perjury and in addition to suffering the penalty prescribed by law for such crime shall forfeit his liquor tax certificate and shall be deprived of all rights and privileges thereunder and of any right to a rebate of any portion of the tax paid thereon, and shall be debarred from trafficking in liquors for a period of five years from the date of his conviction. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 35.*)

Source.—L. 1905, ch. 689, § 9, in part, as amended by L. 1908, ch. 488.

§ 482. Filing such reports and affidavits.—Any report or affidavit required by the two preceding sections shall be acknowledged and sworn to before a notary public, commissioner of deeds, or justice of the peace, and shall be filed personally by such landlord, proprietor, lessee or keeper or by registered mail with the said superintendent of elections at such office as he may designate. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 36.*)

Source.—L. 1905, ch. 689, § 9, in part, as amended by L. 1908, ch. 488.

§ 483. Reports by police and certain departments.—Whenever the state superintendent of elections shall require, it shall be the duty of the chief of police and the respective heads of the departments of buildings, fire and health to forthwith make a report in writing to the superintendent of elections of every building or part of a building in such city in which the business of trafficking in liquors is conducted under a liquor tax certificate issued under subdivision one of section eight of the liquor tax law, showing the location thereof by street and number, election district and assembly district or ward, the character of such business, as declared by the holder of the certificate, specifying whether it be a hotel, restaurant, saloon, store, shop, booth or other place and the name of the holder of such certificate, and if the place be a hotel the report shall state whether or not

the building and holder of the certificate conform to all the laws, ordinances, rules and regulations of the state or locality including the laws, ordinances, rules and regulations of the building, fire and health departments in relation to hotels and hotel keepers. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 37.*)

Source.—L. 1905, ch. 689, § 9, in part, as amended by L. 1908, ch. 488.

§ 484. List to be furnished if required by the superintendent of elections.—The superintendent of elections shall also have the right throughout the year whenever deemed necessary by him to require the owner or lessee of any hotel, or inn, containing less than fifty rooms and every lodging-house or dwelling to make to the superintendent within ten days after notification, a sworn report upon a blank to be prepared and furnished by said superintendent, which said report shall contain a list giving the name of every male person of twenty-one years of age and upwards, who resides in said hotel, inn, lodging-house and dwelling, together with the period that they have resided therein, and such other information as may be deemed necessary by said superintendent, and said superintendent shall have the power whenever deemed necessary by him to require said owner or said lessee in addition to notify said superintendent whenever any of said male persons shall within twenty-nine days before election leave said hotel, inn, lodging-house and dwelling. Said superintendent shall have the power to require said list to be made by the owner if said owner is in possession. If said owner is not in possession said superintendent shall have the power to require said owner to furnish the name of the lessee and lessees of said building and said superintendent shall then have the power to require said list of said lessee and lessees. In the event that said building is occupied in part by said owner and in part by a lessee or lessees the said superintendent shall then have the power to compel the owner to furnish the said list for the part occupied by him, and the names of the lessee or lessees who lease the remaining part of said building, and said superintendent may require said lists from said lessee or lessees. In the event of the neglect of the owner or lessee to furnish said list when demanded by said superintendent of elections, said owner or lessee shall be guilty of a misdemeanor punishable by a fine of two hundred and fifty dollars, and in case of a second conviction shall be punishable by a fine of five hundred dollars and imprisonment. If the owner furnishes to said superintendent a list which states that a male person has resided in said premises for a longer period than he has actually resided therein, or if said person puts upon said list a name under which no person has resided any length of time in said premises, said owner shall be guilty of a felony and in addition liable to a penalty of one thousand dollars, which said penalty shall be a lien upon the house and the lot upon which the house is situated. If the lessee furnishes a false list then the said lessee shall be liable to a penalty of one thousand dollars, which said penalty, in addi-

tion to being satisfied out of any goods or chattels of the lessee, shall be a lien upon the leasehold, and shall entitle said leasehold to be sold to satisfy said penalty subject to the rights of the landlord. Every penalty imposed herein upon a house or leasehold shall be a lien upon the house and lot or leasehold in relation to which the penalty is imposed from the time of filing of a certified copy of the judgment in the office of the clerk of the county in which said house and lot or leasehold is situated, subject only to taxes, assessments, water rates and to such mortgages and mechanics' liens as may exist thereon prior to such filing, and it shall be the duty of the prosecuting officer upon the entry of said judgment to forthwith file the copy as aforesaid in the office of the clerk of the county and said copy upon said filing shall be forthwith indexed by the clerk in the index of mechanics' liens. A *lis pendens* may be filed in the office of the clerk of the county in which the realty or leasehold is situated at the time of the commencement of the proceedings under this section. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 38.*)

Source.—L. 1905, ch. 689, § 9-a, as added by L. 1908, ch. 488.

§ 485. Card lists of registered electors.—The board of inspectors of each election district shall on each day of registration transfer to cards, to be provided for that purpose by the secretary of state, which cards shall be in form and style approved by the state superintendent of elections, a complete copy of the name of each person registered in their respective districts, together with all of the answers made and information given by the person registered, at the time of registration, and such cards, inclosed and sealed in a cover to be provided for that purpose by the secretary of state, shall be delivered personally or by mail forthwith by the chairman of the board of inspectors together with a statement on a blank form, to be furnished by the secretary of state after approval by the state superintendent of elections, that the cards delivered contain a correct copy of all the names registered and information given by the persons so registered, to the state superintendent of elections at one of his offices to be designated by him.

In cities of the first class the board of inspectors of each election district shall also on each day of registration transfer to the cards, to be provided for that purpose by the secretary of state, which cards shall be in form and style approved by the state superintendent of elections, a complete copy of the name of each person registered in their respective districts, together with all of the answers made and information given by the persons registered, at the time of registration and such other and further information as may be required by said card and such cards, inclosed and sealed in a cover to be provided for that purpose by the secretary of state, shall be delivered personally forthwith by the chairman of the board of inspectors together with a statement on a blank form, to be furnished by the secretary of state after approval by the state superintendent of elections, that the cards delivered contain a correct copy of all the names registered and

information given as required by said card, to the police department of said city at such office as shall be designated by said police department. (*Amended by L. 1911, ch. 649, L. 1915, ch. 678, and L. 1916, ch. 537, § 59.*)

Source.—L. 1905, ch. 689, § 10.

§ 486. Challenge lists.—1. The state superintendent of elections shall prepare for each election district in the city of New York a challenge list containing the names, alphabetically arranged, and addresses of all persons who, by reason of death, removal, conviction or otherwise, have lost the right to register from the addresses within such election district from which they registered at the last preceding election. Such challenge lists shall be delivered to the respective boards of registry in such city at least one-half hour before the commencement of registration. It shall be the duty of the chairman of such respective boards of registry to challenge the registration of any person applying to them for registration under any name on said challenge lists, unless it shall affirmatively appear after strict examination of the voter, and, if necessary, others also, that such voter has become domiciled at a new address within the election district. Said challenge lists shall contain a column headed "remarks" and it shall be the duty of the chairman of the respective boards of registry to enter in said column opposite the names on said lists whether any person applying for registration under any name on said lists who was challenged was allowed to register and the reason for allowing him to register. If a person applies for registration under any name on said challenge lists who is challenged and does not register then there shall be entered opposite such name in the aforesaid column headed "remarks" the words "challenged but did not register." If no person applies for registration under any name on said challenge lists then there shall be entered opposite each such name in the aforesaid column headed "remarks" the words "no application." Any duly accredited watcher shall have the right to examine such challenge list. On each day of registration the chairman of the board of registry shall make the challenges and the entries in the column headed "remarks" as heretofore provided. At the close of the last day of registration said challenge lists shall be signed and certified as true by each member of such board of registry and returned to the state superintendent of elections in a sealed envelope provided therefor by the said state superintendent.

2. After the last day of registration and before election day in each year the state superintendent of elections also shall prepare for each election district in the city of New York a challenge list containing the names, alphabetically arranged, and addresses of all persons registered in such district during said last preceding period of registration whom he shall have reason to believe, from investigation or otherwise, not to be entitled to vote at said election. Such challenge lists shall be delivered to the respective boards of inspectors in such city at least one-half hour before the opening of the polls of each election. It shall be the duty of the chairman of

the respective boards of inspectors to challenge the vote of any person presenting himself to vote under any name on said challenge lists. Said challenge lists shall contain a column headed "remarks," and it shall be the duty of the chairman of the respective boards of inspectors to enter in said column opposite the names on said lists whether any person applying to vote under any name on said lists who was challenged was allowed to vote and the reason for allowing him to vote. If a person applies to vote under any name on said challenge lists who is challenged and does not vote, then there shall be entered opposite such name in the aforesaid column headed "remarks" the words "challenged but did not vote." If no person applies to vote under any name on said challenge lists then there shall be noted opposite each such name in the aforesaid column headed "remarks" the words "no application." At the close of the polls said challenge lists shall be signed and certified as true by each member of such board of inspectors and returned to the state superintendent of elections in a sealed envelope provided therefor by the said state superintendent.

3. The state superintendent of elections shall prepare duplicates of all challenge lists provided for in this section and he shall keep said duplicate challenge lists on file in his office from the time of their preparation until the close of the third general election following the preparation of said challenge lists. The aforesaid original challenge lists shall also be kept on file for two years after the general election following their preparation. (*Amended by L. 1911, ch. 649, and L. 1915, ch. 678, § 40.*)

Source.—L. 1905, ch. 489, § 11.

§ 487. **Salaries and expenses.**—The annual salary of the state superintendent of elections shall be five thousand dollars; of the chief deputy, four thousand dollars; of the secretary, two thousand dollars; of one chief stenographer, fifteen hundred dollars; of not more than thirteen of the deputies, of whom eight may be assigned to take charge of the branch offices, fifteen hundred dollars each; of not more than seventy of the deputies, twelve hundred dollars each; payable semi-monthly. All other deputies shall receive five dollars for each day's service, not exceeding forty days for any one election, to be paid on the certificate of the superintendent or chief deputy, which forty days shall be within a period beginning one week before the first day of registration and ending December thirty-first of such year. The salaries of the clerks and other stenographers shall be fixed by the said superintendent. All salaries and other compensation provided by this section shall be paid by the state treasurer on the warrant of the comptroller.

The state superintendent may provide one main office, which shall be located in the city of Albany, and branch offices in his discretion, not to exceed eight in number, one of which shall be located in the city of New York and furnish them with needed furniture, stationery and supplies, and expend for such purpose and for disbursements and expenses in carry-

Source.—Former Elec. L. (L. 1896, ch. 909) § 212, as added by L. 1906, ch. 502, and amended by L. 1907, ch. 596.

§ 553. **Time within which proceedings must be brought.**—Such petition shall be presented within fifty days after any election in respect to which the allegations of such petition shall relate if the statement mentioned therein was filed within the twenty days as herein required; but if the statement shall not have been filed within said twenty days, such petition may be presented at any time not more than sixty days after the filing of the statement. The said petition and order to show cause shall be filed, and any order or judgment made in the proceeding based thereon shall be entered in the office of the clerk of the county in which such election was held, if held wholly within a county, or otherwise in such other office as the court, or a justice thereof, shall direct.

Source.—Former Elec. L. (L. 1896, ch. 909) § 213, as added by L. 1906, ch. 502, and amended by L. 1907, ch. 596.

When petition must be filed.—The requirement of this section that the petition shall be filed within thirty (now fifty) days after the election is not satisfied by its presentation to a justice of the supreme court within that time. *Matter of Lance* (1907), 55 Misc. 13, 106 N. Y. Supp. 211.

§ 554. **Proceedings to be summary.**—Upon the return of the order to show cause provided for in section five hundred and fifty-two, the court, or justice, shall immediately, and in such manner as the court or justice shall direct, and without respect to any technical requirement, inquire into the facts and circumstances and into such violations of, or failure to comply with, the provisions of this article, as may be alleged in any such petition, or into such other facts and circumstances relative to any such election or to any contribution or expenditure made in connection therewith, which at any time, whether before or during the continuance of such inquest, the court or justice holding such inquest shall deem necessary to secure compliance with the provisions of this article or to punish for a violation thereof. Such other persons as the court, or justice, shall deem necessary or proper to join or bring in as parties to the said proceeding in order to make its order, judgment or writs effective, may be joined as parties in such manner and upon such notice as said court or justice shall direct.

Source.—Former Elec. L. (L. 1896, ch. 909) § 214, as added by L. 1906, ch. 502, and amended by L. 1907, ch. 596.

Constitutionality.—This provision is in violation of the Constitution providing that no person shall be deprived of his liberty or his property without due process of law. *Matter of Lance* (1907), 55 Misc. 13, 106 N. Y. Supp. 211. This feature was corrected by amendment of 1907.

§ 555. **Preference over other causes.**—The proceedings upon, and the investigation of, the charges set forth in said petition, shall take precedence and be preferred over all other actions or proceedings by or before said court, or justice thereof, and in case of appeals, in the appellate division and in the court of appeals.

L. 1909, ch. 22.

Corrupt practices.

§§ 556-559.

Source.—Former Elec. L. (L. 1896, ch. 909) § 215, as added by L. 1906, ch. 502, and amended by L. 1907, ch. 596.

§ 556. **Appeals.**—Appeals may be taken to the appellate division of the supreme court, and to the court of appeals, from the orders herein provided for, in the same manner that appeals are taken from orders of the special term of the supreme court, and such appeals shall be considered by such appellate courts as appeals from orders.

Source.—Former Elec. L. (L. 1896, ch. 909) § 216, as added by L. 1906, ch. 502.

§ 557. **Subpœnas.**—Any court or justice holding such inquest may issue subpœnas for witnesses, who shall be allowed the same fees, whose attendance may be enforced in the same manner, and who shall be subject to the same penalties, as if served with a subpœna in behalf of the state in a criminal prosecution in such court.

Source.—Former Elec. L. (L. 1896, ch. 909) § 217, as added by L. 1906, ch. 502.

§ 558. **Personal privilege of witnesses.**—No person shall be excused from attending and testifying, or from producing any books, papers or other documents before the court, or justice thereof, upon any trial, investigation or hearing, under the provisions of this article, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime, or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may so testify, or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding.

Source.—Former Elec. L. (L. 1896, ch. 909) § 218, as added by L. 1906, ch. 502.

§ 559. **Conduct of hearing.**—The attorney-general, a district attorney or some person designated by either, or by such court or justice, shall attend the inquest and examine the witnesses, and the persons or committees by or against whom the proceeding is brought shall have the right to appear by counsel at the inquest, produce evidence, and examine and cross-examine witnesses in their own behalf. Such court or justice shall have power, by a subpœna duces tecum, to compel the production before him or it, for examination, of any books or papers of any kind or of any other thing which he or it may require in the conduct of such inquiry, and which is relevant and material. Such court or justice shall have power to cause any person who shall neglect or refuse to appear before him or it as a witness, having been duly summoned, to be brought before him or it; and any person in attendance as a witness, who shall refuse to be sworn as a witness, or who being sworn shall refuse to answer any proper questions propounded to him, and any person who, having been duly summoned, shall neglect or refuse to appear before such court or justice, may be adjudged guilty

of contempt and may be fined not more than one thousand dollars, or imprisoned not more than thirty days, or both.

Source.—Former Elec. L. (L. 1896, ch. 909) § 219, as added by L. 1906, ch. 502.

§ 560. **Judgment and penalty.**—The said court or justice thereof shall render judgment in such proceedings as follows: If such person or persons or committee or committees proceeded against, have failed to file the required statement, or have filed a false or incomplete statement, without wilful intent to defeat the provisions of this article, the judgment shall require the person or persons proceeded against to file such statement or such amendment to the statement, as shall render the same true and complete, within ten days of the entry of the judgment, and to pay the costs and expenses of the proceeding. If such person or persons or committee or committees have failed to file a statement, or have filed a false or incomplete statement, and such failure to file or such false or incomplete statement was due to a wilful intent to defeat the provisions of this article, or if the person or persons proceeded against shall fail to file the required statement or amendment as directed by a judgment of a court or justice within ten days after the entry of such judgment, the person or persons or committee or committees proceeded against shall be liable to a fine not exceeding one thousand dollars, or imprisonment for not more than one year, or both. If such person or persons or committee or committees have filed a statement complying with the provisions of this article, or if the person or persons, committee or committees proceeded against, or either of them, are not required to file a statement as prescribed herein, the court or justice shall render judgment against the applicant or applicants, and in favor of such person or committee, for his or their costs and disbursements, to be taxed by such court or justice.

§ 561. **Application of article limited.**—The provisions of this article shall not be applicable to elections of town or village officers in any town or village, or to any person, association or corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals in respect to the ordinary conduct of such business.

Source.—Former Elec. L. (L. 1896, ch. 909) § 221, as added by L. 1906, ch. 502.

§ 562. **Party funds not to be expended for primary purposes.**—No contributions of money, or the equivalent thereof, made, directly or indirectly, to any party, or to any party committee or member thereof, or to any person representing or acting on behalf of a party, or any moneys now in the treasury of any party, or party committee, shall be expended in aid of the designation or nomination of any person to be voted for at a primary election, either as a candidate for nomination for public office, or for any party position. (*Added by L. 1911, ch. 891 and amended by L. 1913, ch. 820.*)

L. 1909, ch. 22.

Laws repealed.

§§ 570, 571.

ARTICLE XVII.

(Former article XXI, renumbered by L. 1913, ch. 800.)

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 570. Laws repealed.

571. When to take effect.

§ 570. Laws repealed.—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 571. When to take effect.—This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
Revised Statutes.....	Part 1,		1824	258	All
chapter 6.....	All		1824	316	All
1778	12	9	1825	33	All
1778	16	All	1826	245	All
1778	39	All	1827	179	1-7, 10, 11
1781	36	2	1828	20	19
1784	66	2	(2d Meet.)		
1787	15	1-25, 27	1828	21	1,
1789	12	All	¶ 45, 192, 427, 480, 506, 529 (2d Meet.)		
1789	35	All	1829	139	All
1791	5	All	1832	248	All
1791	52	All	1832	249	All
1792	33	All	1837	445	All
1792	72	All	1841	301	All
(15th Sess.)			1842	130	All
1792	1	All	1842	325	3-5
(16th Sess.)			1844	331	All
1792	5	All	1845	354	All
(16th Sess.)			1847	240	All
1793	14	All	1851	217	All
1796	32	All	1854	286	All
1796	57	32	1855	513	All
1797	62	1-10, 12, 13	1856	79	All
1799	51	All	1859	380	All
1800	23	All	1860	349	All
1801	24	All	1860	480	All
1801	61	1-9,	1861	307	All
11-13, 15, 19, 20.			1864	253	All
1801	64	1-3	1865	475	All
1802	81	1, 3, 4	1865	570	All
1804	2	All	1865	740	All
(28th Sess.)			1866	524	All
1807	112	All	1866	812	All
1808	170	2, 3	1870	134	All
1809	16	All	1870	138	All
1810	193	12	1870	388	All
1811	201	All	1870	503	All
1812	56	All	1871	712	All
1812	169	All	1872	570	All
R. L. 1813	25	All	1872	698	All
R. L. 1813	41	All	1872	757	All
1815	145	All	1873	314	All
1819	37	All	1873	474	All
1821	246	All	1873	824	All
1822	34	1	1875	138	All
1822	250	1-15,	1876	287	All
17-26, 30			1877	28	All
1823	268	All	1877	322	All

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1878	354	All	1894	765	All
1879	320	All	1895	23	All
1880	56	All	1895	73	All
1880	142	All	1895	138	All
1880	366	All	1895	158	All
1880	437	All	1895	810	All
1880	460	All	1895	909	All
1880	465	All	1895	991	All
1880	508	All	1895	992	All
1880	553	All	1895	993	All
1880	576	All	1895	1034	All
1881	18	All	1895	1035	All
1881	137	All	1896	163	All
1881	163	All	1896	339	All
1881	196	All	1896	909	All
1882	13	All	1897	379	All
1882	154	All	1897	410	All
1882	366	All	1897	449	All
1882	410	1839-	1897	450	All
1844, 1846-1848,	1850-1861, 1864-1866,		1897	608	All
1868-1929, 1931.			1897	609	All
1883	316	All	1898	168	All
1883	380	All	1898	179	All
1883	422	All	1898	335	All
1883	508	All	1898	340	All
1884	161	All	1898	363	9
1885	267	3, 4	1898	674	All
1885	446	All	1898	675	All
1886	649	All	1898	676	All
1887	265	All	1899	58	All
1888	583		1899	268	All
[For sections repealed in title xx. as amended, see chapter 236, Laws 1891, in this schedule] title 20, §§ 3-25; 26 all after the word "board," in the last line; 27-32			1899	363	All
1889	1	All	1899	466	All
1890	117	All	1899	467	All
1890	169	All	1899	473	All
1890	262	All	1899	499	All
1890	321	All	1899	630	All
1890	330	All	1899	641	All
1890	355	All	1899	649	All
1891	7	All	1900	202	All
1891	236		1900	204	All
[Sections 3 to 25, inclusive, all after the word "board" in the last line of section 26, and sections 27 to 32, inclusive, of title xx. of chapter 583, Laws 1888, as amended by chapter 236, Laws 1891] 1 part amending L. 1888, ch. 583, tit. 20, §§ 3-25; 26 all after the word "board" in the last line; 27-32.			1900	225	All
1891	296	All	1900	381	All
1891	336	All	1900	506	All
1892	127	All	1900	648	All
1892	680	All	1900	684	All
1893	233	All	1900	711	All
1893	274	All	1900	732	All
1893	370	All	1901	95	All
1894	61	All	1901	113	All
1894	275	All	1901	167	All
1894	302	All	1901	208	All
1894	348	2-8	1901	232	All
1894	764	All	1901	300	All
			1901	360	All
			1901	530	All
			1901	536	1, 2
			1901	544	All
			1901	598	3, 4
			1901	615	All
			1901	654	All
			1902	89	All
			1902	176	All
			1902	195	All
			1902	241	All
			1902	405	All

L. 1909, ch. 22.

Consolidators' notes.

LAWS OF	CHAPTER	SECTION	LAWS OF	CHAPTER	SECTION
1903	111	All	1906	466	All
1903	122	All	1906	498	All
1903	197	All	1906	502	All
1903	595	All	1906	570	All
1903	644	All	1906	642	All
1904	70	All	1907	119	All
1904	74	All	1907	255	All
1904	249	All	1907	296	All
1904	350	All	1907	470	All
1904	394	All	1907	472	All
1904	487	All	1907	504	All
1904	488	All	1907	596	All
1904	733	All	1907	654	All
1905	49	All	1907	744	All
1905	165	All	1908	105	All
1905	207	All	1908	456	All
1905	229	All	1908	463	All
1905	643	All	1908	464	All
1905	674	All	1908	480	All
1905	875	All	1908	488	All
1905	689	All	1908	489	All
1906	159	All	1908	491	All
1906	227	All	1908	492	All
1906	259	All	1908	521	All
1906	331	All			

CONSOLIDATORS' NOTES TO SCHEDULE OF REPEALS.

When a statute has been specifically repealed, that and the repealing statute are given without an explanatory note.

L. 1778, ch. 12, § 10.—Provides for the delivery of commissions under the great seal of state to delegates to the continental congress. Obsolete.

L. 1778, ch. 39.—Provides for a special election in the eastern district of the state to elect certain public officers. Temporary and obsolete.

L. 1787, ch. 15.—L. 1801, ch. 193, repeals all acts "within the purview or operation" of the revised acts of 1801, one of which, L. 1801, ch. 61, regulates the election of governor, lieutenant-governor, senators and members of assembly and contains the substance of the statute repealed.

L. 1789, ch. 35.—Directs the supervisors of the county of Westchester to meet on the fourth Monday of May in each year to canvass votes for members of assembly. Superseded by L. 1801, ch. 61, and included in the repeal by L. 1801, ch. 193, which repeals all acts which come within the purview of the revised acts of 1801.

L. 1791, ch. 5.—Amends L. 1787, ch. 15. Superseded by L. 1801, ch. 61, and included in the repeal by L. 1801, ch. 193, which repeals all acts which come within the purview of the revised acts of 1801.

L. 1792, ch. 33.—Repeals L. 1789, ch. 12, and L. 1791, ch. 52, regulating the election of representatives to congress. Obsolete.

L. 1792, ch. 72.—Provides for the appointment of presidential electors for the election in 1792, and for the convening of the legislature in case of an election prior to the ordinary time. Temporary and obsolete.

L. 1792, ch. 1 (16th Sess.).—Repeals L. 1792, ch. 72, § 2, which apportioned the presidential electors for the year 1792, among four districts of the state.

L. 1792, ch. 5.—Regulates the election of representatives in congress. Expires by limitation with the taking of a future census of the inhabitants of this state. Temporary and obsolete.

L. 1793, ch. 14.—Provides for the election of senators in congress and expires by limitation forty days after the first meeting of the legislature after January 1, 1800. Temporary and obsolete.

L. 1796, ch. 32.—L. 1813, ch. 202, repeals all acts "within the purview or operation" of the revised laws of 1813, one of which, 2 R. L., ch. 25, p. 246, relates to the election of president and vice-president and contains the substance of the statute repealed.

L. 1796, ch. 57, § 32.—Continues L. 1792, ch. 5, which regulates the election of representatives in congress, until March 1, 1797. Temporary and obsolete.

L. 1797, ch. 62; L. 1799, ch. 51.—L. 1801, ch. 193, repeals all acts "within the purview or operation" of the revised acts of 1801, one of which, L. 1801, ch. 61, regulates the election of governor, lieutenant-governor, senators and members of assembly.

bly, and another of which, L. 1801, ch. 64, regulates the election of representatives in congress. The two contain the substance of the statutes repealed.

L. 1800, ch. 23.—Revives L. 1793, ch. 14, which regulates the election of senators in congress. L. 1801, ch. 24, was afterward enacted to regulate the same subject. Abrogated and obsolete.

L. 1801, ch. 64.—L. 1813, ch. 202, repeals all acts "within the purview or operation" of the revised laws of 1813, one of which, 2 R. L., ch. 46, p. 243, regulates the elections of representatives in congress and contains the substance of the statute repealed.

L. 1802, ch. 81.—L. 1813, ch. 202, repeals all acts "within the purview or operation" of the revised laws of 1813, one of which, 2 R. L., ch. 68, p. 241, apportions the senate and assembly districts and contains the substance of the statute repealed.

L. 1804, ch. 2.—L. 1827, ch. 9, § 4, ¶ 1, repeals all laws "consolidated and re-enacted in" R. S., pt. 1, ch. 6; R. S., pt. 1, ch. 6, tit. 8, art. 3, § 11, contains the substance of the statute repealed.

L. 1809, ch. 16.—L. 1813, ch. 202, repeals all acts "within the purview or operation" of the revised laws of 1813, one of which, 2 R. L., ch. 25, p. 246, provides for the compensation of presidential electors and contains the substance of the statute repealed.

L. 1810, ch. 193, § 12.—L. 1813, ch. 202, repeals all acts "within the purview or operation" of the revised laws of 1813, one of which, 2 R. L., ch. 41, p. 247, provides for the return by inspectors of elections of votes for governor, lieutenant-governor, senators and representatives in congress and contains the substance of the statute repealed.

L. 1812, ch. 56.—L. 1813, ch. 202, repeals all acts "within the purview or operation" of the revised laws of 1813, one of which, 2 R. L., ch. 25, p. 246, regulates the meetings of presidential electors and contains the substance of the statute repealed.

As the statutes covered by express repealing acts have been repealed by the Consolidated Laws, the repealing statutes have been recommended for repeal.

L. 1812, ch. 169.—L. 1813, ch. 202, repeals all acts "within the purview or operation" of the revised laws of 1813, one of which, 2 R. L., ch. 46, p. 243, regulates the election of representatives in congress and contains the substance of the statute repealed.

2 R. L., 1813, ch. 25, p. 246.—Regulates the proceedings of presidential electors. So much as is inconsistent with L. 1825, ch. 33, is repealed by § 5 of that act. Abrogated and obsolete.

2 R. L., 1813, ch. 41, p. 247.—Regulates elections of governor, lieutenant-governor, senators, and members of assembly. Superseded by L. 1822, ch. 250.

2 R. L., 1813, ch. 46, p. 243.—Regulates the election of representatives in congress. Superseded by L. 1822, ch. 250.

L. 1819, ch. 37.—Enacts that the election of representatives in congress shall be held on the last Tuesday of April, 1821, and in every second year thereafter. Superseded by L. 1822, ch. 250.

L. 1821, ch. 246.—Section 1 requires county clerks to make returns to the secretary of state before May 21, 1821, and requires the secretary of state and other state officers to complete their proceedings thereon in three days. Section 2 requires the secretary of state to send by express, if necessary, the certificates calling for a constitutional convention pursuant to L. 1821, ch. 90, § 4. Temporary and obsolete. Section 3 provides that any *mayor, recorder, judge of any court of common pleas, clerk of any county or any commissioner authorized to administer oaths* may qualify canvassers of votes returned to the secretary's office. L. 1822, ch. 250, § 14, provides that canvassers shall qualify before the *chancellor or one of the justices of the supreme court or a master in chancery or the recorder of the city of Albany*, and § 29 of the same law repeals all inconsistent statutes.

L. 1822, ch. 34, § 1.—Provides that state canvassers may determine within less than twenty-eight days the result of a special election in case of any vacancy in the office of representative in congress. Superseded by L. 1822, ch. 250, § 18.

L. 1824, ch. 316.—Provides for a special vote on the manner of choosing presidential electors. Temporary and obsolete.

L. 1828, ch. 20, § 19 (2d meeting).—In accordance with the provisions of § 33 of this same act, § 19 (not a part of the original revised statutes) was printed by the revisers as § 20 of R. S., pt. 1, ch. 6, tit. 6. R. S., pt. 1, ch. 6, was repealed by L. 1842, ch. 130, tit. 8, § 8.

L. 1832, ch. 248.—Alters the time of electing representatives in congress. Superseded by L. 1842, ch. 130.

L. 1832, ch. 249.—Provides for the publication and distribution of L. 1829, ch. 139, directing the manner of choosing presidential electors, and further provides for the

L. 1909, ch. 22.

Consolidators' notes.

compensation of messengers employed under R. S., pt. 1, ch. 6, tit. 5, art. 1, § 6 (probably error for § 26). Temporary and obsolete.

L. 1837, ch. 445.—Regulates the transmission to the secretary of state of certified copies of statements of canvass by boards of county canvassers in certain counties. Amends L. 1829, ch. 139, §§ 5, 11. Obsolete.

L. 1842, ch. 325, §§ 3-5.—Requires the county board of canvassers in certain counties to specify the number of votes for representatives in congress in each congressional district, and provides for special meetings in October, 1842, of supervisors and other bodies charged with the duty of dividing towns into election districts and designating polling places. Obsolete.

L. 1845, ch. 354.—Prescribes the method of receiving and canvassing votes upon certain proposed constitutional amendments at the general election to be held in 1845. Temporary and obsolete.

L. 1855, ch. 513, § 3.—Statute repealed provides that in the city of New York there shall be *nine* ballot boxes. L. 1856, ch. 79, § 2, provides that in the city of New York there shall be *ten* ballot boxes. Section 3 provides that so much of L. 1855, ch. 513, § 3, as is inconsistent therewith is repealed.

L. 1860, ch. 349.—Prescribes the method of receiving and canvassing votes upon a proposed constitutional amendment at the general election to be held in 1860. Temporary and obsolete.

L. 1870, ch. 503.—Repeals all laws which prescribe that voters shall register before election day, "except so far as the same apply to the city and county of New York."

L. 1872, ch. 757.—Prescribes the method of receiving and canvassing votes upon certain proposed constitutional amendments at the general election to be held in 1872. Temporary and obsolete.

L. 1873, ch. 314.—Prescribes the method of receiving and canvassing votes at the general election in 1873 upon the question whether certain judicial officers shall be elected or appointed. Temporary and obsolete.

L. 1879, ch. 320.—Prescribes the method of receiving and canvassing votes at the general election to be held in 1879 upon a proposed constitutional amendment. Temporary and obsolete.

L. 1885, ch. 267, §§ 3, 4.—Amends the title of L. 1880, ch. 437 (since repealed), and amends the first sentence of § 1 thereof. Obsolete.

L. 1888, ch. 583; L. 1891, ch. 236.—Change made in language used in section column in order to conform to the general plan adopted for the proposed laws. Substance not changed.

L. 1890, ch. 330.—Provides special appropriations for the expenses of election in 1890. Temporary and obsolete.

L. 1892, ch. 127.—Authorizes the use of the Myers' automatic ballot cabinets at elections of town officers. Superseded by Election Law (L. 1896, ch. 909), Article 7 as added by L. 1899, ch. 466. Obsolete.

L. 1894, ch. 348.—Consists of eight sections. Section 1, amending "old" Town Law, is repealed by Town Law. Sections 2, 3, 5 amend §§ 11, 12, 15 of "old" Election Law (L. 1892, ch. 680). Section 4 relates to election officers in New York city. Section 6 relates to term of election officers. All these sections were superseded by Election Law of 1896, ch. 909. Section 7 repeals inconsistent acts and § 8 states when act shall take effect.

L. 1895, ch. 1035.—Amends Election Law (L. 1892, ch. 680), § 11 relating to election officers to "read as follows." Superseded by Election Law (L. 1896, ch. 909). Obsolete.

L. 1896, ch. 909.—This statute which is the "old" Election Law is recommended for repeal because its live provisions have been incorporated in Election Law.

L. 1897, ch. 379.—All of statute except §§ 22, 23, 27, 28 have been heretofore amended "to read as follows." Section 27 renumbered certain sections of the old Election Law and § 28 states when act takes effect; recommended for repeal. Sections 22 and 23 consolidated in Election Law, §§ 431 and 437.

L. 1897, ch. 609.—Consolidated in Election Law, § 330.

L. 1898, ch. 335.—All of this statute except §§ 6, 7, part, and 8 has been heretofore amended "to read as follows." Section 8 states when act takes effect; recommended for repeal. Sections 6 and 7 part consolidated in Election Law, §§ 358, 366-372.

L. 1898, ch. 674.—Sections 14, 15 have been superseded by amendment "to read as follows." Balance of act consolidated in Election Law, §§ 500-512, 515 part, 516-522.

L. 1899, ch. 58.—Consolidated in Election Law, §§ 514, 515 part.

L. 1899, ch. 466.—Part of § 1 amended "to read as follows." Balance of § 1 con-

solidated in Election Law, §§ 390, 394-396, 399-402, 409-412, 417, 418, 420 and 421. Section 2 renumbers article and certain sections of Election Law. Section 3 is the enacting clause; recommended for repeal.

L. 1899, ch. 473.—Part of statute heretofore amended "to read as follows." Balance of act consolidated in Election Law.

L. 1899, ch. 630.—Sections 1-5, 8, 10 amended so as to read as follows. Section 7 repeals "old" Election Law, § 33, subd. 2, and renumbers subds. 3 and 4. Sections 6, 9, 11 consolidated in Election Law. Section 12 states when act takes effect.

L. 1899, ch. 641.—Consolidated in Election Law.

L. 1900, ch. 302.—Section 1 amended "to read as follows." Section 2 consolidated in Election Law. Section 3 states when act takes effect.

L. 1900, ch. 225.—Section 1 amended "to read as follows." Section 2 consolidated in Election Law. Section 3 states when act takes effect.

L. 1900, ch. 331.—Consists of six sections. Sections 1-3, 4, pt. amending Election Law, § 82; § 5 amended so as to read as follows. Section 4 amending Election Law, § 85, consolidated in Election Law. Section 6 states when act takes effect.

L. 1901, ch. 95.—Consists of twenty-two sections. Sections 1-5 pt., 6, 8, 9-18, 20 amended so as to read as follows. Section 22 states when act takes effect.

L. 1901, ch. 360.—Consolidated in Election Law.

L. 1901, ch. 530.—Consists of eight sections. Section 7 amended so as to read as follows. Section 8 states when act shall take effect.

L. 1901, ch. 536, §§ 1, 2.—Consists of six sections. Section 3 is repealed by Town Law. Section 4 is a repeal. Section 5 is a saving clause of a temporary nature and now obsolete. Section 6 states when act shall take effect. Remainder of statute, §§ 1, 2 consolidated in Election Law.

L. 1901, ch. 544.—Consolidated in Election Law.

L. 1901, ch. 596.—Consists of four sections. Section 1, 2, relate to Town Law and are repealed by Town Law. Section 3 is consolidated in Election Law, Section 4 states when act shall take effect.

L. 1901, ch. 654.—Incorporated in Election Law.

L. 1902, ch. 195.—Consists of sixteen sections. Section 1 amended "to read as follows." Section 15 is temporary. Section 16 states when act shall take effect. Remainder of act incorporated in Election Law.

L. 1902, ch. 405.—Consists of six sections. Sections 1, 3-5 amended so as to read as follows. Section 6 states when act takes effect. Section 2 incorporated in Election Law.

L. 1903, ch. 111.—Consists of seven sections. Sections 1-5 amended so as to read as follows. Section 7 states when act takes effect. Section 6 incorporated in Election Law.

L. 1903, ch. 122.—Incorporated in Election Law.

L. 1903, ch. 595.—Incorporated in Election Law.

L. 1904, ch. 70.—Incorporated in Election Law.

L. 1904, ch. 350.—Incorporated in Election Law.

L. 1904, ch. 394.—Consists of fourteen sections. Sections 7-10, 12 amended so as to read as follows. Section 14 states when act shall take effect. Remainder of act consolidated in Election Law.

L. 1904, ch. 487.—Consolidated in Election Law.

L. 1904, ch. 488.—Consolidated in Election Law.

L. 1904, ch. 733.—Consists of three sections. Section 2 amended so as to read as follows. Section 3 states when act shall take effect. Section 1 consolidated in Election Law.

L. 1905, ch. 207.—Consolidated in Election Law.

L. 1905, ch. 229.—Consolidated in Election Law.

L. 1905, ch. 643.—Consists of twenty-five sections. Sections 3-5 amended so as to read as follows. Section 25 states when act shall take effect. Remainder of act consolidated in Election Law.

L. 1905, ch. 674.—Consists of five sections. Section 3 pt. amended "so as to read as follows." Section 4 is a temporary provision. Section 5 states when act shall take effect. Remainder of act consolidated in Election Law.

L. 1905, ch. 675.—Consists of six sections. Section 1 amended so as to read as follows. Section 6 states when act shall take effect. Remainder of act consolidated in Election Law.

L. 1905, ch. 689.—Consolidated in Election Law.

L. 1906, ch. 159.—Consolidated in Election Law.

L. 1906, ch. 227.—Consolidated in Election Law.

L. 1906, ch. 259.—Consolidated in Election Law.

L. 1906, ch. 331.—Temporary; recommended for repeal.

L. 1917, ch. 777. Information from electors; war census. § 1.

- L. 1906, ch. 466.—Temporary; recommended for repeal.
 L. 1906, ch. 498.—Consolidated in Election Law.
 L. 1906, ch. 502.—Part of statute amended so as to read as follows. Balance consolidated in Election Law.
 L. 1906, ch. 642.—Consolidated in Election Law.
 L. 1907, ch. 119.—Consolidated in Election Law.
 L. 1907, ch. 255.—Consolidated in Election Law.
 L. 1907, ch. 296.—Consolidated in Election Law.
 L. 1907, ch. 470.—Consolidated in Election Law.
 L. 1907, ch. 472.—Consolidated in Election Law.
 L. 1907, ch. 504.—Consolidated in Election Law.
 L. 1907, ch. 596.—Consolidated in Election Law.
 L. 1907, ch. 654.—Consolidated in Election Law.
 L. 1907, ch. 744.—Consolidated in Election Law.

ELECTIONS.

Misconduct as to designating petitions; Penal Law, § 760-a.

- L. 1914, ch. 20.—An Act to legalize the filing of certain certificates of nomination to town and village offices.
 Omitted as temporary.
 L. 1916, ch. 97.—An Act to authorize the custodians of primary records of the county of Niagara to correct and complete the enrollment and enrollment books in one election district of said county.
 Omitted as temporary and local.
 L. 1917, ch. 776.—An Act in relation to the fall primary in the year nineteen hundred and seventeen. (*In effect June 8, 1917.*)

Section 1.—In the year nineteen hundred and seventeen, the official primary election, known as the fall primary, provided in the election law to be held on the seventh Tuesday before the general election in such year, shall be held, instead, on Wednesday, September nineteenth. The time for doing any act fixed by such law by reference to a stated number of Tuesdays preceding the primary, or primary election, shall be according to such number of Tuesdays preceding the seventh Tuesday before the general election, in such year. The secretary of state shall transmit the certificates provided for in section fifty-one of such law not later than Thursday, September sixth, in such year.

- L. 1917, ch. 777.—An Act to provide for obtaining information from electors on days of registration and election in aid of the military or war census. (*In effect June 8, 1917.*)

Section 1.—The registers of electors for the general election in the year nineteen hundred and seventeen shall each contain an additional column for replies by the voter to the following questions: "Have you registered yourself or been registered to your own knowledge in any military or war census in or out of this state since April first, nineteen hundred and seventeen? If so, at what address?" Such questions shall be printed at the head of the column. Below the heading such column shall be divided by a light ruled vertical line. The reply to the first question shall be entered in the first section of such column and the reply to the last question in the second section. Such questions shall be asked by the chairman of the board of inspectors of each voter as he appears personally for regis-

Cross-references.

tration, and, in an election district where registration is not required to be personal, of each voter as he appears before the board of inspectors for receiving a ballot on the day of the general election if he shall not have previously answered such questions on a day of registration. The first question shall be answered by "Yes" or "No." If the answer to the first question be "No" the second question need not be asked or answered. Each inspector shall enter the replies of the voter in the register of which he has charge, at the time such replies are made. In a district where registration is required to be personal such additional column shall immediately precede the signature column. In any other district, it shall precede the column headed "Remarks." A voter refusing to answer any such question shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding fifty dollars, or by imprisonment not exceeding three months, or both.

ELECTRICAL CONDUCTORS.

The following acts relating to the placing underground of electrical conductors in the cities of New York and the former city of Brooklyn, although included in the first edition, have been omitted as local. The subject is now regulated by §§ 525-528 of the Greater New York charter, which, however, refer to L. 1887, ch. 716, L. 1891, ch. 231, L. 1892, ch. 263, and the amendatory and supplemental laws, for the procedure.

L. 1884, ch. 534; L. 1885, ch. 499, as am. by L. 1886, ch. 503, and L. 1887, ch. 664; L. 1887, ch. 716, as am. by L. 1890, ch. 550; L. 1891, chs. 231 and 383; L. 1892, chs. 263 and 454; L. 1893, ch. 396; L. 1894, ch. 207; L. 1897, ch. 710.

ELECTRICITY.

Incorporation and powers of electric light companies; Transportation Corporations Law, §§ 60-67. General provisions regarding, Public Service Commissions Law, §§ 64-77. Injury to wires or meters; Penal Law, § 1431.

ELEVATED TRAMWAY CORPORATIONS.

Incorporation and powers; Transportation Corporations Law, §§ 30-33.

ELEVATORS.

Fees and charges; General Business Law, § 396.

ELMIRA REFORMATORY.

See Prison Law, §§ 280-308.

EMANCIPATION.

L. 1913, ch. 532.—An act to provide for an exhibition and celebration in New York city to commemorate the fiftieth anniversary of the emancipation proclamation, creating a commission to conduct the same and make an appropriation therefor. Omitted as temporary.

EMBALMING.

License to practice; Public Health Law, §§ 290-299. Illegal practice; Penal Law, § 1763.

Cross-references.

EMBEZZLEMENT.

See Larceny.

EMBRACERY.

Definition and punishment; Penal Law, § 376.

EMIGRANTS.

Many of the provisions of law relating to emigrants were incorporated in the New York City Consolidation Act (L. 1882, ch. 410). Other provisions have been superseded by the United States legislation on the subject, or rendered obsolete by L. 1892, ch. 531, and L. 1893, ch. 528, amending L. 1849, ch. 350, abolishing the office of commissioners of emigration for the city of New York.

EMPLOYERS AND EMPLOYEES.

Employers' Liability; Labor Law, §§ 200-212. Frauds in procuring employment; Penal Law, § 939. See Labor Law; Workmen's Compensation Law.

EMPLOYMENT.

False statements as to; Penal Law, § 950.

EMPLOYMENT AGENCIES

Law revised; General Business Law, §§ 170-192.

ENUMERATION.

See State Law, §§ 140-158.

EPILEPTICS.

Craig Colony for; State Charities Law, §§ 100-117; Letchworth Village for care and treatment of epileptics and feeble-minded, see Letchworth Village.

EPISCOPAL CHURCHES.

Incorporation and powers; Religious Corporations Law, §§ 40-47.

ERIE COUNTY.

Jurors in; see Jurors. Town meetings in; Town Law, §§ 520-523.

ESCAPES.

What constitutes; Code Civ. Pro., § 155. Sheriff's liability for; Code Civ. Pro., § 158. Officers permitting; Penal Law, §§ 1697, 1839. Penal provisions generally; Penal Law, §§ 1690-1698. Retaking escaped prisoner; Code Crim. Pro. §§ 186, 187.

ESCHEATS.

See Public Lands Law, §§ 60-69.

ESTIMATE.

State board abolished by L. 1915, ch. 174.

EVAPORATED APPLES.

Sale of, regulated; Agricultural Law, §§ 260-261.

EUCAINE.

To be sold on prescription only; Penal Law, § 1746.

Cross-references.

EVIDENCE.

Requesting the admission of genuineness of a paper; Code Civ. Pro. § 725. Competency of a witness (waiver of a privilege), Code Civ. Pro. §§ 828-838. Admission by member of corporation; Code Civ. Pro. § 839. Seal as evidence of consideration; Code Civ. Pro. § 840. Presumption of death in certain cases; Code Civ. Pro. § 841. Surveyor's testimony incompetent; Code Civ. Pro. § 841-a. Administration of an oath or affirmation; Code Civ. Pro. §§ 842-850. Compelling attendance and testimony of witness; Code Civ. Pro. §§ 852-869. Documentary evidence; Code Civ. Pro. §§ 921-962. Evidence of foreign corporation; General Corporations Law, § 9. Compelling attendance of witness in criminal cases; Code Crim. Pro. §§ 607-619-a, 952. Rules of evidence in criminal cases; Code Crim. Pro. § 392. Defendant as a witness in criminal cases; Code Crim. Pro. § 393. Confessions; Code Crim. Pro. § 395. Dying declarations of woman as to cause of death in certain cases; Code Crim. Pro. § 398-a. Persons jointly indicted as witnesses; Code Crim. Pro. 393-a. Use of forged evidence; Penal Law, § 810. Forged evidence; Penal Law, § 811. Destroying evidence; Penal Law, § 812. Suppressing evidence; Penal Law, § 814. Presumption of responsibility; Penal Law, §§ 815-817. Perjury in general; Penal Law, §§ 1620-1634. Inducing another to commit perjury; Penal Law, § 813.

EXCEPTIONS, CASE AND MOTION FOR NEW TRIAL.

In civil actions; Code Civ. Pro. §§ 992-1007. In criminal actions; Code Crim. Pro. §§ 455-461.

EXCISE.

See Liquor Tax Law; City Local Option Law.

EXECUTIONS.

In general; Code Civ. Pro. §§ 1362-1383. Against property (what property exempt), Code Civ. Pro. §§ 1389-1486. Against a person; Code Civ. Pro. §§ 1387-1495. In criminal cases; Code Crim. Pro. §§ 486-490.

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